

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 12 September 2006¹

Table of contents

I — Introduction	I - 736
II — The decision at issue	I - 737
III — The procedure before the Court of First Instance and the contested judgment	I - 740
IV — The procedure before the Court of Justice	I - 740
V — Sumitomo's appeal	I - 741
A — Scope of the appeal	I - 741
B — The first plea: breach of Community law in the finding of an infringement of Article 81(1) EC in respect of project line pipe	I - 743
1. The reasoning of the Court of First Instance	I - 743
2. The appellant's arguments	I - 747
(a) Mr Becher's statements	I - 747
(b) The 'Gruber + Weber' paragraph	I - 749
(c) Vallourec's statements	I - 749

¹ — Original language: Dutch.

3. The Commission's counter-arguments	I - 751
(a) Preliminary remark	I - 751
(b) The arguments regarding Mr Becher's statement	I - 751
(c) The arguments concerning reversal of the burden of proof: the 'Gruber + Weber' paragraph	I - 753
(d) The arguments concerning Mr Verluca's statements	I - 753
4. Assessment	I - 757
(a) Preliminary remarks	I - 757
(b) Mr Verluca's statements	I - 759
(c) Mr Becher's statements	I - 762
(d) The 'Gruber + Weber' paragraph	I - 764
C — The second plea — the excessive length of the proceedings	I - 765
1. The appellant's arguments	I - 765
2. The Commission's arguments	I - 766
3. Assessment	I - 767
VI — Nippon Steel's appeal	I - 771
A — The first plea: the Court of First Instance erred in law by applying a wrong standard of proof since it is established that the Commission's assertions are incompatible with the appellant's commercial interests and are therefore irrational	I - 771
1. The relevant parts of the contested judgment	I - 771
2. The appellant's arguments	I - 772
3. The Commission's arguments	I - 773
4. Assessment	I - 775
	I - 735

B — The second plea: that the Court of First Instance erred in law by applying the wrong standard of proof in a case in which the documentary evidence is ambiguous and in which the appellant has given an alternative plausible explanation for the conduct at issue	I - 779
C — The third plea: the Court of First Instance erred in law by applying the wrong standard of proof with regard to the level of corroboration required in support of contested statements which the Commission used as the principal items of evidence, but which are implausible, highly ambiguous and in contradiction with other evidence	I - 779
D — The fourth plea: the Court of First Instance erred in law by giving contradictory and inadequate reasons in concluding that Mr Becher's statement of 21 April 1997 corroborates Mr Verluca's statements regarding the alleged infringement in respect of project line pipe	I - 780
1. The appellant's arguments	I - 780
2. The Commission's arguments	I - 780
3. Assessment	I - 781
VII — Costs	I - 783
VIII — Conclusion	I - 783

I — Introduction

Engineering and Others v Commission in so far as that judgment concerns them.²

1. This case concerns the appeals brought by Sumitomo Metal Industries Ltd ('Sumitomo') and Nippon Steel Corp. ('Nippon Steel') against the judgment of the Court of First Instance of 8 July 2004 in Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE*

2. In the contested judgment, the Court of First Instance reduced the fines which had been imposed by Commission Decision

2 — [2004] ECR II-2501.

2003/382/EC of 8 December 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/E-1/35.860-B seamless steel tubes)³ ('the decision'), and dismissed the remainder of the applications for annulment of that decision.

II — The decision at issue

3. The Commission addressed the decision to eight producers of seamless carbon-steel tubes. Of those eight producers, four were European undertakings ('the Community producers'), namely Mannesmannröhren-Werke AG ('Mannesmann'), Vallourec SA ('Vallourec'), Corus UK Ltd (formerly British Steel, 'Corus') and Dalmine SpA ('Dalmine'). The four other addressees of the decision were Japanese undertakings ('the Japanese producers'), namely: NKK Corp., Nippon Steel, Kawasaki Steel Corp. and Sumitomo.

4. Seamless carbon steel tubes are used in the oil and gas industry. They fall into two categories of products.

5. The first category of products includes borehole tubes, commonly known as 'Oil Country Tubular Goods' or 'OCTG'. These tubes can be sold either plain-ended ('plain ends') or threaded. Threading is designed to enable OCTG tubes to be joined together and may be applied in accordance with American Petroleum Institute (API) standards. Threaded tubes made to those standards are referred to below as 'standard thread OCTG tubes'. In addition, threading is also applied to OCTG tubes using special techniques, which are usually patented. In the latter case, the threading, or 'joints', are known as 'premium quality' or 'premium'. Tubes threaded according to these special methods are referred to below as 'premium OCTG tubes'.

6. The second category of products consists of oil and gas pipes ('line pipe') made of seamless carbon steel; these are divided into pipes made to standard specifications and those made to order for specific projects ('project line pipe').

7. In November 1994, the Commission decided to initiate an investigation into the existence of anti-competitive practices concerning carbon steel tubes used in the oil industry. In December 1994, it carried out investigations at the premises of various producers, including Sumitomo. Between

3 — OJ 2003 L 140, p. 1.

September 1996 and December 1997, the Commission carried out further investigations at the premises of Vallourec, Dalmine and Mannesmann.

During an investigation at Vallourec's premises on 17 September 1996, the head of Vallourec Oil & Gas, Mr Verluca, made a statement ('Mr Verluca's statement'), which played a major role in the contested Commission decision.

During an investigation at Mannesmann's premises, the head of that company, Mr Becher, answered a number of questions put to him by the Commission ('Mr Becher's response'). The decision is also expressly based in part on that response.

8. According to the decision, the eight undertakings addressed by it concluded an agreement with the object, *inter alia*, of respecting each other's domestic markets (recitals 62 to 67 of the decision). Under that agreement, each undertaking gave a commitment not to sell standard thread OCTG tubes or project line pipe in the domestic market of any other party to the agreement. The agreement was concluded in the framework of the so-called 'Europe-Japan Club'. The principle of respect for domestic mar-

kets was designated by the term 'Fundamental Rules' ('Fundamentals'). The Commission found that the members of the club had in fact complied with the Fundamental Rules and that the agreement had therefore had anti-competitive effects in the common market.

9. The agreement consisted of three parts. Firstly, the Fundamental Rules concerning observance of domestic markets, which constitute the infringement established in Article 1 of the decision. Secondly, the fixing of prices for orders and of minimum prices for 'special markets' and, thirdly, the sharing of markets elsewhere in the world, with the exception of Canada and the United States of America, ('sharing keys') (recital 61 to the decision).

10. The Commission bases its conclusions concerning the existence of the 'Fundamental Rules' on a number of documents listed in recitals 62 to 67 to the decision and on the table in recital 68. In its contention, that table shows that the share of the domestic producer in the deliveries of OCTG tubes and line pipe carried out by the addressees of the contested decision in Japan and on the domestic market of each of the four Community producers was very high. The Commission infers from this that on the whole the domestic markets were in fact respected by the parties to the agreement. As regards the other two parts of the agreement in

question, the Commission set out the evidence in recitals 70 to 77 to the decision.

11. According to the Commission (recitals 59 and 60 to the decision), the Europe-Japan Club met approximately twice a year from 1977 to 1994.

12. However, the Commission took the view that 1990 should be taken as the starting date of the infringement, since from 1977 to 1990 there were agreements on the voluntary restraint of exports between the Community and Japan (recital 108 to the decision). According to the Commission, the infringement ended in 1995 (recitals 96 and 97 to the decision).

13. In so far as is relevant for the present appeals, the operative part of the decision reads as follows:

'Article 1

1. ... Sumitomo Metal Industries Limited [and] Nippon Steel Corporation ... have ...

infringed the provisions of Article 81(1) of the EC Treaty by participating, in the manner and to the extent set out in the grounds to this decision, in an agreement providing, inter alia, for the observance of their respective domestic markets for seamless standard-threaded OCTG pipes and tubes and project line pipe.

2. The infringement lasted from 1990 to 1995 in the case of ... Sumitomo Metal Industries Limited [and] Nippon Steel Corporation ...

...

Article 4

The following fines are imposed on the firms mentioned in Article 1 on account of the infringement established therein:

5. Sumitomo Metal Industries Limited EUR 13 500 000 ment complained of began before 1 January 1991 and continued until after 30 June 1994;
6. Nippon Steel Corporation EUR 13 500 000 — set the fine imposed on each of the two applicants at EUR 10 935 000;
- ...
- dismissed the remainder of the application;

III — The procedure before the Court of First Instance and the contested judgment

- ordered all the parties to bear their own costs.

14. By seven applications, lodged at the Registry of the Court of First Instance between 28 February and 3 April 2000, seven of the eight undertakings fined, including Sumitomo and Nippon Steel, brought an action against the decision. All claimed that the decision should be annulled in whole or in part and that the fines imposed on them should be cancelled or, in the alternative, in the event that the decision was upheld in whole or in part, that the fines should be reduced.

IV — The procedure before the Court of Justice

15. In the contested judgment, the Court of First Instance:
 - set aside the contested judgment in whole or in part;
- annulled Article 1(2) of the decision in so far as it established that the infringe-
- annul, in whole or in part, Article 1 and Articles 3 to 6 of the decision in so far as they are addressed to Sumitomo;

- order, if appropriate, the Commission to pay compensation to Sumitomo for the excessive duration of the proceedings before the Court of First Instance, being a sum of not less than EUR 1 012 332;
- 18. The Commission contends that both appeals should be dismissed and that the appellants should be ordered to pay the costs.

- order the Commission to pay the costs of the proceedings before the Court of First Instance and before the Court of Justice.
- 19. The appeals of Sumitomo and Nippon Steel were joined by decision of the President of the Court of Justice of 15 March 2005.

- 17. On appeal, Nippon Steel claims that the Court of Justice should:
- 20. The parties presented oral argument at the hearing on 8 December 2005.

- set aside the contested judgment;

V — Sumitomo's appeal

- annul the decision in so far as it concerns Nippon Steel;

A — *Scope of the appeal*

- in the alternative, in the event that the appeal is declared well founded only in so far as it relates to special line pipe, reduce the fine imposed by two thirds;
- 21. In its notice of appeal (point 2.3), Sumitomo states that, for the sake of procedural economy, it adopts the arguments put forward by Nippon Steel in its appeal. Those arguments concern both standard thread OCTG and project line pipe, whereas Sumitomo's arguments in these proceedings relate exclusively to the considerations which led the Court of First Instance to conclude that it was involved in

- order the Commission to pay the costs of the proceedings before the Court of First Instance and before the Court of Justice.

an infringement of Article 81(1) EC in respect of project line pipe. Sumitomo also requests that the appeals be joined.

merely to mention a plea without elaborating on it.⁶

22. It seems to me that this attempt by Sumitomo to widen the scope of its appeal by ‘hitching a lift’ on another party’s appeal cannot succeed.

25. A general reference in an appeal to the pleas and arguments which an appellant puts forward in similar proceedings lacks, in my view, the precision demanded by that requirement, even if the pleas and arguments are set out in detail in the similar appeal.

23. Under Article 112(1)(c) of the Rules of Procedure of the Court of Justice, an appeal must contain the pleas in law and legal arguments relied on.

24. In a now extensive and unequivocal body of case-law, the Court of Justice has held that the pleas submitted must refer to the decision of the Court of First Instance⁴ and that, on pain of inadmissibility, it must be clearly indicated in which paragraphs of the decision the Court of First Instance infringed the law.⁵ It follows from that requirement of precision, inter alia, that it cannot suffice

26. Even if there is extensive similarity between two or more appeals, in view of which they may be joined for the purpose of the proceedings and the judgment, all the appellants remain obliged, under Article 112 of the Rules of Procedure, to indicate precisely in their notices of appeal which pleas in law and arguments they rely on to challenge which parts of the contested judgment, as well as the form of order which should, in their view, follow from them.⁷

4 — Pleas which are in essence directed against an act or failure to act by the institution(s) are inadmissible. The resubmission of those pleas would mean that it was an ‘ordinary’ appeal. See, inter alia, judgments in Case C-401/96 P *Somaco v Commission* [1998] ECR I-2587, paragraph 49, and Case C-161/97 P *Kernkraftwerke Lippe-Enns v Commission* [1999] ECR I-2057, paragraphs 76 to 77.

5 — See, inter alia, Case C-221/97 P *Schröder and Thomann v Commission* [1998] ECR I-8255, paragraphs 35 and 38 to 42, and Case C-257/98 P *Lucaccioni v Commission* [1999] ECR I-3251, paragraphs 61 to 62.

6 — Case C-51/92 P *Hercules v Commission* [1999] ECR I-4235, paragraph 113.

7 — Even in actions at first instance, the Court of Justice and the Court of First Instance have adopted a restrictive stance towards the widening of the scope of an action by means of general references. See, specifically, Case T-31/99 *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881, paragraph 113, and the case-law cited in that paragraph, as well as the principles listed by the Court of Justice in Case C-310/97 P *Commission v Assidomen Kraft Products AB* [1999] ECR I-5365, paragraphs 52 to 63. All those points were recently restated in detail by the Court of First Instance in Case T-209/01 *Honeywell v Commission* [2005] ECR I-5527, paragraphs 53 to 68.

27. That precision in defining the scope and details of the appeal is a necessary condition for the orderly and adequate conduct of this procedure, instituted solely for the purpose of reviewing points of law. It is, moreover, required in the interests of the other party, for whom there must be no lack of clarity as to the grounds of appeal and arguments to which it must respond.

28. I therefore conclude that Sumitomo's appeal must be declared inadmissible, in so far as the grounds and arguments on which it relies are put forward by Nippon Steel in its appeal against the contested decision.

B — *The first plea: breach of Community law in the finding of an infringement of Article 81(1) EC in respect of project line pipe*

1. The reasoning of the Court of First Instance

29. In the contested judgment, the Court of First Instance assessed as follows the first plea put forward by the applicants at first instance, alleging that the Commission had not proved to the requisite legal standard the infringement found in Article 1 of the contested decision.

30. In paragraphs 173 to 188 of the contested judgment, the Court of First Instance set out the criteria which must be complied with by the Commission in the production of evidence.

31. The Court of First Instance then examines, first, the second part of the first plea, which contains the allegation that the evidence has no probative force and, subsidiarily, the first part of that plea, namely, that the existence of the alleged agreement is inconsistent with the situation prevailing on the United Kingdom offshore market and the other markets (paragraphs 189 to 337).

32. The Court of First Instance attaches particular importance to Mr Verluca's statement of 17 September 1996, supplemented by his statement of 14 October 1996 and by the document entitled 'Vérification auprès de Vallourec' (together: 'Mr Verluca's statements'). The importance of Mr Verluca's statements is so great because they are the only evidence which covers all aspects of the infringement, in particular its duration and the products covered (namely standard thread OCTG tubes and project line pipe) (paragraph 189).

33. In paragraphs 205 to 212, the Court of First Instance explains why it is able to regard Mr Verluca's statements as reliable and thus to attach particular significance to them.

34. In paragraphs 219 to 221, the Court of First Instance concludes that part of its assessment as follows:

‘219 Moreover, it must be borne in mind that, according to the case-law of the Court of First Instance, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence ... Therefore, it must be concluded that, despite their reliability, Mr Verluca’s statements must be corroborated by other evidence to establish the existence of the infringement penalised in Article 1 of the contested decision.

220 Nevertheless, the degree of corroboration required in this case is lesser, in terms both of precision and of depth, in view of the reliability of Mr Verluca’s statements, than would be the case if the latter were not particularly credible. Thus, it must be concluded that, if it were to be held that a body of consistent evidence was such as to corroborate the existence and certain specific aspects of the market-sharing agreement referred to by Mr Verluca and referred to in Article 1 of the contested decision, Mr Verluca’s statements might be suffi-

cient in themselves, in such a case, to constitute evidence of other aspects of the contested decision ... Moreover, provided that a document does not manifestly contradict Mr Verluca’s statements as to the existence or the essential content of the market-sharing agreement, the fact that it provides evidence of significant elements of the agreement which he described is sufficient to endow it with corroborative value in the context of the body of inculpatory evidence ...’

35. In paragraphs 222 to 331, the Court of First Instance then examines the other evidence in the Commission’s decision. The Court’s assessment, in paragraphs 294 to 302, of the statement made by Mr Becher on behalf of Mannesmann is particularly important.

36. With regard to the reliability of Mr Becher’s statement, which was disputed by the applicant at first instance because it was not based on direct knowledge, the Court of First Instance stated in paragraph 297: ‘Where, as in the present case as far as Mannesmann is concerned, a person not having direct knowledge of the relevant circumstances makes a statement as a representative of a company, admitting the existence of an infringement by it and by other undertakings, that person thoroughly

relies on information provided by his company and, in particular, by employees thereof with direct knowledge of the practices in question ...'

37. In paragraph 302, the Court of First Instance makes the following observations regarding the reliability of Mr Becher's statement: 'It is true that the fact that Mr Becher denied the existence of an intraEuropean component of the Fundamental Rules in the form of an obligation for mutual respect of domestic markets as between European producers weakens his statement, in some degree, as evidence capable of corroborating Mr Verluca's statements. However, it must be observed that Mr Becher confirmed the existence of a market-sharing agreement between the European and Japanese producers for OCTG and project line pipe unequivocally ... Thus, his statement corroborates those of Mr Verluca as regards that aspect of the infringement and, therefore, regarding the fact that the Japanese applicants were parties to a market-sharing agreement under which they agreed not to market standard thread OCTG and project line pipe on Community markets. ...'

38. The Court of First Instance concludes its assessment of the evidence put forward by the Commission in the contested decision as follows:

'332 It is not clearly apparent from most of the information making up the said

body of evidence which seamless steel tubes were covered by the sharing arrangement, but there is no doubt that the products covered included standard thread OCTG. The specific references to those products in the *Réflexions stratégiques* and *Réflexions sur le contrat VAM* notes, in the sharing key document and in the Mannesmann reply, and the unqualified references to OCTG in general in other documents relied on by the Commission adequately and clearly corroborate Mr Verluca's statement relating to the fact that the Fundamental Rules concerned those products.

333 As regards project line pipe, a single item of evidence, Mannesmann's reply made by Mr Becher, unequivocally supports Mr Verluca's statement that the illegal agreement also covered project line pipe. However, given the particularly probative nature of that reply, as described in paragraphs 294 to 302 above, it must be considered as being sufficient to corroborate Mr Verluca's statements, which were in themselves already very reliable ... in relation to those products.

334 In any event, it has already been held that, if the body of consistent evidence relied on by the Commission makes it possible to establish the existence of, and certain specific aspects of, the market-sharing agreement mentioned by Mr Verluca and referred to in Article 1 of the contested decision, the latter's statements could in themselves be sufficient, in that case, to evidence other aspects of the contested decision, in accordance with the rule deriving from the *Cement* judgment ... (paragraph 1838), and relied on by the Commission ... It has already been held, in paragraphs 330 and 332 above, that the body of evidence relied on by the Commission is sufficient to corroborate Mr Verluca's statements in several respects, and in particular with regard to standard thread OCTG.

335 In those circumstances, it must be considered that Mr Verluca clearly told the truth in his statements and, therefore, that those statements constitute sufficient evidence to establish that the agreement on sharing of the home markets of the Europe-Japan Club members covered not only standard thread OCTG, as shown by several other items of evidence, but also the project line pipe. There is no reason to suppose that Mr Verluca, who had direct knowledge of the facts, might have made incorrect statements regard-

ing line pipe, when other evidence corroborates his statements concerning the existence of the agreement and its application to standard thread OCTG.

336 Finally, even if it is assumed that the Japanese applicants may have raised a doubt as to the specific products covered by the agreement penalised in Article 1 of the contested decision — which has not been demonstrated — it must be observed that if the decision, taken as a whole, shows that the infringement found related to a particular kind of product and mentions the evidence on which that conclusion is based, the fact that the decision does not contain a precise and exhaustive list of all the types of product covered by the infringement is not sufficient in itself to justify annulment thereof (see, by analogy, in the context of a plea alleging an inadequate statement of reasons, *Gruber + Weber v Commission*, cited in paragraph 203 above, paragraph 214). If that were not the case, an undertaking could escape any penalty despite the fact that the Commission had established with certainty that it had committed an infringement in circumstances in which the identity of the specific products, included in a range of similar products marketed by the undertaking in question, had not been established.'

2. The appellant's arguments

(a) Mr Becher's statements

39. The appellant's arguments in support of its plea alleging that the Court of First Instance infringed Community law by concluding that the Japanese applicants were party to an infringement of Article 81(1) EC in respect of project line pipe fall into three categories:

(a) arguments directed against the Court's conclusion that Mr Becher's statement constitutes sufficient corroboration of Mr Verluca's statements;

(b) arguments against the reversal of the burden of proof allegedly arising from paragraph 336 of the contested judgment (the '*Gruber + Weber*' paragraph);

(c) arguments directed against the Court's conclusion that Mr Verluca's statements must be regarded as reliable.

40. In that sequence, as followed in the notice of appeal, I shall reproduce those three parts of the first plea below:

41. With regard to Mr Becher's statement, the appellants submit in the first place that the Court of First Instance attributed incorrect probative value to it by holding that that statement unequivocally confirms the existence of a market-sharing agreement in respect of project line pipe.

42. In particular, the Court of First Instance should have taken into account the fact that Mr Becher expressed two reservations in his statement: namely that he was referring to facts which occurred before he became the manager of Mannesmann and that, from the words he uses, a degree of uncertainty or doubt is apparent with regard to what he had been told about the events in question.⁸ The Court's argument, in paragraph 297 of the contested judgment, that Mr Becher's statement is based on information provided by his company and, in particular, by employees with direct knowledge of the practices in question, is purely speculative in this connection, and for its part also contains an incorrect assessment of the probative value.

8 — The relevant passage of Mr Becher's statement reads as follows in the English translation: 'My only knowledge of the term "Fundamentals" is in conjunction with past behaviour by European and Japanese manufacturers (i.e. before I became the Manager of MWE on 1.4.95). As far as I know and this is based on earlier reports on the "Fundamentals" ...'.

43. The second mistake is that the Court of First Instance characterised Mr Becher's statement as reliable evidence capable of corroborating Mr Verluca's first statement, notwithstanding the Court's admission that Mr Becher's denial of the intra-European aspect of the 'Fundamentals' was incorrect.⁹

44. Once the Court of First Instance had established that there was a significant substantive inaccuracy in Mr Becher's statement, it was no longer at liberty to select from that statement elements which could be put forward as corroborating Mr Verluca's statement.

45. In that connection, the appellant further points out that, in any event, Mr Becher's statement, or parts of it, could not be put forward as unequivocally corroborating Mr Verluca's statement (see the first argument referred to above) and, while it confirmed what the latter had said concerning the sharing key, it had no probative force with regard to project line pipe, since the sharing key related only to standard thread OCTG tubes, as the Court of First Instance accepted in paragraph 278 of the contested judgment.¹⁰

⁹ — According to the applicant, the relevant passage in Mr Becher's statement is: 'In the Dalmine document submitted to me, the term "Fundamentals" [is used] in conjunction with activities by seamless manufacture[r]s in Europe. The use of the term is incorrect as far as I know. ...'.

¹⁰ — The relevant passage of this ground reads: 'In that connection, it must be observed first that, contrary to the Commission's assertion, the sharing key document relates only to seamless OCTG and not to line pipe. ...'.

46. The third mistake is that the Court of First Instance put forward contradictory and unsatisfactory arguments for its conclusion that that statement was capable of serving to substantiate the alleged infringement in respect of project line pipe.

47. In addition to the arguments already put forward above against such a conclusion, the Court's approach is in itself regarded as inconsistent since, in paragraph 220 of the contested judgment (cited in point 34 above), its basic premiss had been that documents should be accepted as corroborative evidence only if they did not manifestly contradict Mr Verluca's statements regarding the essential elements of the market-sharing agreement.

48. However, in the case of Mr Becher's statement, the Court of First Instance regarded it as corroborative evidence in spite of the fact that that statement contradicted on an essential point Mr Verluca's assertion that there was an intra-EU agreement. The Court of First Instance gave no explanation for such an important difference in the evaluation of documents and statements as evidence.

(b) The '*Gruber + Weber*' paragraph

49. An inadmissible reversal of the burden of proof is said to arise from what is stated in paragraph 336 of the contested judgment (cited in point 38 above).

50. According to the reasoning followed in that paragraph, the Commission can assume the existence of an infringement in respect of product X even if it is unable to give precise details of such an infringement, provided that it has established an infringement in respect of a range of similar products by the defendant undertaking. By following that line of reasoning in support of its conclusion that the Commission had established an infringement in respect of project line pipe, the Court of First Instance reversed the burden of proof.

51. However, in so doing, the Court of First Instance misinterpreted its own case-law in the *Gruber + Weber v Commission* case¹¹ by assuming that that judgment is applicable to the present case, where the question is not whether a particular product falls within the category of products in respect of which an infringement of Article 81(1) EC is alleged,

but whether the Commission succeeded, in the contested decision, in establishing such an infringement in respect of one particular product, namely project line pipe.

52. Moreover, in this case it cannot be assumed that standard thread OCTG tubes and project line pipe belong to the same category of products. This case concerns two clearly different categories of products, with disparate applications and geographical destinations, which the Commission rightly regarded as two distinct product markets in its Mannesmann/Vallourec decision.¹²

(c) Vallourec's statements

53. The third part of the first plea is, in particular, directed against the Court's supposition in paragraphs 219 and 220 of the contested judgment (cited in point 34 above), in so far as it follows from it that it was possible to assume, on the basis of Mr Verluca's statements alone, that the practices which were the subject of the

11 — Case T-310/94 [1998] ECR II-1043, paragraph 214.

12 — Commission Decision of 3 June 1997 declaring a concentration to be compatible with the common market (Case No IV/M.906 — MANNESMANN/VALLOUREC) according to Council Regulation (EEC) No 4064/89 (OJ 1997 C 238, p. 15).

complaint against the Japanese producers also related to project line pipe.

ment) or vagueness (in particular in paragraph 349 of the contested judgment) in Mr Verluca's statements.

54. In the first place, the Court of First Instance cannot find support for its views in paragraph 1838 of the *Cement* judgment.¹³ Unlike in that case, where the issue was the probative force of a document drawn up immediately after the meeting had taken place of which it gave a report, Mr Verluca's statements were made some considerable time after the events to which they relate. The Court's reasoning thus comes into conflict with its earlier view, set out in paragraph 91 of the judgment in *Enso-Gutzeit v Commission*,¹⁴ to the effect that one undertaking's statement does not constitute adequate proof of other undertakings' involvement in the alleged infringement, unless supported by other evidence.

55. In this connection, moreover, the conclusion of the Court of First Instance in paragraph 220 (cited in point 34 above) concerning the reliability of Mr Verluca's statements is open to question. On two points, the Court expressly held that there were inaccuracies (in particular in paragraphs 281 to 284 of the contested judg-

56. However, one element in Mr Verluca's statements of 18 December 1997, from which it can be inferred that his statements concerning the applicability of the arrangements to project line pipe were not correct, was covered by the Court of First Instance using an interpretative device.

57. In the light of the fact that the Court of First Instance had held that Mr Verluca's statements were not reliable on two points, it would not normally be expected to take a different approach to a third point, concerning which there might also be reasonable doubt. That is a fortiori the case in light of the fact that, according to the sharing key document, the market-sharing agreement applied only to standard thread OCTG tubes and that according to the testimony of a Dalmine employee, Mr Jachia, the 'tacit' agreement applied only to standard thread OCTG tubes.

58. In adopting that approach, in the appellant's view, the Court of First Instance infringed the law in several respects:

¹³ — 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* [2000] ECR II-491.

¹⁴ — Case T-337/94 [1998] ECR II-1571.

— in the first place, the Court of First Instance wrongly assessed the probative value of the note on the meeting with JF;

- it passed over the probative value of the sharing key document and Mr Jachia's statement that the agreements objected to did not relate to project line pipe;
- the statement of grounds is inadequate and internally contradictory;
- the Court of First Instance wrongfully employed an artificial device in its interpretation of Mr Verluca's statement of 18 December 1997. That reversed burden of proof to the detriment of the applicant.

59. Finally, the appellant claims that the Court of First Instance acted unlawfully by assuming that an infringement of Article 81(1) EC in respect of project line pipe had occurred, whereas on the basis of the available evidence it was not able to state when that infringement began and when it ended.

Mr Becher's statement as corroboration of Mr Verluca's statements, the Commission observes as a preliminary point that, in paragraph 333 (cited in point 38 above) of the contested judgment, the Court of First Instance underestimated rather than overestimated its value as corroborative evidence supporting Mr Verluca's statement in regard to project line pipe.

61. In particular, the Court of First Instance did not regard the circumstance that several participants in the cartel admitted the practices imputed to them in the decision — including those which related to project line pipe — as evidence corroborating Mr Verluca's statements. In this connection, the Commission mentions the explicit or implicit acknowledgement by Vallourec, Dalmine and Corus of the facts alleged in the decision.

(b) The arguments regarding Mr Becher's statement

3. The Commission's counter-arguments

(a) Preliminary remark

60. With regard to the appellant's arguments concerning the probative value of

62. The Commission is of the opinion that the appellant's three arguments in support of its claim that the Court of First Instance attributed an incorrect probative value to Mr Becher's statement as corroboration of Mr Verluca's statements concerning the

applicability of the market-sharing agreement[s] to project line pipe are a barely disguised attempt to persuade the Court of Justice to assess the facts on appeal. They are therefore inadmissible.

63. If they are indeed deemed admissible, they must be dismissed as — manifestly — unfounded.

64. The first argument suggests a different interpretation of the qualifying reservation 'as far as I know' (original: 'nach meiner Kenntnis') from that which is justified in the light of its context. In this instance, Mr Becher was commenting on an interpretation of the facts, contained in a document presented to him, which was different from his own. Any general reservation with regard to the reliability of his own statement is not to be found in that phrase.

65. Nor can the fact that Mr Becher based his statement on information provided to him by employees of his company — Mannesmann —, who certainly had direct knowledge of the alleged practices, in any way detract from its reliability. In this connection, the Commission refers to paragraph 205 of the contested judgment, where the Court of First Instance, without being contradicted, states: '... Answers given on

behalf of an undertaking as such carry more weight than that of an employee of the undertaking, whatever his individual experience or opinion ...'.

66. The second argument is equally untenable, in the Commission's view. Even though Mr Becher's statement conceals the fact that the market-sharing arrangement also extended to the European participants among themselves, it is certainly perfectly credible in so far as it relates to project line pipe. That part of the statement certainly did not correspond to the interests of Mannesmann, Mr Becher's company. The fact that a statement is not as self-incriminating as it could be does not render those admissions which it does contain by definition unreliable.

67. Moreover, Mr Becher's denial of the existence of a market-sharing arrangement between the European producers as such is not incompatible with the sharing key document. That document relates solely to arrangements made between, on the one hand, the European producers and, on the other, the Japanese producers. It is silent on the existence of inter-European arrangements.

68. The third argument is completely untenable. In support of its claim that the Court of

First Instance based its acceptance of Mr Becher's statement as corroboration of Mr Verluca's statements on unsatisfactory and internally contradictory reasoning, the appellant refers to its — likewise untenable — first and second arguments.

ence of opinion regarding the facts does not fall within the jurisdiction of the Court of Justice.

(c) The arguments concerning reversal of the burden of proof: the '*Gruber + Weber*' paragraph

69. The appellant claim that standard thread OCTG tubes and project line pipe cannot be regarded as belonging to a range of similar products as referred to in the *Gruber + Weber* judgment¹⁵ is factual in nature. The hearing and determination of such claims is a matter exclusively for the Court of First Instance. This claim is therefore inadmissible in an appeal.

70. Moreover, this argument is not about an — impermissible — reversal of the burden of proof, as the appellant claims, but about a difference of opinion between the appellant and the Court of First Instance concerning the assessment of the evidence. That differ-

(d) The arguments concerning Mr Verluca's statements

71. The Commission contends that this part of the first plea is inadmissible since it is directed at paragraph 220 of the contested judgment, where the Court of First Instance stated that if 'it were to be held that a body of consistent evidence was such as to corroborate the existence and certain specific aspects of the market-sharing agreement referred to by Mr Verluca and referred to in Article 1 of the contested decision, Mr Verluca's statements might be sufficient in themselves, in such a case, to constitute evidence of other aspects of the contested decision ...'.

72. However, this part should have been directed at paragraph 335 of the judgment, where the Court of First Instance concluded, specifically in relation to project line pipe, that: '... Mr Verluca clearly told the truth in his statements and, therefore, that those statements constitute sufficient evidence to establish that the agreement on sharing of the home markets of the Europe-Japan Club members covered not only standard thread

15 — Cited in footnote 11.

OCTG, as shown by several other items of evidence, but also the project line pipe ...’.

law of the Court of Justice in *Enso-Gutzeit*,¹⁷ as claimed by the appellant, depends precisely on the — factual — assessment of whether or not other evidence corroborates one person’s statement.

73. Since the appellant has thus failed to give a sufficiently precise indication of the aspect against which this part of the first plea and the associated arguments are in particular directed, they must be declared inadmissible.¹⁶

74. If the Court of Justice does not agree with the Commission in this respect, the Commission submits that this part of the plea and the arguments put forward in support of it are nevertheless inadmissible.

77. The second step must also lead *prima facie* to inadmissibility since it would necessarily entail a reassessment by the Court of Justice of the facts assessed at first instance by the Court of First Instance. That applies both to the assessment of Mr Jachia’s statement and to the alleged conflict between Mr Verluca’s statements and Mr Becher’s statement, as well as to the alleged inconsistency between the market-sharing document and Mr Verluca’s statements.

75. The appellant’s intention is to contest the legal tenability of the Court’s decision to base its argument principally on Mr Verluca’s statements and then, subsidiarily, to argue that Mr Verluca’s statement was in any event insufficiently reliable to constitute satisfactory proof of an infringement of Article 81(1) EC in respect of project line pipe.

78. It is true that the appellant alleges no fewer than four breaches of the law in the assessment of the probative force of Mr Verluca’s statements, but it does not succeed in defining the nature of those alleged breaches, other than by disputing the findings of fact made by the Court of First Instance.

76. The first step in that approach is bound to fail, because the applicability of the case-

79. In the alternative, in the event that the Court of Justice finds Sumitomo’s arguments admissible, the Commission contends that in

¹⁶ — In this connection, the Commission refers to Case C-138/95 P *Campo Ebro Industrial and Others v Council* [1997] ECR I-2027, paragraphs 60 and 61.

¹⁷ — Cited in footnote 14.

none of the five instances referred to by the appellant did the Court of First Instance err in assessing the probative value of statements or documents or in classifying them as evidence.

Europe, whereas Mr Verluca was concerned mainly with the European markets, where in practice the market-sharing arrangements with those producers were not working;

80. In the first place, the Court of First Instance drew no incorrect conclusions from the — apparent — contradiction between Mr Verluca's statements and the sharing key document:

— the Court of First Instance therefore drew, in paragraphs 283 and 284 of the contested judgment, the correct conclusion from that — apparent — contradiction by holding that it did not substantially detract from the credibility of Mr Verluca's statement.¹⁹

— although the Court held, in paragraph 278 of the judgment,¹⁸ that the sharing key document related only to OCTG tubes, it does not automatically follow from this that there was no infringement in respect of project line pipe;

81. Secondly, the assessment by the Court of First Instance of the statements made to the public prosecutor in Bergamo does not reveal any breach of the law:

— although there seems to be some contradiction between the sharing key document and Mr Verluca's statements as regards the involvement of the South American producers, it is evident that that contradiction is for the most part superficial since the sharing key document mainly covered the market-sharing arrangements with the South American producers on markets outside

— in fact, the appellant's claim that the Court of First Instance failed to take

18 — The relevant passage in paragraph 278 reads: 'In that connection, it must be observed ... that ... the sharing key document relates only to seamless OCTG and not to line pipe.'

19 — In so far as is relevant here, paragraphs 283 and 284 read as follows:

'283 ... Although the contradiction noted in paragraph 281 above certainly weakens the probative value of the sharing key document and also, to some extent, that of Mr Verluca's statements, its significance is minimised ... Even if the Latin American producers agreed to apply a sharing key on markets other than the European market, it must be observed that the negotiations with those producers substantially failed from the European point of view, so that Mr Verluca's negative assessment of their outcome actually corresponds to the sharing key document on that crucial point.'

284 It must be concluded that the contradiction between Mr Verluca's assertions in one of those statements and the sharing key document, referred to by the Commission in recital 86 to the contested decision, does not substantially detract from the credibility of those two items of evidence.'

account of Mr Jachia's statement amounts to saying that the appellant does not agree with the Court's assessment of the evidence, but it does not substantiate further the content of the alleged breach of the law. That in itself is sufficient for this argument to be declared manifestly inadmissible, or manifestly unfounded;

- moreover, the appellant itself has already stated at first instance that Mr Jachia's statement should not be relied on since it was not referred to in the Commission's decision;
 - indeed, in his reply to the first question put to him in December 1997, he reconfirmed his earlier statements;
 - in his comments on the note made following a meeting with JF in 1994, he explained that there existed, within the general structure of the Europe-Japan Club, a sharing key for international invitations to tender for standard products, that is to say, standard thread OCTG;
 - the Court of First Instance was able to consider Mr Biasizzo's deposition significant since he had direct personal knowledge of the matter because he was responsible for the relevant division of Dalmine, and because, partly on account of his admission concerning the bribe paid to Agip employees, he could be regarded as a reliable witness (see paragraphs 311 and 312 of the contested judgment).
 - however, that does not prove that there is no infringement in respect of project line pipe. A document which is indicative of the one infringement cannot thereby demonstrate the non-existence of the other infringement;
 - moreover, if the decision had misinterpreted Mr Verluca's statement, Vallorec would have brought an action for its annulment in so far as it related to project line pipe.
82. Thirdly, Mr Verluca's comments on the note made following the meeting with JF do not undermine the credibility of his statements concerning project line pipe:

83. Fourthly, it is out of the question that the Court of First Instance gave the Commission the benefit of the doubt, or that it reversed the burden of proof:

- the ‘gloss’ which the Court of First Instance is alleged to have wrongly included in paragraph 217 of the contested judgment is not identified.²⁰ In fact, the Court of First Instance merely confirms the indisputable fact that that part of Mr Verluca’s explanations related to the report of the meeting with JF, a report which related exclusively to standard thread OCTG, from which it follows that the relevant part of Mr Verluca’s explanations is also confined to that product;

- the claim that the Court of First Instance reversed the burden of proof in that paragraph by assessing Mr Verluca’s explanations differently from the applicants is merely framing an invitation to the Court to review the facts as a point of law.

20 — Paragraph 217 reads: ‘As regards Sumitomo’s argument based on the reference in the “Vérification auprès de Vallourec” document to the fact that the sharing key arrangement applied “only to standard products”, so that line pipe, not being a standard product, was not affected by it, it should be noted that, in making that statement, Mr Verluca was replying specifically to a question which related to the report of the meeting with JF. It is clear from a reading of that report that it relates exclusively to OCTG tubes and not to line pipe, allowing the inference that Mr Verluca’s explanations related only to OCTG tubes.’

84. Fifthly, the Commission contends that no argument against the reliability of his statement can be derived from the fact that Mr Verluca’s explanations were vague concerning the point in time when the infringement ended. In that respect, the Court of First Instance drew from this lack of precision the — correct — conclusion, in paragraph 349 of the contested judgment,²¹ that his statement was insufficiently clear on that point and could not suffice on its own. Moreover, assuming that an infringement in respect of project pipe line was established, which took place in the context of the Europe-Japan Club, the period during which that club was active determines the duration of the infringement in respect of that product. In that respect, in the Commission’s view, the statement of grounds for the contested judgment is incontestable.

4. Assessment

(a) Preliminary remarks

85. It is apparent from paragraphs 333 to 336 of the contested judgment, reproduced in point 38 of this Opinion, that the Court of First Instance bases the applicants’ involve-

21 — The relevant passage of paragraph 349 reads: ‘... Indeed, whilst the veracity of what Mr Verluca said in relation to the duration of the infringement is not in doubt, it is apparent from the vagueness of what he says concerning the end of the infringement that his statement is not alone sufficient to establish the latter date to the requisite legal standard.’

ment in an infringement of Article 81(1) EC in respect of project line pipe on three grounds, presented as alternatives:

- Mr Verluca's statements, which in themselves constitute sufficient proof (paragraphs 334 and 335);

- Mr Verluca's statements are in any case corroborated by the reply given by Mr Becher on behalf of Mannesmann (paragraph 333);

- the absence of further specific evidence regarding a specific product, namely project line pipe, does not affect the finding of an infringement in respect of that product, if sufficient evidence is furnished with regard to the range to which that product belongs (the '*Gruber + Weber*' paragraph 336).

86. In that order, I shall deal with the various parts of the plea put forward.

87. The parts of the plea which are directed in particular at Mr Verluca's and Mr Becher's

statements have in common that they seek to dispute the probative value attributed by the Court of First Instance to those statements using arguments intended to show that they are not reliable, or less reliable than the Court of First Instance held them to be.

88. On closer examination, the appellant is trying here to show, by means of a different analysis of Mr Verluca's and Mr Becher's statements, that the Court of First Instance drew incorrect conclusions from them and consequently infringed the law by making an incorrect assessment of their probative value.

89. That approach makes it imperative, if one is to do justice to the appellant's arguments, to give a thorough account of them, as in points 39 to 59 above.

90. However, there is another, much more fundamental, objection to that approach, inasmuch as, if the Court of Justice were to allow it, parts of the investigation into and assessment of the facts would have to be repeated, as it were, by the Court of Justice in the appeal. However, such a re-examination of the facts in an appeal is expressly excluded by Article 225 EC in conjunction with Article 58 of the Statute of the Court of Justice.

91. For that reason, pleas and arguments directed against the probative value attributed by the Court of First Instance to evidence put forward must be examined carefully in order to prevent them from becoming a disguised means of securing a re-examination of the facts by the Court of Justice.

92. Only if and in so far as the arguments derived from the facts and evidence which are put forward by the appellant in support of its plea are such that they could cast reasonable doubt on the correctness of the evaluation of those facts and evidence by the Court of First Instance can they be held to be admissible and re-examined.

93. Using that criterion, which is to be inferred from the case-law of the Court of Justice,²² I shall assess the admissibility of the various parts of this plea.

(b) Mr Verluca's statements

94. These parts of the plea are directed against the assessment made by the Court of

First Instance of the probative value of Mr Verluca's statements, as it is set out in paragraphs 219 and 220 of the contested judgment.²³

95. I do not agree with the Commission's assertion that the appellant should have directed its objections at paragraph 335 of the contested judgment and that, consequently, the plea as a whole cannot succeed because the Court's finding in that paragraph still remains valid in any event.

96. In paragraphs 219 and 220, the Court of First Instance defined the premiss on the basis of which, after assessing the other evidence, it was able to find that, with regard to project line pipe, Mr Verluca's statements alone could suffice in order to establish an infringement of Article 81(1) EC.

97. These parts of the plea are directed against that premiss, namely that Mr Verluca's statements are so reliable that corroborative evidence is sufficient for the infringement as such to be considered proven and, hence, for an infringement in respect of a particular product to be considered proven even though no corroborative evidence is available in that regard. If that premiss were to prove untenable, the

22 — *Inter alia*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraphs 48 to 51; and Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-26, paragraphs 47 and 48.

23 — Quoted above in point 34.

basis not only for the conclusions in paragraph 335, but perhaps also for those in paragraphs 333 and 336, would cease to exist.

98. However, I regard the various arguments which the appellant has put forward against the abovementioned premiss as in part unfounded and in part inadmissible.

99. In my view, the argument that the Court of First Instance misinterpreted and misapplied the 'rule' contained in paragraph 1838 of its judgment in the *Cement* case²⁴ is, as such, unfounded.

100. Under that 'rule', the Commission can rely on a piece of evidence in order to conclude that Article 81(1) EC has been infringed, provided that its probative value is beyond doubt and that the evidence itself unequivocally corroborates the existence of the infringement in question.

101. It is in principle for the Court of First Instance to assess the probative value of a document or statement and to classify it on the basis of that assessment.

102. There is no argument to be derived from the rule in question, in paragraph 1838, as defined in the judgment cited above, to the effect that it applies only to statements and documents which are given or drawn up immediately after the events to which they relate. The decisive requirement is that their probative value should be unequivocal, that is to say, beyond any reasonable doubt.

103. I consider that the appellant's attempt to argue that Mr Verluca's statements were made after the practices in question had taken place and that those statements could not therefore comply with the standard defined in the *Cement* judgment is of a factual nature and therefore inadmissible.

104. Assuming, therefore, that Mr Verluca's statements could be classed as reliable, the Court of First Instance was entitled to consider, in accordance with the judgment in *Enso-Gutzeit*,²⁵ that his statements were sufficient for the infringement to be regarded as proven, provided that they were corroborated by other evidence, and that, on that assumption, those statements were a sufficient basis for finding an infringement in respect of a specific product in the range.

²⁴ — Cited in footnote 13.

²⁵ — Cited in footnote 14.

105. In my view, the arguments whereby the appellant attempts to show that the Court of First Instance was wrong in classifying Mr Verluca's statements as reliable in so far as those statements related to project line pipe are inadmissible. This applies to the arguments which the appellant derives from the assessment by the Court of First Instance of the alleged inconsistencies between Mr Verluca's statements and the sharing key document, the disregarding of Mr Jachia's statements and the alleged contradictions between Mr Verluca's statements and Mr Becher's statement.

106. None of the factual arguments put forward here by the appellant even remotely supports the presumption that the Court of First Instance made any errors in the assessment of the relevant statements and documentary evidence which were of such a kind as to invalidate its assessment of their probative value.

107. In fact, by those arguments, the appellant sets the assessment of the relevant statements and documents which it considers desirable against the probative value attributed to them by the Court of First Instance. By drawing from the differences between its assessment and that of the Court of First Instance the conclusion that the Court assessed the evidence incorrectly, it is seeking to obtain an assessment of the facts at the appeal stage, which would be the result of declaring those arguments admissible.

108. As I have explained in points 90 to 93 above, such a result would be contrary to the rule that the appeal must remain confined to a review on questions of law.

109. I also regard as inadmissible the argument that the Court of First Instance had given, in paragraph 217 of the contested judgment, an impermissible explanation of Mr Verluca's statement and had thus reversed the burden of proof.

110. Here too, the appellant compares its assessment with that of the Court of First Instance, characterising the latter as a reversal of the burden of proof so as to obtain a re-assessment of the facts by the Court of Justice. Such an attempt is inadmissible.²⁶

111. Moreover, I cannot see why the finding of fact in paragraph 217 of the contested judgment that 'in making that statement, Mr Verluca was replying specifically to a question which related to the report of the meeting with JF' implies a reversal of the burden of proof. The same applies to the observation that the meeting with JF related exclusively to OCTG tubes and the conclusion drawn from this that that statement by

26 — See *Aalborg Portland*, cited in footnote 22, paragraph 132.

Mr Verluca could only refer to that product. If those observations and that conclusion support the reliability of Mr Verluca's explanations, that is no more and no less than the consequence of the assessment of the facts by the Court of First Instance, an assessment which is unassailable on appeal.

112. I can also be brief about the fifth element of this part of the plea. If it is in fact admissible, it is in any event manifestly unfounded.

113. The fact that the Court of First Instance holds, in paragraph 349, that Mr Verluca's statement is not sufficiently precise about the date on which the infringement ended, does not detract from the reliability, established earlier in the contested judgment and corroborated by other evidence, of the statement with regard to the content of the infringement.

114. Furthermore, the conclusion drawn from the finding that Mr Verluca's statement is imprecise with regard to the date when the infringement ended, namely that his statement is not sufficiently reliable in that regard and therefore not sufficient to establish that date to the requisite legal standard, seems to me to be indisputable.

(c) Mr Becher's statements

115. The arguments which the appellant has put forward against the reliability of Mr Becher's statements and, hence, against the assessment of them by the Court of First Instance as evidence capable of corroborating Mr Verluca's statements, are, in my view, in part inadmissible and in part unfounded.

116. The first argument, that the Court of First Instance, by taking no account of the two reservations expressed by Mr Becher in his statement, incorrectly assessed the probative value of his statement, is unfounded.

117. Mr Becher's lack of any personal knowledge of the alleged infringement in itself makes the reservation 'nach meiner Kenntnis' understandable, particularly as he immediately refers to the source of his 'Kenntnis', namely, the earlier reports which he had read, when he was asked to comment on a document presented to him. This reservation, which is confined to the specific context of the relevant part of his statement, cannot be construed as a general reservation in relation to his statement as a whole.

118. Nor does the claim that Mr Becher's statement is based on information provided to him by employees of the company of which he was an executive undermine its reliability. As the Court of First Instance, referring to earlier case-law,²⁷ stated in paragraph 205 of the contested judgment without being contradicted, answers given on behalf of an undertaking carry more weight than answers given by an employee.

119. There is therefore nothing speculative about the declaration of the Court of First Instance in paragraph 297 that when a person not having direct knowledge of the relevant circumstances makes a statement as a representative of a company, admitting the existence of an infringement by it and by other undertakings, that person necessarily bases what he says on information provided by the company and, in particular, by employees with direct knowledge of the practices in question. Having regard to the significant legal and economic risks which such a statement may entail, making it without having that information available would be particularly risky.

120. This argument — if it is in fact admissible — does not in any way detract from the probative value which the Court of First Instance attributed to Mr Becher's statement.

121. By the second argument, the appellant again gives its own view of the reliability, and thus the probative value, of Mr Becher's statement, which it compares with the Court's view, from which it then infers that the Court of First Instance assessed the probative value incorrectly.

122. I find it difficult to see this as anything but a disguised attempt to persuade the Court of Justice to re-examine the facts on appeal. Consequently, with reference to what I have stated in points 91 to 93 above, this argument must therefore be declared inadmissible.²⁸

123. For the sake of completeness, I would point out in this connection that the substantive allegations which are made against the Court of First Instance by this argument, even if *prima facie* plausible, would be absolutely insufficient to create any hint of a suspicion that the Court of First Instance made a substantial error in assessing the probative value of Mr Becher's statement. This is true both of the conclusions which the Court of First Instance draws from the alleged conflict between Mr Becher's statement and the sharing key document and as regards the reasoning followed by the Court with regard to the consequences which the concealment of the intra-European aspect of the infringement have for the credibility of the other parts of the statement.

27 — Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, paragraph 45.

28 — Advocate General Tizzano followed an identical line of reasoning in his Opinion in *BAI and Commission v Bayer*, cited above in footnote 22, point 36.

124. The third argument — in order to support the claim that there is an internally contradictory and incomplete statement of grounds for the conclusion of the Court of First Instance that Mr Becher's statement corroborates Mr Verluca's so far as project line pipe is concerned — refers to the considerations put forward by the appellant in support of the first and second arguments.

125. In so far as this is a recycling of claims of a factual nature which are now being put forward under the guise of an allegation of failure to state grounds, they are manifestly inadmissible.

126. The same applies to the allegation, presented as supplementary, that the Court of First Instance was wrong in attributing to Mr Becher's statement a different probative value from that which was permissible according to the Court itself, in paragraph 220 of the contested judgment.

127. This is again challenging the assessment by the Court of First Instance of the implications of Mr Becher's denial of the intra-European aspect for the credibility of the other parts of his statement.

128. I conclude that this part of the first plea cannot succeed either, and that, conse-

quently, the conclusion in paragraph 333 of the contested judgment, namely that Mr Verluca's statement that the infringement also covered project line pipe, is not invalidated.

(d) The '*Gruber + Weber*' paragraph

129. The third part of the first plea is directed against the reasoning followed by the Court of First Instance, referring by analogy to paragraph 214 of the judgment in *Gruber + Weber*,²⁹ which led it to conclude that, even if the applicants at first instance may have raised doubts as to the specific products covered by the agreement penalised in the decision, that decision does not need to be annulled.

130. From the way in which the opening sentence of paragraph 336 is worded: '... even if it is assumed that ... — which has not been demonstrated —', it is clear that this is a hypothetical consideration for the sake of completeness, which adds nothing to the conclusions which the Court of First Instance drew in the preceding paragraphs 333 and 335.

131. Since, in my opinion, the first two parts of this plea, which in turn relate to the

29 — Cited in footnote 11.

conclusions contained in paragraph 335 and paragraph 333, cannot succeed, the third part, which is directed against paragraph 336, has become ineffective, that is to say that, even if it were to succeed, it could make no difference to the operative part of the contested judgment.

Instance, approximately four years and three months, was excessive. In particular, the interval of two years between the end of the written procedure and the decision to open the oral procedure and the period of 16 months between the close of the oral procedure and the delivery of the judgment were disproportionately long.

132. According to settled case-law, such (parts of) pleas directed against merely supplementary legal grounds cannot succeed.³⁰

133. I therefore take the view that the third part of the first plea, being ineffective, must be disregarded.

135. The Court of First Instance thus infringed Article 6(1) of the European Convention on Human Rights ('ECHR').

C — The second plea — the excessive length of the proceedings

1. The appellant's arguments

134. In the appellant's view, the length of the proceedings before the Court of First

136. In comparison with the *Baustahlgewebe* case,³¹ in which the Court of Justice held that a duration of proceedings at first instance of five years and six months constituted a breach of the principle enshrined in Article 6(1) of the ECHR that there should be effective access to the courts within a reasonable time, the present case, involving eight undertakings, seven of which brought actions, using a total of three languages of the case, is somewhat simpler than the *Baustahlgewebe* case, which concerned eleven actions.

³⁰ — Of the case-law, which is now extensive, reference should be made to Case C-35/92 P *Parliament v Frederiksen* [1993] ECR I-991, paragraph 31; Case C-362/95 P *Blackspur v Council and Commission* [1997] ECR I-4775, paragraphs 18 to 23, and the order in Case C-467/00 P *Staff Committee v ECB* [2001] ECR I-6041, paragraphs 34 to 36.

³¹ — Case C-185/95 P [1998] ECR I-8417, paragraphs 26 to 49.

137. In any event, the interval of two years between the close of the written procedure in the present cases and the opening of the oral procedure must be regarded as excessively long, particularly in the light of the fact that the measures of organisation of procedure took only two months.

138. The treatment of the present cases also took a disproportionately long time when compared with the average duration of proceedings before the Court of First Instance for similar categories of cases.³²

139. The appellant claims to have suffered financial damage as a result of the duration of the proceedings, in the form of extra interest payments for delay in the payment of the fine imposed and extra costs for the provision of the necessary bank guarantee, which, according to its calculations, amount to EUR 827 332 in total.

140. In addition, in keeping with the reduction which has been applied to fines by the Court of Justice, it considers that an amount of EUR 175 000 would be appropriate compensation.

2. The Commission's arguments

141. The Commission draws attention to the fact that the Court of Justice, exercising its unlimited jurisdiction, can reduce a fine in order to grant reasonable compensation for a breach of the legal principle of independent judicial review within a reasonable time.

142. However, in the hypothetical event that the Court of Justice were to set aside completely the fine imposed, there would no longer be any basis on which the damage suffered by the appellant could be set off as a reduction. In that event, because the procedure on appeal can never serve as a self-contained vehicle for an action claiming damages, the appellant would have to bring an action for damages under Article 235 EC. Moreover, the Commission points out, it would be inappropriate in that situation to hold it liable for compensation since it is not to blame for the length of time taken by the proceedings before the Court of First Instance.

143. Moreover, in the light of the circumstances — the number of parties, the intervention of the EFTA Surveillance Authority, the number of languages of the case, as well as the size and complexity of the file forming the basis of the contested decision —, the length of the proceedings was not excessive, even if it is compared with

³² — The appellant refers here to the data in the 2003 *Annual Report — Synopsis of the work of the Court of Justice and the Court of First Instance of the European Communities*, Annex 12.

the average duration of comparable proceedings before the Court of First Instance during the relevant period, that is, the period from 2000 to 2004.

31 of that judgment that the Court of Justice had in fact taken due account of the damage suffered by the appellant in that case as a result of unnecessary interest charges.

144. The Commission further disputes the claim that the appellant sustained financial damage as a result of the excessive duration of the proceedings:

- the appellant took no account of the income yielded by the amount of the fine which it had had at its disposal during the course of the proceedings;
- the appellant failed to take the steps necessary to limit as far as possible its costs in connection with the fine imposed.

145. Finally, it argues that the appellant bases its supplementary claim for EUR 175 000 as reasonable compensation simply for infringement of the principle of adequate judicial review on an incorrect interpretation of the relevant passages of the judgment in *Baustahlgewebe*. It is clear from paragraph

3. Assessment

146. In *Baustahlgewebe*, the Court of Justice used the following criteria to justify its finding that in that case the proceedings at first instance had taken an excessively long time:³³

- the absolute duration of the proceedings;
- their importance for the persons concerned;
- the number of actions and the number of languages of the case;
- the volume of the documents and the complexity of the questions of fact and law raised;

³³ — Cited in footnote 31, paragraphs 28 to 45.

- any conduct on the part of the applicants and the competent authorities which may have contributed to the prolongation of the proceedings;
- proceedings does not affect the continuity of the appellant's business in any way, but it may well affect its financial interests. The fact that there is a difference of opinion between the appellant and the Commission regarding the amount of the costs incurred as a result of the excessive duration of the proceedings does not alter that finding.

- the interval between the end of the written procedure and the decision to open the oral procedure;

- any interim measures of organisation of procedure and measures of inquiry;
149. The number of actions brought (seven) is clearly smaller than in *Baustahlgewebe* (eleven); the number of languages of the case is the same (three).

- the interval between the end of the oral procedure and the judgment.

147. In comparison with *Baustahlgewebe*, the present proceedings took significantly less time at first instance, namely, four years and three months as against five years and six months.

150. A comparison of the complexity of the questions of fact and law, and of the volumes of the underlying documents, is tricky. Nevertheless, I am inclined, after studying the judgments given at first instance, to estimate the complexity of the questions of fact and law to be examined in the present cases at a somewhat higher level than in *Baustahlgewebe*.

148. With regard to the importance for the person concerned, the situation is not fundamentally different from that in *Baustahlgewebe*. It is true that the length of the

151. Practically all the facts on which the Commission's decision was based were disputed and had to be examined during the proceedings at first instance, and the statements and documents available in that regard had to be assessed for their probative value.

152. The present proceedings are further characterised by a great variety of difficult questions of law, such as the involvement of the EFTA Surveillance Authority, the status of the Community offshore markets and that of the United Kingdom in particular. It is true that those questions of law were not all new, but answering them in the factual context of these proceedings required a thorough preliminary analysis.

153. The file in the proceedings at first instance contains no indication that the appellant undertook or asked the Court of First to undertake any action which could have contributed to the prolongation of the proceedings.

154. Two years elapsed between the end of the written procedure on 1 February 2001 and the opening of the oral procedure on 4 February 2003.

155. On 18 June 2002, 11 July 2002 and 31 July 2002, the Court of First Instance adopted measures of organisation of procedure.

156. The interval between the end of the oral procedure on 21 March 2003 and the delivery of the judgment on 8 July 2004 was almost fifteen and a half months.

157. In the light of the foregoing, I conclude that, in terms of the workload involved for the Court of First Instance, the present cases were, in their totality, by and large equal to the group of cases of which the *Baustahlge-webe* case formed part, but the total duration of the proceedings at first instance in the present group of cases was significantly shorter, namely by one year and three months.

158. In my view, no decisive significance attaches to the fact that it took two years, after the end of the written procedure, before the oral procedure was formally opened. The analysis of the large case-file and underlying documents, as well as their synthesis into an extensive Report for the Hearing — 135 pages, which had to be translated from the working language of the Court of First Instance into the three languages of the case —, necessarily mean that a start has to be made on the relevant preparatory activities long before the decision to open the oral procedure can be taken.

159. The various measures which the Court adopted from the middle of June 2002 onwards for the organisation of the proceedings also require a preliminary analysis of (parts of) the case-files.

160. The interval of almost sixteen months between the hearing and the delivery of the judgment is long, but I hesitate to describe it as excessive in view of the circumstance that the hearings took two and a half days and in view of the judgments themselves, which, in terms of their length and structure, reflect the legal and factual complexity of the present cases.

161. In addition to that, there is also a circumstance which was, admittedly, referred to by the Commission, but which demands a rather more detailed examination.

162. During the period when the present cases were pending before the Court of First Instance — from 2000 to 2004 —, the Court's workload in terms of pending cases roughly doubled from 520 to 1 012 cases. That increase shows that during that period the demand for decisions by the Court of First Instance manifestly exceeded the available capacity.

163. As the workload of a judicial body grows, the average duration of the proceedings will increase. This also manifests itself in the statistics of the Court of First Instance. The average duration of the category of proceedings to which competition cases belong gradually increased from well over

30 months in 2001 to well over 35 months in 2005.³⁴

164. This phenomenon whereby, in the case of a body whose workload exceeds its capacity, the average speed with which cases are dealt with decreases, arises from the 'waiting-room effects' which are seen mainly after the end of the written procedure and after the end of the oral procedure. At those times, the Court or Chamber hearing a case must first prepare the preceding cases for the hearing or, as the case may be, complete them with a judgment, before it can start dealing with the following cases. Viewed in that light, the fact that the present cases took considerably less time to deal with than the cases disposed of in the *Baustahlgewebe* judgment³⁵ testifies to the diligence exercised by the Court of First Instance.

165. Against that background, a period of four years and three months taken to deal with the present voluminous and complicated cases cannot be regarded as disproportionately long.

34 — I have not taken the year 2000 into account here because the statistics for that year are significantly distorted by the very large *Cement* cases (cited in footnote 13). The hearing of those cases took, on average, approximately five years. It resulted in a 1 265-page judgment.

35 — Cited in footnote 31.

166. I therefore conclude that this plea cannot succeed.

VI — Nippon Steel's appeal

A — The first plea: the Court of First Instance erred in law by applying a wrong standard of proof since it is established that the Commission's assertions are incompatible with the appellant's commercial interests and are therefore irrational

167. For the sake of completeness, I would point out that, if the demand for decisions by a Community judicial body structurally exceeds that body's capacity and internal measures to increase productivity are no longer possible without affecting the quality requirements with which that body's decisions must continue to comply, it is the responsibility of the framers of the Treaty to maintain the conditions under which the Court of Justice as a Community institution can continue to fulfil the task assigned to it in Article 220 EC.

1. The relevant parts of the contested judgment

169. This plea relates to paragraphs 173 to 188 of the contested judgment where the Court of First Instance sets out the principles concerning the burden of proof and the standard of proof which it applies in its analysis of the Japanese producers' arguments.

168. Confirmation that the framers of the Treaty recognise that responsibility is to be found in the Treaty of Nice³⁶ which, with regard to the Court of First Instance, makes various provisions in order to keep its capacity in line with the demand for decisions. I think in particular of the possibility under Article 224 EC for more than one judge per Member State to be appointed to the Court of First Instance and of the power conferred on the Council by Article 225a EC to create judicial panels at first instance.

170. So far as concerns the legal standards which are applicable to the evidence which must be produced in order to establish an infringement of Article 81(1) EC, the Court of First Instance states the following in paragraphs 179 and 180:

'179 As the Japanese applicants correctly observe, the Commission must produce sufficiently precise and consistent evi-

³⁶ — OJ 2001 C 80, p. 1.

dence to support the firm conviction that the alleged infringement took place (see, to that effect, *CRAM and Rhein-zink v Commission*, cited in paragraph 57 above, paragraph 20; *Woodpulp II*, cited in paragraph 56 above, paragraph 157; *SIV and Others v Commission*, cited in paragraph 57 above, paragraphs 193 to 195, 198 to 202, 205 to 210, 220 to 232, 249, 250 and 322 to 328; and *Volkswagen v Commission*, cited in paragraph 57 above, paragraphs 43 and 72).³⁷

171. Next, the plea is directed at the essential elements which, according to the Court of First Instance, must be proved in order to be able to presume that there is an infringement of Article 81(1) EC. In this connection, the appellant draws attention to the following passages in paragraphs 181 and 185 of the contested judgment:

‘181 ... it follows from the actual text of Article 81(1) EC that agreements between undertakings are prohibited, regardless of their effect, where they have an anti-competitive object ...’

‘180 However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see, to that effect, *PVC II*, cited in paragraph 61 above, paragraphs 768 to 778, and in particular paragraph 777, confirmed on the relevant point by the Court of Justice, on appeal, in its judgment in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschaapij and Others v Commission* [2002] ECR I-8375, paragraphs 513 to 523).’

‘185 ... as far as the existence of the infringement is concerned, it [does] not matter whether or not the conclusion of the agreement with an anti-competitive purpose referred to by the Commission in Article 1 of the contested decision was in the commercial interests of the Japanese applicants if it were established, on the basis of evidence contained in the Commission’s file, that they in fact concluded that agreement.’

2. The appellant’s arguments

172. The appellant claims that the Court of First Instance erred by not drawing the

37 — Joined Cases 29/83 and 38/83 [1984] ECR 1679; 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* (‘*Woodpulp II*’) [1993] ECR I-1307, I-1445, paragraph 127; Joined Cases T-68/89, T-77/89 and T-78/89 *Siv and Others v Commission* [1992] ECR II-1403, and Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707.

correct legal conclusions from the fact that the Japanese producers had no economic interest in committing the alleged infringement. In particular, the mistake lies in the Court's failure to adjust the legal standard, with which the evidence for the finding of an infringement of Article 81(1) EC must comply, in light of the manifest lack of any economic interest. The Court simply took the view that the absence of an economic interest is irrelevant if it can be established — on the basis of the evidence in the Commission's file — that the agreement at issue was concluded.

173. The appellant, by contrast, is of the opinion that:

- (1) the absence of economic motives on the part of the appellant for concluding the agreement at issue should have had the effect of requiring more persuasive evidence for its existence than would otherwise have been the case;

- (2) the absence of economic motives should have had a bearing on the conclusions which could be drawn from the Commission's ambiguous evidence for the existence of the agreement. In any case, if there was another explanation for the

appellant's market conduct at issue, no infringement of Article 81(1) EC should have been inferred from that evidence;

- (3) the absence of economic motives should have had a bearing on the admissibility as evidence of statements made on behalf of another party allegedly involved in the cartel in order to substantiate the Commission's allegations: such evidence is admissible only if all the essential parts of the agreement (such as the participants, the duration, the products involved and the nature of the infringement) were already established on the basis of evidence independent of those statements. In this connection, the appellant refers to paragraph 91 of the judgment in *Enso-Gutzeit*.³⁸

3. The Commission's arguments

174. The Commission is of the opinion that this plea is inadmissible and in any event unfounded.

³⁸ — Cited in footnote 14.

175. The Commission puts forward primarily two arguments against the admissibility of the plea:

(1) the plea cannot succeed without a further examination of the factual assessment made by the Court of First Instance of the clarity and probative value of the statements, reports and other documents produced by it. (In the Commission's view, this argument also tells against the admissibility of the second and third pleas);

(2) the plea widens the scope of the appeal beyond the framework of the pleas put forward at first instance, since on that occasion the applicant put forward its arguments concerning the lack of commercial interest in the export of OCTG tubes and project line pipe to Europe completely independently of the assessment of the probative value of the material produced by the Commission.

176. The Commission considers the plea unfounded because:

(1) the appellant's arguments are directed at the effects and, more generally, the

relevance of the commercial interests of the undertakings to the establishment of the infringement. In paragraph 184 of the contested judgment, the Court of First Instance held, in accordance with the existing case-law,³⁹ that agreements which, in themselves, pursue the object of restricting competition, and are expressly prohibited by Article 81(1) EC, cannot be justified on the basis of an analysis of the economic context, if that anti-competitive object of the agreement was incontestably established on the basis of documentary evidence;⁴⁰

(2) apart from the fact that the appellant's claim that it has no commercial interest in the agreement at issue was not uncontradicted at first instance, it was sufficient for the Court of First Instance, faced with a file which provided plenty of direct evidence regarding the applicant's clandestine conduct, to examine that evidence and to find, on the basis of that examination, that the prohibition in Article 81(1) EC had been infringed.

³⁹ — In this context, the Commission also refers to *Aalborg Portland*, cited in footnote 22, paragraphs 55 to 57.

⁴⁰ — Paragraph 184 of the contested judgment reads: 'As regards the specific case of agreements which, like those which the Commission found to exist in the present case, involve respecting domestic markets, the Court of First Instance held, in its *Cement* judgment, cited in paragraph 66 above (paragraphs 1085 to 1088), first, that, in themselves, they pursue the object of restricting competition and fall within a category of agreements expressly prohibited by Article 81(1) EC and, second, that the object whose reality was incontestably established, in the case in question, by documentary evidence cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned.'

- (3) the arguments which the appellants derive from the *Enso-Gutzeit* judgment are incorrect since they relate to the admissibility of statements as inculpatory evidence. That case did not concern the admissibility of that evidence, but its credibility in the context of applying the principle of unfettered evaluation of the evidence.⁴¹

179. Nor am I persuaded by the argument that the appellant has widened the scope of its pleas put forward at first instance by arguing that the Court of First Instance should have taken into consideration in its evaluation of the evidence the circumstance that the appellant had no commercial interest in the agreement at issue. It is true that the appellant advanced that argument separately at first instance but, precisely when applying the principle of unfettered evaluation of evidence, such contextual elements should in principle be taken into consideration.

4. Assessment

177. I am not convinced by the Commission's arguments against the admissibility of this plea. The question whether the Court of First Instance rightly used the correct criterion when assessing the evidence put forward in support of the contested infringement is, in the abstract, pre-eminently a question of law.

180. In assessing the plea on the substance, I shall confine myself to the question whether the alleged absence of any commercial interest in the infringement of Article 81(1) EC found by the Commission's decision should have given the Court of First Instance reason to make a different assessment of the evidence than that made in the contested judgment.

178. Moreover, the manner in which the appellant has presented and substantiated this plea, namely by deriving its arguments in part from the factual assessment by the Court of First Instance of the evidence produced, could certainly create the impression that it was primarily seeking a re-assessment of that evidence by the Court of Justice on appeal. That should not, in my view, entail inadmissibility.

181. In this connection, it is necessary to consider whether the reasoning followed by the Court of First Instance in paragraphs 179 to 188 of the contested judgment, on the basis of which it decided first to assess the evidence submitted by the Commission, and only as a secondary point to assess whether or not the existence of the agreement in question was compatible with the situation existing on the relevant markets, is correct.

⁴¹ — In this connection, the Commission refers to the Opinion of Advocate General Vesterdorf in Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, section E, point 2.

182. It seems to me that the approach adopted by the Court of First Instance is clear and, in the light of the existing case-law, irreproachable.

183. In paragraph 179, the Court of First Instance begins by recalling the principle arising from now abundant case-law⁴² that the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place. The Court then again emphasises, in paragraph 180, by reference to settled case-law,⁴³ that it is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement. In paragraph 181, the Court rounds off the first part of its reasoning with a reminder of the settled case-law⁴⁴ that it follows from the text of Article 81(1) EC that agreements between undertakings are prohibited, regardless of their effects, when they have an anti-competitive object. In this case, the Commission has relied primarily on the anti-competitive object of the agreement, the existence and object of which it seeks to demonstrate by reference to a large number of items of documentary evidence.

184. In paragraph 182, the Court of First Instance concludes on the basis of that first

part of its reasoning that all this potentially has important consequences for the first part of the applicant's first plea, which in essence alleges that the infringement penalised in Article 1 of the decision had no anti-competitive effects.

185. The Court of First Instance begins the second part of its reasoning by pointing out that the applicant's arguments concerning the absence of effects of the agreement at issue on competition, even if well founded, could not in principle by themselves lead to the annulment of Article 1 of the contested decision (paragraph 183).⁴⁵

186. More specifically, as regards agreements such as the one at issue in the present case, which involve respecting domestic markets, the Court of First Instance has already held, in the *Cement* judgment, that, in themselves, they pursue the object of restricting competition and fall within a category of agreements expressly prohibited by Article 81(1) EC and that that object, whose reality was incontestably established

42 — Cited in footnote 37.

43 — Already cited above in point 170 of this Opinion, in which paragraph 180 of the judgment is reproduced.

44 — See, inter alia, Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 123.

45 — In support of this statement, the Court of First Instance refers to Case C-277/87 *Sandoz prodotti farmaceutici v Commission* [1990] ECR I-45 and to Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917, paragraph 30).

in the *Cement* case by documentary evidence, cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned (paragraph 184).

187. Consequently, as far as the existence of the infringement is concerned, it does not matter whether the conclusion of the present agreement was in the commercial interests of the Japanese applicants if it is established, on the basis of evidence in the Commission's file, that they in fact concluded that agreement (paragraph 185).

188. In this case, the argument to the effect that the applicants proved the existence of circumstances which cast the facts established by the Commission in a different light and thus allow another, plausible explanation of those facts to be substituted is irrelevant. The case-law on which that argument is based relates to circumstances in which the Commission relies solely on the conduct of the undertakings in question on the market for its view that an infringement has been committed⁴⁶ (paragraph 186).

189. In the present case, the Commission relied on documentary evidence to support

its finding of the existence of an anti-competitive agreement. It follows that the case-law relied on by the applicant cannot be relevant here unless the Commission has failed to establish the existence of the infringement on the basis of the documentary evidence adduced by it. It is therefore not sufficient for the applicant to put forward a plausible alternative to the Commission's view; it will have to begin by alleging that the evidence relied on to establish the infringement is insufficient (paragraph 187).

190. That reasoning of the Court of First Instance is completely consistent with the existing case-law of the Court of First Instance and the Court of Justice. The appellant's view that, where a plausible explanation for the alleged practices exists, namely the lack of any commercial interest, higher standards of proof should be applied, would imply a considerable tightening of that case-law.

191. There does not seem to me to be any reason for that. As the Court of Justice held in its recent judgment in *Aalborg Portland*,⁴⁷ at paragraphs 55 to 57, the production of evidence in competition cases is often extremely difficult since the parties involved are aware of the prohibited nature of anti-competitive practices and of the fines which

46 — The Court of First Instance refers here in particular to Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission*, known as 'PVC II' [1999] ECR II-931, paragraphs 727 and 728.

47 — Cited in footnote 22.

they are liable to incur. In most cases, the existence of such practices must therefore be inferred from coincidences and indicia which, taken together, constitute, in the absence of another plausible explanation, evidence of an infringement of the competition rules.

194. That metaphor is not adequate here, because this case does not involve an assessment of two probabilities, one of which is more likely than the other in the given context, but the determination of one probability on the basis of a body of evidence.

192. If, as in the present case, the Commission succeeds in gathering a large amount of documentary evidence to substantiate an infringement alleged by it, it is obvious that the Court of First Instance must first assess that evidence. Only if that evidence appears insufficient to prove the alleged infringement is it necessary, in addition, to consider whether the existence of that infringement can be inferred from coincidences and indicia connected with conduct on the market.

195. If that evidence appears sufficient to establish the existence of the alleged infringement, the requirement of convincing evidence is satisfied.

193. The appellant illustrates its allegation with a metaphor borrowed from the case-law of the House of Lords:⁴⁸ if a large brown creature is seen in Regent's Park it is more likely to be an Alsatian dog than a lion, and, accordingly, the assertion that it is indeed a lion will require a special standard of proof.

196. In other words, if, on the basis of its field characteristics, a bird can be identified as a duck, it is — even though there is no water in the vicinity — a duck and not a crow.

197. I therefore conclude that the appellant's first plea cannot succeed.

48 — *Secretary of State for the Home Department v Rehman* [2001] UKHL47, annex D.4, point 5 (Lord Hoffman).

B — The second plea: that the Court of First Instance erred in law by applying the wrong standard of proof in a case in which the documentary evidence is ambiguous and in which the appellant has given an alternative plausible explanation for the conduct at issue

method followed by the Court of First Instance in its assessment of whether the Commission provided sufficiently conclusive evidence for the existence of the infringement was correct: the Court was entitled to act as it did on the basis of the existing settled case-law.

C — The third plea: the Court of First Instance erred in law by applying the wrong standard of proof with regard to the level of corroboration required in support of contested statements which the Commission used as the principal items of evidence, but which are implausible, highly ambiguous and in contradiction with other evidence

201. By these two pleas, the appellant is trying to infer inductively from the Court's assessment of the actual probative value of the evidence put forward the conclusion that the Court of First Instance applied too low a standard in that assessment.

198. There is no need to reproduce the appellant's arguments in support of these two pleas.

199. In both pleas the appellant effectively begins by alleging that the Court of First Instance applied an incorrect standard (one that was too low) in its assessment of the evidence, in the form of statements and documents, which the Commission produced to corroborate the infringement at issue.

202. In my view, this attempt to persuade the Court of Justice to review the assessment of the facts by the Court of First Instance cannot succeed, because such a review would exceed the scope of an appeal limited to a review of questions of law.

200. In my assessment of the first plea above, I have already established that the

203. I therefore conclude that these two pleas are manifestly inadmissible.

D — The fourth plea: the Court of First Instance erred in law by giving contradictory and inadequate reasons in concluding that Mr Becher's statement of 21 April 1997 corroborates Mr Verluca's statements regarding the alleged infringement in respect of project line pipe

1. The appellant's arguments

204. The appellant refers to paragraph 220 of the contested judgment in which the Court of First Instance stated: '... Moreover, provided that a document does not manifestly contradict Mr Verluca's statements as to the existence or the essential content of the market-sharing agreement, the fact that it provides evidence of significant elements of the agreement which he described is sufficient to endow it with corroborative value in the context of the body of inculpatory evidence ...'.

205. In its assessment of the significance of Mr Becher's statement for the purpose of corroborating Mr Verluca's statements, the Court of First Instance departed from the criterion which it formulated in paragraph 220 of the contested judgment. By asserting that there was no market-sharing agreement between the European producers themselves, Mr Becher contradicted Mr Verluca's statements on a very fundamental point. The Court of First Instance clearly recognised this, moreover, since it states in paragraph 302 that that contradiction affects the

credibility of Mr Becher's statement. Nevertheless, the Court still took the view that his statement corroborated Mr Verluca's as regards the applicability of the market-sharing agreement to project line pipe.

206. In essence, the Court of First Instance thus accepts contradictory evidence concerning Mr Becher's statement, whereas, according to its own standard, it would probably have disregarded such contradictory statements if they were contained in documents. The Court thereby created an arbitrary distinction between the statements and the evidence recorded in documents.

207. By making that arbitrary distinction, the Court of First Instance erred in law in its assessment of the probative value of Mr Becher's statement. That statement can therefore not be used to substantiate the existence of a market-sharing agreement in respect of project line pipe.

2. The Commission's arguments

208. The Commission contends that this plea is inadmissible because, being directed

against only one of the Court's three separate conclusions (paragraphs 333, 334, 335 and 336), including the infringement at issue also in relation to project line pipe, it cannot succeed.

facts admitted in such a statement, which are also incriminating for the person concerned himself, undoubtedly have a clear probative value.

209. In the alternative, the Commission contends that this plea is unfounded, since the Court of First Instance was properly entitled to make a distinction between statements given at a later date concerning infringements under investigation, and contemporaneous documentary evidence.

210. Documents drawn up during the period when the infringements took place and before the investigation into them had begun generally have the same probative value for all matters dealt with in them. At that stage, the content of such documents is less likely to be influenced by tactical considerations with a view to an investigation. If the content of such documents clearly contradicts statements given at a later date, there is cause for reasonable doubt about the reliability of those statements. In such a case, it cannot be concluded that the evidence in question is consistent.

211. The situation is different in the case of statements which are given at a later date in the course of an investigation. In such statements, certain facts may be admitted, whereas others are denied, because the person concerned, being aware of the Commission's investigation, may presume that the Commission is already acquainted with certain facts and circumstances. The

212. The appellant's argument effectively asks the Court of Justice to find that because a self-incriminating statement is incomplete or is mitigated in part by a denial, no further probative value whatsoever should be attributed to it. Such an argument is incompatible with the view of the Court of First Instance, in paragraphs 211 and 297 of the contested judgment, and not contested, that considerable weight may in principle be attached to statements which run counter to the maker's interests.

3. Assessment

213. It can be inferred from the wording of the first sentence of paragraph 334⁴⁹ of the contested judgment ('In any event, it has already been held that, if ... , [Mr Verluca]'s statements could in themselves be sufficient ... to evidence other aspects of the contested decision'), that the finding set out in paragraph 333, which is based on Mr Becher's statement as corroboration of Mr Verluca's

49 — Quoted in full in point 38 of this Opinion.

statements in respect of project line pipe, is secondary in character compared with the finding contained in paragraphs 334 and 335 that Mr Verluca's statements could suffice as proof that the infringement at issue extends to those products.

214. Since the appellant's pleas are not expressly directed at the finding in paragraphs 334 and 335, it is possible to draw the conclusion that this plea, even if it were to succeed, could not lead to the setting aside of the contested judgment and, therefore, being ineffective, does not need to be considered.⁵⁰

215. I shall therefore examine this plea in more detail only for the sake of completeness.

216. In essence, the appellant complains that the Court of First Instance uses a double standard by giving more weight to documentary evidence which contradicts Mr Verluca's statements than to statements which differ in part from Mr Verluca's statements.

217. I agree with the Commission that statements made on behalf of undertakings during the investigation procedure, after the infringement had taken place, cannot be treated in the same way, from the point of view of the assessment of evidence, as written documents which were drawn up at the time of the infringement and before the investigation procedure began.

218. It stands to reason that those who make such statements will try to hide what they think can reasonably remain concealed. Those statements will therefore often appear incomplete and, sometimes, concealing of the truth. However, in so far as those statements contain utterances which incriminate the declarants themselves, those utterances can, as the Court of First Instance rightly pointed out in paragraphs 211 and 297 of the contested judgment, be regarded as reliable.

219. That is a fortiori the case where the issue on which different statements differ from one another is clearly unconnected with the issue or issues on which those statements corroborate or reinforce one another.

220. In this case, Mr Verluca's statements and those of Mr Becher differ in so far as the scope *ratione loci* of the infringement is concerned, but agree in so far as the scope *ratione materiae* of the infringement is concerned.

⁵⁰ — See the case-law cited in footnote 30.

221. The fact that Mr Becher confirms in his statement that his company was involved in a market-sharing agreement which also covered project line pipe, and thus — further — incriminates his company, could therefore constitute sufficient reason for the Court of First Instance to regard that statement as reliable in so far as it related to that project.

222. I therefore conclude that this fourth plea put forward by the appellant, whether or not it is ineffective, is in any event unfounded.

VII — Costs

223. It follows from the foregoing that I conclude that the appeals of Sumitomo and Nippon are unfounded in their entirety.

224. Since the Commission has applied for the appellants to be ordered to pay the costs of the proceedings, they must be ordered to pay the costs under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice.

VIII — Conclusion

225. In the light of the above, I propose that the Court should:

A. In Case C-403/04 P:

(1) Declare the appeal unfounded;

(2) Order the appellant to pay the costs of the appeal.

B. In Case C-405/04 P:

- (1) Declare the appeal unfounded;
- (2) Order the appellant to pay the costs of the appeal.