Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 15 October 2015 [1]

Case C-247/14 P

HeidelbergCement AG
v

European Commission

(Appeal — Markets for cement and related products — Article 18(3) of Council Regulation (EC) No 1/2003 — Commission's powers to request information — Statement of reasons — Necessity of the information requested — Format of the information requested — Proportionality of the request — Self-incrimination)

1. What are the conditions for, and the limits to, the Commission's powers to require, by way of decision, undertakings to supply information, in the context of an investigation relating to possible breaches of EU competition rules?

2. These are, in essence, the key issues raised by the appeal lodged by HeidelbergCement AG ('HeidelbergCement' or 'the appellant') against the judgment of the General Court in which the latter dismissed the action for annulment directed against a Commission decision, adopted pursuant to Article 18(3) of Regulation (EC) No 1/2003, [2] requesting that company to provide a considerable amount of information.

3. Largely similar issues are also raised by three other appeals, lodged by other companies active in the cement market, against three judgments of the General Court in which that court also dismissed, for the most part, their challenges to Commission decisions equivalent to the one challenged by HeidelbergCement. In those other three proceedings too, I will deliver my Opinion today. [3] The present Opinion should thus be read together with those Opinions.

1 — Original language: English.

2 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

3 — *Schwenk Zement* v *Commission*, C-248/14 P; *Buzzi Unicem* v *Commission*, C-267/14 P; and *Italmobiliare* v *Commission*, C-268/14 P.

I – **Legal framework**

4. Recital 23 in the preamble to Regulation No 1/2003 states:

‘The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by [Article 101 TFEU] or any abuse of a dominant position prohibited by [Article 102 TFEU]. When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.’

5. Article 18 (‘Requests for information’) of Regulation No 1/2003, in the relevant part, provides:

‘1. In order to carry out the duties assigned to it by this Regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information.

2. When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.

3. Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.

…’

II – **Background to the proceedings**

6. In 2008 and 2009, the Commission — acting under Article 20 of Regulation No 1/2003 — carried out a number of inspections at the premises of several companies active in the cement industry, including HeidelbergCement. Those inspections were followed, in 2009 and 2010, by a number of requests for information under Article 18(2) of Regulation No 1/2003.

7. By letter of 8 November 2010, the Commission notified HeidelbergCement that it intended to send the latter a decision requesting information under Article 18(3) of Regulation No 1/2003 and forwarded the draft questionnaire it planned to annex to that decision. HeidelbergCement submitted its observations to the Commission on 16 November 2010.

8. On 6 December 2010, the Commission notified HeidelbergCement that it had decided to initiate proceedings, under Article 11(6) of Regulation No 1/2003 and Article 2 of Regulation (EC) No 773/2004,[4] against it as well as against seven other companies for suspected infringements of Article 101 TFEU involving restrictions on imports in the EEA coming from countries outside the EEA, market sharing, price coordination and related anticompetitive practices in the cement market and related product markets.

4 — Commission Regulation of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ 2004 L 123, p. 18).

9. On 30 March 2011, the Commission adopted Decision C(2011) 2361 final of 30 March 2011 in proceedings pursuant to Article 18(3) of Council Regulation (EC) No 1/2003 (Case 39520 — Cement and related products) ('the contested decision').

10. In the contested decision, the Commission stated that, under Article 18 of Regulation No 1/2003, in order to carry out its duties under that regulation, it may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information (recital 3 of the contested decision). After pointing out that the applicant had been informed of the Commission's intention to adopt a decision under Article 18(3) of Regulation No 1/2003 and that the former had submitted its observations on the draft questionnaire (recitals 4 and 5 of the contested decision), the Commission, by decision, required the appellant to answer the questionnaire set out in Annex I. Notably, Annex I comprised 94 pages and 11 sets of questions. The instructions concerning the answers to that questionnaire were set out in Annex II, while the answer templates were set out in Annex III.

11. The Commission also drew attention to the alleged infringements (recital 2 of the contested decision), which it described as follows: '[t]he alleged infringements concern restrictions on trade flows in the European Economic Area (EEA), including restrictions on imports in the EEA coming from countries outside the EEA, market-sharing, price coordination and related anticompetitive practices in the cement market and related product markets'. Referring to the nature and volume of the information requested, as well as the seriousness of the alleged infringements of the competition rules, the Commission considered it appropriate to give the appellant 12 weeks to reply to the first 10 sets of questions and 2 weeks to reply to the 11th set (recital 8 of the contested decision).

12. The operative part of the contested decision reads as follows:

'Article 1

HeidelbergCement together with its subsidiaries located in the European Union under its direct or indirect control, shall provide the information referred to in Annex I to this decision, in the form requested in Annexes II and III thereto, no later than twelve weeks, for questions 1-10, and two weeks, for question 11, from the date of notification of this decision. All annexes form an integral part of this decision.

Article 2

This decision is addressed to HeidelbergCement together with its subsidiaries located in the European Union under its direct or indirect control.'

13. On receipt of the contested decision, HeidelbergCement applied for an extension of the time-limit to reply to some sets of questions. After an initial rejection of that application, following an additional request from HeidelbergCement, the Commission granted the appellant an extension of 5 additional weeks to answer the first 10 sets of questions.

14. On 18 April, 6 May and 2 August 2011, HeidelbergCement provided its answers to the questionnaire sent by the Commission.

III – Procedure before the General Court and the judgment under appeal

15. By application lodged on 10 June 2011, HeidelbergCement requested the General Court to annul the contested decision.

16. By separate application of 17 June 2011, HeidelbergCement requested the General Court to suspend the application of the contested decision. By order of 29 June 2011, the President of the General Court dismissed those requests.

17. By judgment of 14 March 2014 in *HeidelbergCement* v *Commission*, T-302/11 ('the judgment under appeal'),[5] the General Court dismissed the action and ordered HeidelbergCement to pay the costs.

IV – **Procedure before the Court and forms of order sought**

18. In its appeal, lodged with the Court on 20 May 2014, HeidelbergCement claims that the Court should:

— set aside the judgment in Case T-302/11;

— annul Commission Decision C(2011) 2361 final in proceedings pursuant to Article 18(3) of Regulation No 1/2003 (Case 39520 — Cement and related products);

— in the alternative, refer the case back to the General Court for a fresh decision;

— order the Commission to pay the costs at first instance and on appeal.

19. The Commission, for its part, contends that the Court should:

— dismiss the appeal;

— in the alternative, in case of annulment of the judgment in Case T-302/11, dismiss the action;

— order HeidelbergCement to pay the costs.

20. HeidelbergCement and the Commission presented oral argument at the hearing held on 3 June 2015.

V – **Assessment of the grounds of appeal**

21. In its appeal, HeidelbergCement submits seven grounds of appeal. Before analysing the merit of those grounds, however, I will briefly illustrate some key aspects of the system provided for in Regulation No 1/2003 with regard to requests for information issued by the Commission.

5 — EU:T:2014:128.

A – *Introduction*

22. Regulation No 1/2003 grants far-reaching powers of investigation to the Commission.[6] The aim of those powers is to enable that institution to carry out its duty under the EU Treaties to ensure that the rules on competition are applied effectively and uniformly in the European Union.[7] To that end, the Commission enjoys wide discretion to decide, first, whether to use those powers[8] and, if so, the appropriate moment to do so[9] and the relevant facts to investigate.[10]

23. That discretion is, however, not unfettered. Indeed, in the exercise of its powers of investigation, the Commission is required to observe the general principles of law and the fundamental rights recognised in EU law.[11] Among those, the need to safeguard the undertakings' rights of defence throughout the procedure[12] including, under certain conditions, the right not to incriminate oneself is of particular significance.[13]

24. In addition, the Court has, on numerous occasions, stressed that the need to protect individuals against arbitrary or disproportionate intervention by public authorities in their private sphere, including when those authorities are enforcing competition rules, is a general principle of EU law.[14] A measure of investigation is arbitrary when adopted in the absence of facts capable of justifying the interference with the fundamental rights of an undertaking,[15] and disproportionate when it constitutes an excessive and, thus, intolerable interference with those rights.[16]

25. As regards the Commission's power to request information by way of decision, it is clear that the Commission may address its decision to any undertaking which might hold relevant information, irrespective of its involvement in the suspected infringement. That power includes the right to request companies to provide answers to specific questions and to disclose documents in their possession.[17] The information requested must be 'necessary' for the Commission to give effect to Articles 101 and 102 TFEU.

26. If the burden of proving an infringement of the EU competition rules rests on the Commission,[18] the undertakings subject to measures of investigations are, nonetheless, under a duty to cooperate actively with that institution.[19]

6 — As I have emphasised in a previous Opinion, it is generally accepted that the Commission should be entitled to enjoy such extensive powers, and to an appropriate discretion in exercising them, as competition infringements constitute serious contraventions of the economic laws on which the European Union is founded. See my Opinion in *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:92, point 62.

7 — See, to that effect, recital 1 in the preamble to Regulation No 1/2003. See also judgment in *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 25.

8 — Judgments in *Solvay* v *Commission*, 27/88, EU:C:1989:388 paragraphs 12 and 13, and *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraphs 15 and 16.

9 — See, to that effect, judgments in *Automec* v *Commission*, T-24/90, EU:T:1992:97, paragraph 77, and *Ufex and Others* v *Commission*, C-119/97 P, EU:C:1999:116, paragraph 88.

10 — See, to that effect, judgment in *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157.

11 — See recital 37 in the preamble to Regulation No 1/2003. See also judgment in *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337.

12 — See, to that effect, judgments in *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraphs 14 and 15, and *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 32.

13 — See recital 23 in the preamble to Regulation No 1/2003.

14 — See judgments in *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 19, and *Roquette Frères*, C-94/00, EU:C:2002:603, paragraphs 27, 50 and 52.

15 — Judgments in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 55, and *Dow Chemical Ibérica and Others* v *Commission*, 97/87 to 99/87, EU:C:1989:380, paragraph 52.

16 — See, to that effect, judgment in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraphs 76 and 80 and the case-law cited.

17 — See, to that effect, judgments in *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:432, paragraph 41, and *Aalborg Portland and Others* v *Commission*, 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, EU:C:2004:6, paragraph 61.

18 — Article 2 of Regulation No 1/2003.

19 — See judgment in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 27.

27. In order to allow those undertakings to assess the scope of their duty to cooperate, whilst at the same time safeguarding their rights of defence,[20] the Commission must indicate the legal basis and the purpose of the request in the decision.[21]

28. It is against that background that I will now assess the grounds of appeal put forward by the appellant.

B – *The grounds of appeal*

1. Purpose of the request for information

a) Arguments of the parties

29. By its first ground of appeal — directed against paragraphs 23 to 43 and 47 of the judgment under appeal — HeidelbergCement submits that the General Court misinterpreted and misapplied Article 18 of Regulation No 1/2003 when dismissing its plea alleging an inadequate statement of reasons in the contested decision. In particular, according to the appellant, the contested decision lacked detail regarding the nature of the suspected infringements as well as the products and geographic markets concerned. HeidelbergCement also alleges an inadequate statement of reasons by the General Court on this issue.

30. The Commission contends that this ground of appeal should be rejected. The Commission emphasises that the procedure was still at an early stage when the contested decision was adopted. A request for information cannot contain the level of detail which is required for decisions adopted at the end of the investigation, such as the statement of objections.

b) Assessment

31. At the outset, I would call to mind that, according to settled case-law, the statement of reasons required under Article 296 TFEU for measures adopted by EU institutions must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the EU Courts to review its legality. The requirement to state reasons must be assessed by reference to all the circumstances of the case. It is not necessary for the reasoning to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.[22]

32. With regard to decisions ordering an inspection under Article 20 of Regulation No 1/2003, the Court has recently confirmed that the Commission is not required to communicate to the addressees of such decisions all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements, provided it clearly indicates the presumed facts which it intends to investigate. Although the Commission is obliged to indicate as precisely as possible the evidence sought and the matters to which the investigation relates, it is, on the other hand, not essential in a decision ordering an inspection to identify precisely the relevant market, the legal nature of the presumed infringements or the period during which those infringements were committed, provided that the decision contains the essential elements already mentioned. Indeed,

20 — See, generally, judgment in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 47 and the case-law cited.

21 — Article 18(3) of Regulation No 1/2003.

22 — See the judgment in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:2030, paragraphs 31 and 32 and the case-law cited.

inspections normally take place at the beginning of an investigation and, consequently, the Commission still lacks, at that stage, precise information on those aspects. It is the very aim of an inspection to gather evidence relating to a suspected infringement so that the Commission is able to verify its suspicions and make a more specific legal assessment. [23]

33. These principles seem to me to be applicable — *mutatis mutandis* — to decisions requesting information under Article 18(3) of Regulation No 1/2003. Evidently, both types of measures pursue the same aim and consist in a fact-gathering exercise. Although not worded in identical terms, the relative resemblance of the two provisions would also seem to support a uniform reading of the two. [24]

34. Against that backdrop, the crucial issue is whether the General Court has correctly examined the adequacy of the statement of reasons contained in the contested decision. In other words, the question is as follows: taking into account the stage of the procedure at which the contested decision was adopted, is the statement of reasons in question sufficiently clear to, on the one hand, enable the recipient to exercise its rights of defence and assess its duty to cooperate with the Commission and, on the other hand, permit the exercise of judicial review by the EU Courts?

35. That question should, in my view, be answered in the negative.

36. The appellant criticises three elements of the statement of reasons: (i) the description of the presumed infringements, (ii) the geographic scope thereof, and (iii) the products concerned by the infringements. It is indeed true that each of these elements is formulated — to use the terms employed by the General Court — 'in very general terms which would have benefited from greater detail and [warrant] criticism in that regard'. [25]

37. As concerns the presumed infringements, recital 2 of the contested decision states: '[t]he alleged infringements concern restrictions on trade flows …, including restrictions on imports …, market-sharing, price coordination and related anticompetitive practices'. This description of the possible infringements seem not only quite vague ('restrictions on trade flows', 'including restrictions on imports') but also all-encompassing ('related anticompetitive practices'). The reference to 'market sharing' and 'price-coordination' — being so general — does little to delimit with more precision the nature of the conduct suspected by the Commission. Most cartels, in fact, include elements of market-sharing and price-fixing. In practice, the vast majority of the types of agreement prohibited by Article 101 TFEU seem to be caught by this description.

38. With regard to the geographic scope of the presumed infringements, the contested decision mentions restrictions on trade flows in the EEA, including restrictions on imports in the EEA coming from countries outside the EEA. It is true that the geographic component of the relevant market need not be defined in a decision under Article 18, [26] yet some reference to at least some of the countries affected ought to have been possible. In particular, it is not clear whether the market possibly affected is the entire EEA or only parts of it and, if so, which parts.

39. Lastly, the contested decision is even more elusive when it comes to explaining the products which are the subject-matter of the investigation. In practice, only cement is identified as a relevant product, since — for the rest — the decision refers to '[cement-]related product markets'. Again, this description is not only extremely vague (how closely 'related' to cement must the products be?), but potentially covers all the types of products for which the appellant is active (as a seller or as a buyer).

23 — *Ibidem*, paragraphs 34 to 37 and the case-law cited.

24 — Article 18 of Regulation No 1/2003 provides that the decision must 'state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which [the information] is to be provided'. Article 20(4) of the same regulation provides that the decision must ''specify the subject matter and purpose of the inspection, appoint the date on which it is to begin'.

25 — Paragraph 42 of the judgment under appeal.

26 — Opinion of Advocate General Kokott in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:223, points 35 to 38.

40. According to the General Court,[27] the scarcity of details in the contested decision is partly alleviated by the fact that it expressly refers to the Commission decision to initiate proceedings, which included additional information on the geographic extent of the presumed infringements and the type of products covered.

41. HeidelbergCement disputes that the failures of the contested decision can be remedied by a mere reference to a previous decision and points out, in any event, that the decision to initiate proceedings is also affected by the same lack of detail.

42. In my view, EU acts imposing obligations that interfere with the private sphere of individuals or undertakings and that, if not complied with, carry the risk of hefty financial penalties, should, as a matter of principle, have a self-standing statement of reasons.[28] Indeed, it is important to enable those individuals or undertakings to grasp the reasons for that act without an excessive interpretative effort,[29] so that they can exercise their rights effectively and in good time. This is especially true for acts which include express references to previous acts containing a different statement of reasons. Any meaningful difference between the two acts may be a source of uncertainty for the addressee.

43. Notwithstanding the above, I am of the view that, by way of exception, in the present case, the General Court was correct in stating that the statement of reasons in the contested decision may be read in conjunction with the statement of reasons included in the decision to initiate proceedings. The two decisions were adopted in the framework of the same investigation and obviously concern the same presumed infringements. They were also adopted within a short period of time. More importantly, there seems to be no meaningful difference between the statements of reasons included in the two decisions. Therefore, I take the view that, in the present case, the first decision could be regarded as 'context' of the second decision, which the addressee could not be unaware of.[30]

44. Nevertheless, if it is true that the first decision included more significant detail on the geographical scope of the presumed infringements (explaining that those infringements covered Austria, Belgium, the Czech Republic, France, Germany, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom), it was not equally precise as regards the nature of those infringements and the products covered. In particular, the explanation given of the concept of 'cement and related products' included in a footnote on page 4 of that decision covers a potentially very wide and disparate set of products.

45. That said, I am of the view that the fact that a statement of reasons may be too general or somewhat vague on certain aspects does not result in invalidity if the rest of the decision allows the recipient and the EU Courts to understand with sufficient precision what information the Commission seeks and the reasons for that.[31] Indeed, even if only indirectly or implicitly, the subject-matter of the questions posed may shed additional light on a statement of reasons which may have been drafted without the required precision. After all, very precise and focused questions inevitably reveal the scope of the Commission's investigation. This seems to me particularly true for acts adopted at an early stage of the process, when the scope of the investigation is not entirely and finally set and, in fact, may need to be limited or expanded in the future, as a consequence of the information subsequently gathered.

27 — Paragraphs 41 and 42 of the judgment under appeal.

28 — Cf. Opinion of Advocate General Léger in *BPB Industries and British Gypsum* v *Commission*, C-310/93 P, EU:C:1994:408, point 22.

29 — Cf. Opinion of Advocate General Lenz in *SITPA*, C-27/90, EU:C:1990:407, point 59.

30 — See case-law referred to in point 31 of this Opinion.

31 — Advocate General Kokott states in her Opinion in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:223: 'what is required is … not so much as precise a description as possible of the markets concerned as, rather, a definition of the infringements of competition law suspected by the Commission which is understandable to the undertakings concerned' (point 52).

46. In the present case, however, the opposite is actually true. The questions posed to HeidelbergCement are extraordinarily numerous and cover very diverse types of information. It is, to my mind, extremely difficult to identify a connecting thread among questions which range from the quantity and costs of CO_2 emissions of production facilities,[32] to the means of transport and distance travelled for shipments of the goods sold;[33] from the type of packaging used for the shipments[34] to the transport and insurance costs for those shipments;[35] from statistics regarding building permits[36] to VAT numbers of its customers;[37] and from the technology and fuel used in the production facilities[38] to the costs of repair and maintenance of those facilities.[39] Moreover, some questions posed do not seem to be fully in line with what was stated in the earlier decision to initiate proceedings: for example, questions 3 and 4 (which concern a particularly significant amount of information over a 10-year period[40]) are not limited to the Member States identified as possibly concerned by the decision to initiate proceedings.

47. Incidentally, if the connecting thread tying those questions together were to be a complete mapping of the undertaking's revenue and cost structure to enable the Commission to analyse it by econometric methods (comparing it with those of other companies active in the cement industry), it could be questioned whether such a broad and all-encompassing request for information is at all appropriate under Article 18. Unless the Commission is in possession of concrete indicia pointing to objectionable behaviour for which such an analysis could provide necessary support, such a request for information would seem more appropriate for a sectorial investigation under Article 17 of Regulation No 1/2003.[41]

48. In those circumstances, I agree with the appellant that the purpose of the Commission's request for information was insufficiently clear and unambiguous. It was consequently excessively difficult, for that undertaking, to understand the presumed infringements so as to assess the extent of its duty to cooperate with the Commission and, if necessary, exercise its rights of defence, for example by refusing to answer the questions which it deemed unlawful. All the more so since — as the General Court itself recognised — certain questions concerned information which was not purely factual and included a value judgement,[42] and other questions were relatively vague.[43] As such, in respect of those questions, the risk of providing self-incriminatory answers could not easily be ruled out by the appellant.

49. That lack of detail cannot — as the Commission claims — be justified by the fact that the contested decision was adopted at an early stage of the investigation. Indeed, that decision was issued almost three years after the investigation had begun. During that time, a number of inspections had taken place and very detailed requests for information had already been issued by the Commission and answered by the undertakings concerned, including HeidelbergCement. In fact, some months before the adoption of the contested decision, the Commission considered that it had gathered sufficient elements to initiate proceedings under Article 11(6) of Regulation No 1/2003 and Article 2 of Regulation No 773/2004. Those elements should have enabled the Commission to provide more detailed reasons in the contested decision.

32 — Question 5(AG) and (AH).
33 — Question 3(Z), (AB) and (AD).
34 — Question 3(AH).
35 — Question 4(Z).
36 — Question 2.
37 — Question 3(Y) and Question 4(W).
38 — Question 5(F) and (G).
39 — Question 5(AF).
40 — The appellant estimated that those questions alone concerned around 500 000 economic transactions.
41 — See also infra, point 74 of this Opinion.
42 — See paragraph 126 of the judgment under appeal.
43 — See paragraph 112 of the judgment under appeal.

50. At the hearing, the Commission itself stated that the amount of detail required in a statement of reasons depends, among other things, on the information which the Commission has in its possession when a decision under Article 18 is adopted. I believe this to be correct. Yet, to my mind, this necessarily implies that a statement of reasons which might be acceptable in respect of a decision adopted at the beginning of an investigation (i.e. a decision requiring an undertaking to submit to an inspection under Article 20, or the very first decision to request information under Article 18(3)) might not be equally acceptable as regards a decision adopted at a much later stage of the investigation, when the Commission has more extensive information on the presumed infringements.

51. In those circumstances, I find it inexcusable that, despite all the information already provided to the Commission over the previous years, and the additional efforts which the contested decision entailed, HeidelbergCement was still 'left in the dark' regarding the precise scope of the Commission's investigation.

52. Furthermore, I believe that the exercise of judicial review by the EU Courts of the legality of the contested decision has been made significantly more difficult. Given the scanty information on the presumed infringements contained in that decision (even when read against the background of the decision to open the proceedings), how are the EU Courts to assess, for example, the need of certain specific pieces of information requested or the proportionate character of the overall request? [44]

53. On the one hand, the more broadly and vaguely a statement of reasons is formulated, the more clearly a correlation between the presumed infringement and the information requested might appear. Yet, it cannot be accepted that a statement of reasons which has, by negligence or on purpose, been drafted without the required precision would have the unintended consequence of enlarging the types of information which could be deemed 'necessary' for the purposes of Article 18.

54. On the other hand, since the proportionality of a request for information depends, among other things, on elements such as the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned, the importance of the evidence sought, the amount and type of useful information which the Commission believes to be in the possession of the undertaking in question, [45] that assessment is again very difficult to make. The EU Courts can assess the amount of work created by a specific request for information but, failing any further details on those aspects, cannot determine whether or not the efforts required of an undertaking in answering such a request are justified in the public interest.

55. For those reasons, I am of the view that the General Court wrongly interpreted and applied Article 296 TFEU and Article 18(3) of Regulation No 1/2003 as concerns the required statement of reasons in a decision to request information. The judgment under appeal must, therefore, be quashed in so far as the General Court held, for the reasons indicated in paragraphs 23 to 43 of that judgment, that the contested decision contained an adequate statement of reasons.

44 — Cf. Opinion of Advocate General Jacobs in *SEP* v *Commission*, C-36/92 P, EU:C:1993:928, point 30.

45 — See points 99 and 100 of my Opinion in *Buzzi Unicem* v *Commission*, C-267/14 P.

2. Choice of the legal instrument and the time-limits imposed

a) Arguments of the parties

56. By its second ground of appeal, directed against paragraphs 44 to 46 of the judgment under appeal, HeidelbergCement submits that the General Court erred in holding that the statement of reasons in the contested decision did not need to address the choice of the legal instrument adopted by the Commission (a decision under Article 18(3) of Regulation No 1/2003 instead of a simple request under Article 18(2) of Regulation No 1/2003), or the time-limits set out in that instrument.

57. The Commission submits that the Court should reject this ground of appeal.

b) Assessment

58. I am of the view that the General Court committed no legal error in holding that the contested decision did not need to include a specific and explicit statement of reasons on the choice of the legal instrument used by the Commission or the time-limit fixed for providing the information requested.

59. Article 18(3) of Regulation No 1/2003 requires the decision only to 'state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided'. While that provision requires the Commission to state, among others, the purpose of the request, it does not require, at least expressly, any explanation concerning the choice of legal instrument or the time-limit fixed.

60. Accordingly, it may be surmised that the EU legislature considered that the reasons behind the choice of the legal instrument and time-limit can normally be gleaned, by implication, from a sufficiently detailed description of the purpose of the investigation. The judgment of the Court in *National Panasonic* v *Commission*[46] — referred to in paragraph 44 of the judgment under appeal — seems to me applicable, by analogy, to the present case and, thus, confirms the suggested reading of the duty to give reasons under Article 18.

61. Furthermore, I do not believe that any additional obligation for the Commission on this point might be derived from Article 296 TFEU. As mentioned above, according to settled case-law, it is not necessary for the reasoning of an act to specify all the relevant facts and points of law, since the question whether the statement of reasons is adequate must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.[47] The fact that the recipient of an act of the institutions is aware of the context in which that act was adopted,[48] for example for having been involved or having contributed to the procedure which led to its adoption,[49] may justify a relatively succinct statement of reasons.

62. The contested decision was adopted in the context of an investigation into possible infringements of Article 101 TFEU in which the appellant was suspected of taking part. The appellant had in fact already been involved in that investigation on several occasions and was made aware in advance of the Commission's intention of adopting a decision under Article 18(3) of Regulation No 1/2003.

46 — 136/79, EU:C:1980:169, paragraphs 24 to 27.

47 — See point 31 of this Opinion.

48 — See, for example, judgment in *Council* v *Bamba*, C-417/11 P, EU:C:2012:718, paragraph 54 and the case-law cited.

49 — See, among others, judgments in *Netherlands* v *Commission*, 13/72, EU:C:1973:4, paragraph 12, and *Acciaierie e ferriere Lucchini* v *Commission*, 1252/79, EU:C:1980:288, paragraph 14.

63. Moreover, in the light of the specific format imposed, and the reference to the other undertakings included in the decision to initiate the proceedings, the appellant could not have been unaware that the bulk of the information requested in the contested decision consisted in data which the Commission had asked of all those undertakings with a view to making a comparison between those data. [50] The Commission could make a meaningful comparison only if the information requested was provided at roughly the same time, and was accurate and complete. Errors or delays, even by a single respondent, would have meant that the comparison envisaged by the Commission would not have been feasible or, in any event, sufficiently reliable.

64. In those circumstances, the Commission was entitled to consider that the adoption of a binding decision under Article 18(3) was the most appropriate method of ensuring that the information requested would be as complete and correct as possible, and would be submitted within the desired period of time. The Commission was also entitled to assume that the addressee of the decision could have understood the reasons behind its choice of resorting to a binding decision.

65. As regards the choice of the time-limits fixed for the submission of a reply to the questions, I observe that, as paragraph 46 of the judgment under appeal correctly states, recital 2 of the contested decision did provide a brief explanation of the two different time-limits fixed for the different sets of questions in the contested decision. The appellant was thus placed in a position where it could have understood that those time-limits had been decided after the Commission had weighted the amount of information requested against the necessity of pursuing the investigation with relative rapidity.

66. Hence, the General Court cannot be criticised on those aspects. That conclusion does not leave undertakings without adequate judicial protection — as the appellant seems to imply — as the EU Courts are obviously empowered to verify whether the choice of the legal instrument or of the time-limit fixed is vitiated by a legal error, for example by a breach of the principle of proportionality. [51] No such argument has, however, been put forward by the appellant in the context of these appeal proceedings.

67. In the light of the above, it is my opinion that the second ground of appeal should be dismissed.

3. Necessity of the information requested

a) Arguments of the parties

68. By its third ground of appeal, directed against paragraphs 48 to 80 of the judgment under appeal — HeidelbergCement criticises the General Court for its interpretation of the requirement of 'necessity' of the information requested under Article 18 of Regulation No 1/2003. Several arguments are put forward in support of this ground. First, HeidelbergCement submits that the General Court failed to examine whether the Commission was in possession, before the adoption of the contested decision, of sufficient indicia supporting a suspicion of a possible infringement of Article 101 TFEU. Without such an examination, it would be impossible to exercise any form of judicial review of whether the criterion of necessity was met in the case under consideration. Second, HeidelbergCement submits that the General Court's interpretation of Article 18 would essentially give unlimited discretion to the Commission, contrary to the wording of that provision. Third, HeidelbergCement contends that the General Court failed to assess the necessity of certain specific types of information requested by the Commission, by stating that judicial review could be exercised at a later stage of the procedure. Fourth, HeidelbergCement argues that the General Court wrongly accepted that the Commission was empowered to request information which was already in its possession.

50 — See, also, recitals 4 and 6 of the contested decision.

51 — On these issues see, respectively, my Opinions in *Schwenk Zement* v *Commission*, C-248/14 P, and *Buzzi Unicem* v *Commission*, C-267/14 P.

69. The Commission argues that the appellant's arguments are limited to questions 1A, 1B, 3 and 4 of the questionnaire. It then goes on to state that the General Court cannot be criticised for failing to investigate whether the Commission was in possession of sufficient indicia to justify the adoption of a decision under Article 18(3) since the appellant did not argue this at first instance. The Commission also contends that, at an early stage of the investigation, it cannot be required to establish a precise correlation between the presumed infringements and the information requested. In any event, the Commission takes the view that the General Court did verify that such a link existed with regard to the information requested. Lastly, the Commission defends the General Court's conclusion that it is entitled, under certain conditions, to issue a fresh request for information already provided by an undertaking.

b) Assessment

i) On the requirement of necessity

70. The information requested by the Commission under Article 18(3) of Regulation No 1/2003 must be 'necessary' for the Commission to give effect to Articles 101 and 102 TFEU.[52] The Commission enjoys broad discretion in that regard.[53] In particular, it is in principle for the Commission to decide whether a specific piece of information or document is 'necessary' for its investigation.[54]

71. This discretion is not, however, unlimited and is, in any event, subject to judicial review by the EU Courts.[55] It is true that the term 'necessary' cannot be read too literally as meaning that the information requested must be regarded as a *conditio sine qua non* for the establishment of the infringements presumed by the Commission.[56] Yet too lax an interpretation of that term is not permissible either: as Advocate General Jacobs pointed out in *SEP*, a mere relationship between a document and the alleged infringement is not sufficient to justify a request for disclosure by the Commission.[57] I agree. In fact, in the event that the EU legislature had the intention of giving the Commission a quasi-unlimited discretion in this matter, Article 18(3) would probably have referred to 'relevant' or 'related' information, instead of 'necessary' information.

72. The term 'necessary' is thus to be understood as meaning that a correlation must exist between the information requested and the presumed infringement that is *sufficiently close* in that the Commission could reasonably suppose, at the time of the request, that the former would help it to carry out its duties in the context of an ongoing investigation.[58] The examination of the requirement of necessity imposes, in other words, an analysis as to whether, from the perspective of the Commission acting at the time of adoption of the request, the information demanded of an undertaking is likely to assist the Commission in verifying whether the presumed infringement has taken place, and to determine its precise nature and scope.

73. It seems important to add, at this juncture, that the purpose of a request for information under Article 18(3) of Regulation No 1/2003 is not to bring to light *any* possible infringement of EU competition rules in a given sector or by a given undertaking. Indeed, that provision — just as Article 20 of the same regulation on inspections — requires the Commission to be in possession of a

52 — See recital 23 in the preamble to Regulation No 1/2003.

53 — Supra, point 22 of this Opinion.

54 — Judgment in *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157, paragraph 17.

55 — Cf. Opinion of Advocate General Darmon in *Orkem* v *Commission*, 374/87, EU:C:1989:207, point 66.

56 — For example, the Court has held that, even if it already has evidence of the existence of an infringement, the Commission may legitimately take the view that it is necessary to order further investigations enabling it to better define the scope of the infringement, to determine its duration or to identify the circle of undertakings involved. See judgment in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 15.

57 — Opinion of Advocate General Jacobs in *SEP* v *Commission*, C-36/92 P, EU:C:1993:928, point 21.

58 — Cf. judgments in *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157, paragraph 15, and *SEP* v *Commission*, C-36/92 P, EU:C:1994:205, paragraph 21; and Opinion of Advocate General Jacobs in *SEP* v *Commission*, C-36/92 P, EU:C:1993:928, points 20 to 22.

number of indicia which led it to suspect the existence of certain *specific* infringements,[59] even if the recipient of the request does not necessarily need to be one of the undertakings responsible for those infringements. Failing any concrete indicia constituting reasonable grounds for suspicion,[60] the adoption of a decision to request information under Article 18(3) may be considered to be an arbitrary measure of investigation.[61]

74. The lack of concrete indicia justifying a request under Article 18 does not mean, however, that the Commission is denied the possibility of making inquiries where it considers that some sectors of the internal market economy do not function properly. In fact, Article 17 of Regulation No 1/2003 permits the Commission to investigate sectors of the economy or types of agreements across various economic sectors where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the internal market. Article 17 provides, though, for a different legal instrument: Article 18 — under which the contested decision has been adopted — does not allow the Commission to adopt decisions requesting information on a speculative basis without having any actual suspicions.[62]

75. As the General Court has stated, a decision adopted under Article 18(3) does not need to include a reference to those indicia, provided that it clearly identifies the presumed facts being investigated.[63] The Court has consistently held that the Commission is not required to communicate to the recipient of a decision ordering an inspection all the information at its disposal concerning the presumed infringements.[64] This principle seems to me applicable also with regard to decisions requesting information to undertakings under Article 18(3).

76. The existence and sufficiency of indicia supporting the adoption of a decision under Article 18 is subject to judicial review, in case an undertaking challenges the lawfulness of that decision.[65] During the court proceedings, the Commission may thus be required to disclose the evidence on which it based its grounds for suspicion, so that the Union judicature is able to verify whether or not the challenged decision was arbitrary.[66] Nevertheless, the arbitrary character of a decision is an issue which is distinct from the 'necessity' of the information requested in that decision. It is also an issue which the EU judges may not raise of their own motion; it is for the party appearing before the EU Courts to submit a specific plea on that point.

ii) The case under consideration

77. At the outset, I must address two preliminary objections regarding the admissibility of the present ground of appeal, put forward by the Commission.

78. On the one hand, it seems to me that the Commission is quite right to point out that, at first instance, the appellant did not argue that the Commission did not have sufficient indicia to justify the adoption of the contested decision. Consequently, I agree with the Commission in that no criticism can be directed against the General Court for not having verified that issue.

59 — Cf. judgment in *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraph 40.

60 — To that effect, see, by analogy, judgment in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraphs 54 and 55.

61 — See point 24 of this Opinion.

62 — See, by analogy, Opinion of Advocate General Kokott in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:223, point 43.

63 — Paragraph 37 of the judgment under appeal.

64 — See judgments in *Dow Chemical Ibérica and Others* v *Commission*, 97/87 to 99/87, EU:C:1989:380, paragraph 45, and *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:2030, paragraph 35.

65 — See, by analogy, judgment in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 54.

66 — Judgment in *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraphs 41 to 56.

79. On the other hand, I do not believe that the Commission is correct in that this third ground of appeal is limited to the General Court's findings regarding questions 1A, 1B, 3 and 4. In fact, at first instance, the appellant did complain of the inadequate statement of reasons in the contested decision which, in its view, made it impossible for it to check whether the information requested was 'necessary' within the meaning of Article 18 of Regulation No 1/2003.

80. HeidelbergCement's application to the General Court is quite clear in that its first line of argument was that the verification of the necessary character of the information requested had been made impossible by the lack of precision of the contested decision. The specific questions to which the Commission refers were given only as examples for the idea that — as the appellant took care to stress — even if the statement of reasons were to be considered sufficient, the correlation between the information requested and the presumed infringements was not apparent. The line of argument which focused only on questions 1A, 1B, 3 and 4 was thus put forward only as alternative and subordinate.

81. That being said, for the reasons explained in the first ground of appeal, the first line of argument put forward by the appellant seems well founded to me: if there is no relatively well-defined purpose of the request for information, how is the recipient of that request to verify whether or not the requirements of Article 18 are fulfilled for every set of questions included in the request?

82. In earlier case-law, the General Court itself emphasised the importance of a nexus between the description of the purpose of the investigation and the necessary character of the information requested. As the General Court held, the criterion of necessity laid down in Article 18 must be assessed by reference to the purpose of the investigation, which must be stated in the request for information itself. The Commission is entitled to require the disclosure only of information which may enable it to investigate presumed infringements which justify the conduct of the investigation and are set out in the request for information. [67] Advocate General Jacobs also stressed the importance of sufficient details on the scope of the investigation being provided in the decision itself. [68]

83. In the judgment under appeal, therefore, not only did the General Court endorse the 'necessity' of the information requested on the basis of an inadequate statement of reasons (disregarding its previous case-law on this point), but — more importantly — it also interpreted the requirement of 'necessity' erroneously. The General Court, in fact, appears to accept that any connection between the information requested and the presumed infringement is enough to fulfil that requirement.

84. The fact that the General Court applied an incorrect test of necessity is apparent, first, from paragraphs 54 to 58 of the judgment under appeal. HeidelbergCement had argued that certain pieces of information sought by the Commission could be of no use to the investigation since that information related to a variety of different products, which were also priced differently, bundled together. Under those circumstances, in the appellant's view, no meaningful comparison of prices within the EEA could be made. Without entering into the merit of HeidelbergCement's argument, the General Court quickly dismissed it by stating that that information: (i) could be regarded as having a connection with the presumed infringements, (ii) the criticism relating to the unreliability of the data provided had no bearing on the lawfulness of the request for information, (iii) it was for the Commission to determine whether the information collected allows it to uphold the existence of one or more infringements against the applicant, it being open to the applicant — should the case arise — to dispute the probative value of the information requested in its reply to a possible statement of objections or in support of an action for annulment against the final decision.

67 — Judgment in *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 333 and the case-law cited.

68 — See Opinion in *SEP* v *Commission*, C-36/92 P, EU:C:1993:928 point 34.

85. The General Court's reasoning on this point seems flawed. Irrespective of whether HeidelbergCement's objections were correct, they could not be dismissed by simply stating that some kind of connection between the information sought and the presumed infringements existed, and that that sufficed. The key issue is whether that information could reasonably be expected to be helpful to the Commission. The importance of that aspect is, however, explicitly dismissed by the General Court which states that a possible lack of usefulness of the information sought would in any event not affect the lawfulness of the contested decision. That is patently wrong. I agree that the Commission should be given broad discretion when deciding what information can be considered useful (and hence 'necessary' within the meaning of Article 18), but the EU Courts cannot avoid carrying out any judicial review of the exercise of that discretion. Had the information requested by the Commission been manifestly irrelevant for the purpose of the investigation, the lawfulness of the contested decision would have been affected, contrary to what the General Court held.

86. The fact that the appellant could have contested the probative value of the information in question in its reply to a possible statement of objections, or in support of an action for annulment against the final decision, has no bearing on the lawfulness of the contested decision. A decision requesting information which is not necessary within the meaning of Article 18(3) of Regulation No 1/2003 is unlawful (in whole or in part) and, as such, ought to be annulled by the EU Courts. The text of that provision is very clear in that the lawfulness of such a decision may immediately be subject to judicial review; according to Article 18(3), the Commission decision must also 'indicate the right to have the decision reviewed by the Court of Justice'.

87. The General Court's erroneous application of the necessity criterion can be seen, second, in paragraphs 60 to 80 of the judgment under appeal. HeidelbergCement had argued that the contested decision infringed Article 18 in that many of its questions required it to supply information which it had already supplied when answering previous requests for information.

88. The General Court initially recalled its case-law according to which requests for information seeking to secure information on a document already in the Commission's possession cannot, in principle, be regarded as justified by the needs of the investigation. It also held that a decision requiring the recipient to provide — for the second time — information requested previously, on the ground that only some of the information is, in the Commission's view, incorrect, might prove to be a burden which is disproportionate to the needs of the investigation and would not, therefore, observe the principle of proportionality or satisfy the requirement of necessity. The General Court finally added that, in its view, the pursuit of an easier way to process the answers provided by the undertakings cannot justify compelling those undertakings to submit information which is already in the Commission's possession in a new format.[69]

89. The General Court's reasoning on this point seems persuasive to me. The principles enounced appear to stem directly from the criterion of 'necessity' provided for in Article 18.[70] Yet, the application of those principles to the case under consideration is not equally convincing.

90. The General Court held that, in very large part, the questionnaire obliged the appellant to resubmit information which it had already supplied the Commission with. In that context, the General Court dismissed the argument put forward by the Commission that the contested decision also sought to remedy alleged errors in the information previously provided by HeidelbergCement: the General Court could identify but one example of alleged errors. Furthermore, the General Court finds that the Commission had adopted decisions under Article 18 which were virtually identical for all the

69 — See, paragraphs 71 to 74 of the judgment under appeal and the case-law cited.

70 — Cf. Opinion of Advocate General Darmon in *Orkem* v *Commission*, 374/87, EU:C:1989:207, point 66.

undertakings concerned by the investigation. That meant that the Commission took no account of the information previously provided by each of those undertakings (including HeidelbergCement). In fact, the General Court found that, at least in part, the contested decision was adopted with the very aim of obtaining from the appellant a consolidated version of its past answers. [71]

91. Notwithstanding those findings, the General Court dismissed HeidelbergCement's arguments by observing that some of the questions concerned information which had not been requested previously, while others were more in-depth than previous requests for information, in that they were more specific due to their altered scope or the addition of further variables. On that basis, the General Court concluded that the fact that the purpose of the questionnaire was to secure fresh or more detailed information was proof that the information requested was necessary. [72]

92. The conclusion reached by the General Court is perplexing: it appears to accept that any change in the text of the questions which implies that the answers are to include additional or more detailed information may be regarded as meeting the requirements of Article 18. That would be true even if the additional or more detailed information is only a relatively minor part of the overall information requested. Indeed, even a cursory comparison of the questions referred to in the judgment under appeal with those already put to the appellant in previous requests reveals that the degree of alteration between those questions is often rather minimal. It is beyond argument that, as the contested decision itself states in recital 6, one of its aims was to obtain a consolidated version of the information previously provided. In particular, that consolidation had to be provided in accordance with the format requested by the Commission, so as to allow a quick comparison of all the data received by it.

93. Furthermore, it is not contested that some information requested by the Commission was in the public domain and that the Commission could easily have obtained it by other means (for example, through searches on the internet).

94. Leaving aside the issue of proportionality of such a request for information, I hardly see how, properly construed, the requirement of 'necessity' is satisfied.

95. For all the reasons given above, I am of the view that the General Court erred in law when applying the requirement of necessity under Article 18 of Regulation No 1/2003. The appellant's third ground of appeal should, accordingly, be upheld and the judgment under appeal be set aside in so far as the General Court dismissed, in paragraphs 48 to 80 of that judgment, the appellant's ground of annulment concerning the necessity of the information requested in the contested decision.

4. Format of the information requested

a) Arguments of the parties

96. By its fourth ground of appeal, HeidelbergCement contends that the General Court, in paragraphs 81 to 85 of the judgment under appeal, wrongly interpreted and applied Article 18 of Regulation No 1/2003 when it accepted that the Commission was entitled to request the recipient of a decision to provide the information sought in a specific format. The appellant argues that the Commission is not permitted to require undertakings to submit the information requested according to specific and strict instructions.

71 — Paragraphs 64 and 70 of the judgment under appeal.

72 — Paragraphs 76 to 79 of the judgment under appeal.

97. The Commission argues that the General Court did not commit any error in that regard. The Commission should be entitled to require an undertaking to provide the requested information in the format that is considered necessary. This interpretation of Article 18 would also be supported by recital 23 of Regulation No 1/2003 [73] which refers to 'such information … as is necessary'.

b) Assessment

i) On the obligation to provide information

98. It should be first recalled that the procedures under Regulation No 1/2003 are not of a criminal nature; they are administrative procedures which can, however, lead to the imposition of hefty fines upon undertakings found responsible for infringing the EU competition rules.

99. As such, there is no absolute right to remain silent in the context of these procedures. [74] As stated in a well-established line of case-law, undertakings subject to those procedures have a duty actively to cooperate with the Commission's investigation, which implies that they must make available to the Commission all information relating to the subject-matter of the investigation. [75]

100. Pursuant to Article 18 of Regulation No 1/2003, the Commission has the power to request companies to provide answers to specific questions and to disclose documents in their possession. [76] An undertaking has a duty to comply even if the information to be provided may be used by the Commission to its disadvantage. [77]

101. Indeed, the Commission's investigative powers are exclusively those conferred to it by Regulation No 1/2003 and, in order to be able to discover and prosecute infringements of EU competition rules, it must largely rely upon information provided by the undertakings themselves (as well as on documents discovered during inspections).

102. That said, I have to stress once again that, under the system established by Regulation No 1/2003, the burden of proving an infringement of the EU competition rules rests on the Commission (or, as the case may be, on national competition authorities). [78] Accordingly, even if without a right to remain silent, undertakings cannot be requested to carry out tasks which, properly speaking, belong to the instruction and investigation of the case.

103. The fundamental issue that this ground of appeal raises is that of delimiting the role of the Commission in investigating a suspected infringement of the competition rules and the role of the undertakings subject to the investigation in cooperating with the Commission. More specifically, one of the key questions which arises in the case under consideration is whether the notion of 'information' in Article 18 of Regulation No 1/2003 can be interpreted as permitting the Commission to require undertakings to submit the information requested according to a very specific format.

104. I take the view that the answer to that question should be, in principle, negative.

73 — This is also mentioned in paragraph 84 of the judgment under appeal.

74 — Only a right to avoid self-incrimination is, within certain limits, recognised for the undertakings subject to those procedures: see infra points 149 to 168 of this Opinion.

75 — Judgment in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 27.

76 — Supra, point 25 of this Opinion.

77 — It is not without interest to note that the right to issue legally-binding requests for information limits the need for that institution to conduct *in loco* inspections at the business premises of undertakings. Clearly, requests for information are generally less intrusive in the privacy of an undertaking and less disruptive for its daily business. Cf. Opinion of Advocate General Darmon in *Orkem* v *Commission*, 374/87, EU:C:1989:207, point 155.

78 — Supra, point 26 of this Opinion.

105. I agree with the Commission that the wording of recital 23 and Article 18 of Regulation No 1/2003 suggests (by referring to the 'necessity' of the information) that the Commission may ask the recipients to supply the information according to a format which may be useful for its investigation. The need to preserve the effectiveness of the Commission's powers of investigation under Regulation No 1/2003 necessarily implies that the information provided must not only be correct and complete, but also readily understandable and exploitable by that institution. That information may not, accordingly, be provided in a chaotic, unsystematic or fragmented manner. Moreover, an undertaking is not to flood the Commission with unrequested documents and data, leaving it to the Commission to sort out the relevant information.

106. However, the notion of 'information' cannot be stretched so far as to mean that undertakings could be requested to complete tasks which belong to the building of a case and are, consequently, typically carried out by Commission staff. The obligation set out in Article 18 of Regulation No 1/2003 is limited to 'providing information' or, as the Court said in its case-law, to make the information available.[79] Nowhere in that provision is there an express reference to obligations which go beyond the submission of information.

107. Accordingly, I take the view that, in principle, the Commission is not entitled, under Article 18(3) of Regulation No 1/2003, to require the recipient of a decision, to provide — in all circumstances — the information requested in a specific format. That does not mean, however, that an undertaking can at all times simply disregard the format requested by the Commission for the information to be provided. Such conduct would be contrary to the duty of active cooperation. An undertaking has thus to give due consideration to the format required by the Commission for the submission of the information requested.

108. In practice, the formatting operations which the Commission can request a company to carry out depend, in my view, on the nature of the information to be supplied. With regard to the information at issue in the case under consideration, three different types can be identified: (i) information which required some marshalling and assembly to be readily understood and used by the Commission; (ii) information which existed in a format which could immediately be sent to the Commission, since it could be readily understood and used by the latter; and (iii) information which was in the public domain.

109. As regards the first type of information, it consisted of information that the recipient of the decision inevitably had to marshal before being able to submit it to the Commission. It thus seems to me that it follows from the duty of active cooperation that, in those circumstances, an undertaking can be expected to make an effort to follow the format requested by the Commission. Insofar as the format chosen by the Commission is not significantly more burdensome than other possible formats which could be used, the undertaking in question could be reasonably required to comply with the Commission's instructions.

110. With regard, however, to the second and third types of information, I do not believe that any request for the relevant information to be reformatted could be considered acceptable. Since the recipient of the decision was immediately able to submit the requested information in a manner in which the Commission could readily understand and process it, I do not see any reason why the operations of reformatting the data in the manner which the Commission considered most appropriate for its investigation should not have been carried out by the Commission staff itself.

79 — Supra, point 99 of this Opinion.

111. In those circumstances, the Commission's request for a large amount of data to be reformatted could, *mutatis mutandis*, be compared to a request for numerous lengthy documents in the possession of an undertaking to be translated into a different language. The fact that the Commission staff may not have the necessary language skills would not, from my point of view, justify such a request.

112. In this context, it should not be overlooked that, unlike what happens at Member States' level with regard to matters such as taxation or securities, in the EU legal order there are no express rules on the manner in which undertakings ought to organise and store data and documents which could be relevant for investigations under Regulation No 1/2003. Undertakings are therefore at liberty to use the methods of organising and storing the information in their possession which they consider best. If, in the context of an investigation for a suspected infringement of the competition rules, the Commission wishes that information to be organised differently, that is a task which properly belongs to the preparation of the case.

ii) The case under consideration

113. In the judgment under appeal, the General Court stated that, as a matter of principle, the Commission's power to request information under Article 18 must necessarily imply the possibility for that institution of requiring that information to be provided according to a specific format. It also added that the exercise of this power is, however, subject to limits stemming from the principle of proportionality and from the undertaking's right to avoid self-incrimination.[80] The General Court then went on to examine the contested decision from the angle of proportionality and concluded that, despite provoking a 'particularly significant workload' for the recipient,[81] it did not infringe that principle.[82]

114. For the reasons explained in points 98 to 112 above, I find this reasoning incorrect. Consequently, the General Court has, in the case under consideration, wrongly interpreted the notion of information within the meaning of Article 18 of Regulation No 1/2003.

115. I take the view that Article 18, properly construed, did not permit the Commission to require the appellant to provide all the information requested in the contested decision in the specific format set out in Annex II and Annex III[83] to that decision.

116. The instructions provided on the manner in which the information had to be provided to the Commission were of the greatest strictness. Full compliance with the format required was ensured by an explicit threat of sanctions. In the box at the beginning of the questionnaire, the Commission writes (in bold and underlined characters): 'Please note that your reply may be considered incorrect or misleading if the following definitions and instructions are not respected'.

117. Therefore, the Commission has not merely asked for a specific format for the supply of the information which had to be marshalled by the appellant, in fact it has instead requested all the information to be provided according to that format, irrespective of its amount and nature.[84]

118. That is, in my view, unacceptable. As a consequence of the Commission's request, the appellant has been required to perform operations of formatting (and re-formatting) which, in principle, should have been carried out by the Commission.

80 — Paragraph 85 and 86 of the judgment under appeal.

81 — Paragraphs 96 and 106 of the judgment under appeal.

82 — Paragraphs 89 to 108 of the judgment under appeal.

83 — Annex II (detailed instructions to answer the questionnaire) and Annex III (answer templates) to the contested decision amount together to almost 30 pages of extremely detailed instructions.

84 — Information of the type explained in points 108 to 110 of this Opinion.

119. First, as the appellant explained — without being contradicted by the Commission — much of the data requested could immediately be provided in the format in which it was stored in its databases. Instead, the fact that the Commission required a very specific and strict format for that data created a very significant amount of additional work, merely for the re-formatting of that data.

120. Second, the Commission also requested the appellant to submit information which was evidently in the public domain. For example, point 10 of Annex II to the contested decision reads: 'All monetary values must be expressed in euro. If the local currency used is not the euro, please convert in euro by using the official exchange rate published by the European Central Bank in the period of reference.' At the hearing, the Commission was asked to explain why those calculations could not be made by its own staff. The Commission did not provide an answer.

121. Third, whereas in the context of the present ground of appeal the amount of information is not at issue, it cannot be disputed that the formatting tasks requested of the appellant were numerous, complex and burdensome. In its application before the General Court, HeidelbergCement included some detailed estimates regarding the number of working hours required to answer the Commission's questionnaire and the ensuing costs. It also offered some evidence in support of its estimates. The Commission, for its part, merely contested those estimates by alleging that the appellant had not produced sufficient or reliable evidence. Yet the Commission did not offer any concrete element in support of its objections, nor did it identify possible errors in those estimates. Thus, at the hearing, the Commission was asked the reasons why it believed that HeidelbergCement had overstated those figures and what, in its view, would be more reliable figures. The Commission could not provide any rough estimate, nor offered any explanation as to why the estimates provided by the appellant should have not been considered credible.

122. In substance, it seems to me that, in the case under consideration, the appellant was required to carry out such extensive, complex and time-consuming clerical and administrative tasks when submitting the information requested that the building of a case against it appeared effectively «outsourced» to the undertaking under investigation.

123. For all those reasons, I am of the view that the appellant is correct in stating that the General Court erred in its interpretation of Article 18 of Regulation No 1/2003. The appellant's fourth ground of appeal should consequently be upheld and the judgment under appeal set aside in so far as the General Court held, for the reasons indicated in paragraphs 23 to 43 of that judgment, that the Commission was entitled to request the information indicated in Annex I to the contested decision, according to the format illustrated in Annex II and Annex III thereto.

5. Time-limits of the request

a) Arguments of the parties

124. By its fifth ground of appeal, directed against paragraphs 101 to 108 of the judgment under appeal, HeidelbergCement contests the General Court's assessment of the proportionality of the time-limits set in the contested decision. In particular, HeidelbergCement submits that that court was wrong to hold that those time-limits were reasonable, taking into account the means available to an undertaking of the size and scale of HeidelbergCement. That would result in having requests for information with different time-limits, depending on the economic means available to the undertakings concerned.

125. The Commission, for its part, notes that the appellant criticises only point 107 of the judgment under appeal, and not the rest of the General Court's reasoning, and asks the Court to reject this ground of appeal.

b) Assessment

126. The Commission's observations on the scope of the present ground of appeal are correct: the appellant merely criticises the fact that the General Court referred to means available to an undertaking of the size and scale of HeidelbergCement when assessing the proportionality of the time-limits in question.

127. In addition, I am not fully persuaded by HeidelbergCement's arguments on that issue.

128. To observe the principle of proportionality with respect to the time-limits fixed in a request for information, the Commission (and the EU Courts when reviewing the legality of that request) must necessarily take into account the means available to the recipient of that request. How would it otherwise be possible to assess whether a given request places an excessive or disproportionate burden on a specific undertaking? The equation which the Commission and EU Courts are required to solve in that regard contains two main variables: on the one hand, the quantity and complexity of the information requested and, on the other hand, the actual capacity of the recipient to provide that information.

129. The quantity and complexity of the information requested depends, obviously, on many variables: the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned, the importance of the evidence sought, the amount and type of useful information which the Commission believes to be in the possession of the undertaking in question. [85]

130. The actual capacity of the recipient to provide the information requested is mainly a function of the (human, technical and financial) means available to it.

131. Therefore, the means generally available to an undertaking of the size and scale of the recipient of a decision issued under Article 18(3) seem to me one of the factors that may be taken into account to determine whether, in reality, that recipient can reasonably be expected to reply within the deadline set by the Commission. Clearly, as the appellant itself recognises, a task that may be excessive for a small family-run undertaking may be less burdensome for a sophisticated multinational with several thousand employees.

132. However, that does not necessarily imply — as argued by the appellant — that the Commission should send requests for information with a different time-limit for each addressee. Indeed, when sending the same request for information to a variety of undertakings, the Commission can also fix a time-limit which is proportionate to all the undertakings concerned.

133. Having said that, I believe that the importance of an undertaking's means should not be over-stated either. In particular, the burden imposed upon an undertaking cannot be an arithmetic proportion of its means. A large undertaking may have more personnel, greater financial capacity and more sophisticated IT tools at its disposal, but that does not mean that the Commission is entitled to require exceptional efforts from that undertaking. After all, it is not an undertaking's role to perform the tasks of the Commission, and that holds true irrespective of the size of that undertaking and the means at its disposal.

85 — See, by analogy, judgment in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 79.

134. In the context of the present ground of appeal, however, the appellant has not argued that the General Court erroneously weighted the workload represented by the contested decision against its capacity to respond, or disregarded other elements of relevance to the assessment of the proportionate character of the time-limits set in the contested decision. As said, it merely objected to the fact that the General Court took into account the means available to it. No further analysis of the proportionality of the contested decision is thus required.

135. On the basis of the above, I take the view that the appellant's objections regarding paragraphs 101 to 108 of the judgment under appeal are ill founded.

6. Vagueness of the questions

a) Arguments of the parties

136. By its sixth ground of appeal, HeidelbergCement submits that the General Court, in paragraphs 109 to 114 of the judgment under appeal, failed to censure the vagueness of certain questions included in the contested decision. In the first place, the statement of reasons in the judgment under appeal is supposedly contradictory in that the General Court stated, first, that the request for information was vague and, next, that it was sufficiently clear. In the second place, the General Court arguably deprived HeidelbergCement of effective judicial protection by stating that the imprecise nature of certain questions could, as the case may be, be contested in an action directed against a possible sanction imposed on that undertaking for a failure to answer those questions.

137. The Commission, for its part, contends that the contested decision did not contain any question which was unclear or ambiguous. At most, it included questions formulated in a general manner which, thus, gave the appellant a wide margin of manoeuvre to provide a proper answer.

b) Assessment

138. On this aspect too, rather than representing a wise 'judgment of Solomon', the judgment under appeal seems actually to have 'cut the baby in half', so to speak, in order to give something to both parties. Yet, the conclusion reached seems unconvincing to me.

139. The General Court first recalls the Court's case-law according to which the principle of legal certainty requires every act of the institutions which produces legal effects to be clear and precise so that the persons concerned may know without ambiguity what their rights and obligations are and may take steps accordingly. [86] This requirement is all the more significant in the present context since, as the General Court itself pointed out, the appellant, as addressee of a decision requesting information under Article 18(3) of Regulation No 1/2003, ran the risk not only of having a fine or periodic penalty payment imposed on it if it supplied incomplete or belated information or if it failed to provide information, but also of having a fine imposed on it if it supplied information which the Commission considered to be incorrect or misleading. [87]

86 — Paragraph 111 of the judgment under appeal.

87 — Paragraph 104 of the judgment under appeal.

140. The General Court went on to state that certain questions used terms which were indeed, 'relatively vague' but that could not be considered a violation of the principle of legal certainty; the reason being that the Commission could not blame the undertaking in question for an inadequate answer where the question was vague. The vagueness of a question should, accordingly, be taken into account by the EU Courts when reviewing the legality of a decision imposing a fine on the undertaking concerned. [88]

141. In my opinion, both HeidelbergCement's complaints on this point are well founded.

142. In the first place, the extremely brief and, to a certain extent, contradictory nature of the judgment under appeal should, to my mind, be censured. The General Court did find that some questions were vaguely formulated, although only to a certain extent ('relatively vague'); however, it then swiftly stated that they were not vague *enough* for the contested decision to be found so ambiguous that the principle of legal certainty was breached.

143. This statement of reasons calls for two critical remarks. First, the General Court seems to imply that the lack of precision of a question (or of a number of questions) would be relevant only to the extent that the whole decision becomes ambiguous. That is wrong. If certain questions were truly vague, then the General Court should have annulled the contested decision only in respect of the parts which concerned those questions. [89] Second, whether certain questions were, as argued by HeidelbergCement, sufficiently vague or not, is impossible for this Court to verify. The judgment under appeal does not contain any indication as to the identity and quantity of the questions found vague, and the reasons for which those questions were only *relatively* vague. This notwithstanding the fact that, in its application before the General Court, HeidelbergCement had listed the questions which, in its view, were insufficiently precise and had explained in detail the (technical or linguistic) reasons for its objections to those questions.

144. In that context, it should be noted that, annexed to its application before the General Court, was the appellant's letter of 16 November 2010 to the Commission, in which it signalled the ambiguities of various questions included in the draft questionnaire, and requested a number of clarifications from the Commission. The Commission, essentially, does not deny that, although several contacts between its staff and the representatives of HeidelbergCement took place in the following months, the concerns mentioned in that letter went largely unanswered.

145. In the second place, the fact that the appellant might be entitled to challenge a fine imposed upon it for providing incomplete or misleading information by reason of the vagueness of the related questions does not mean that the EU Courts cannot (and should not) draw the necessary consequences from a possible breach of the principle of legal certainty by the Commission. As previously mentioned, the General Court's reasoning on this point seems to deprive part of Article 18(3) of Regulation No 1/2003 of its effectiveness. [90]

146. In the light of those considerations, the ground of appeal alleging an insufficient and contradictory statement of reasons in paragraphs 109 to 114 the judgment under appeal should be upheld.

88 — Paragraphs 112 and 113 of the judgment under appeal.

89 — See, to that effect, by analogy, judgment in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 42.

90 — In the part which reads: '[the Commission decision] shall further indicate the right to have the decision reviewed by the Court of Justice'.

7. Self-incrimination

a) Arguments of the parties

147. By its seventh ground of appeal — directed against paragraphs 115 to 139 of the judgment under appeal — HeidelbergCement submits that the General Court interpreted excessively restrictively its right to avoid self-incrimination, and that it also failed to safeguard that right in the case at hand.

148. The Commission contests the arguments put forward by the appellant. It stresses that Question 1D did not require HeidelbergCement to provide a legal assessment or evaluation of specific conduct, but only to provide a method for calculating the quarterly gross margins. If no such method existed for HeidelbergCement, that company could have refrained from providing an answer.

b) Assessment

149. At the outset, it seems useful to recall that recital 23 in the preamble to Regulation No 1/2003 makes a reference to the undertakings' right to avoid self-incrimination when complying with a decision of the Commission to request information. That right had already been recognised by the Court, even before that regulation was adopted.[91] It is indeed one of the basic components of an undertaking's right of defence which is to be upheld throughout the procedures initiated by the Commission pursuant to Regulation No 1/2003.

150. To begin with, I will address certain preliminary arguments put forward by the Commission which I do not find persuasive. First, the Commission's contention that HeidelbergCement could have refrained from answering if no method such as the one requested existed for that undertaking is, to my mind, patently wrong. In fact, the General Court already rejected such an argument by pointing out that the question was drafted in imperative terms and, that being so, the appellant was under a duty to answer.[92] Second, the Commission is, in my view, misrepresenting the nature of question 1D: that question did not ask HeidelbergCement to indicate the method used, if any, to calculate the quarterly gross margins, but the method, *considered appropriate* by that company, for calculating those margins. The difference is of no small significance; the question is not merely factual but also required the applicant to express an opinion, as correctly stated by the General Court.[93]

151. Against this background, I shall now examine, in the first place, whether the General Court interpreted too restrictively the right to avoid self-incrimination and, in the second place, whether that right was correctly applied in the case at hand.

152. In paragraph 121 of the judgment under appeal, the General Court held that a distinction should be drawn between questions which can be classified as purely factual and those which cannot. It is only if a question cannot be classified as purely factual that, in the opinion of that court, it must be ascertained whether such a question might involve an admission on the part of the undertaking concerned of the existence of an infringement which it is incumbent upon the Commission to prove. In paragraph 124, the General Court found that a question which required the undertaking to compile data, without asking for any opinion on them to be expressed, could not infringe that undertaking's rights of defence.

91 — See, in particular, judgments in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 35, and *Solvay* v *Commission*, 27/88, EU:C:1989:388, paragraph 32.

92 — Paragraphs 128 to 131 of the judgment under appeal.

93 — Paragraphs 126 and 132 of the judgment under appeal.

153. This is, in my view, an incorrect interpretation of the right to avoid self-incrimination. Despite the somewhat ambiguous wording of recital 23 in the preamble to Regulation No 1/2003,[94] whether a question requires an undertaking only to give factual information (such as compiling data, clarifying factual circumstances, describing facts of an objective nature, etc.) is an important element in that regard, but it is not necessarily determinative. The fact that no information of a subjective nature is asked of an undertaking does not exclude the possibility that, in certain circumstances, that undertaking's right to avoid self-incrimination may be breached.

154. The Court has consistently referred to questions which 'might *involve* an admission on its part of the existence of an infringement'.[95] The terms chosen by the Court are not devoid of significance.[96] In *PVC II*, the Court further clarified the test for self-incrimination: what is key is whether an answer from the undertaking to which the question is addressed is in fact *equivalent* to the admission of an infringement.[97]

155. That case-law means that the Commission is not permitted to ask questions the answers of which might *imply* an admission of guilt by the undertaking in question.

156. For example, there is no doubt, in my view, that the Commission is not allowed to ask undertakings whether, during a given meeting, their representatives agreed with those of their competitors to price increases, or accepted not to compete on certain national markets. Although such questions might be described as purely factual, they would manifestly breach the undertaking's right not to provide self-incriminatory information since an answer may be equivalent to an express admission of an infringement of Article 101 TFEU.

157. The interpretation of the right to avoid self-incrimination proposed is also supported by the Court's case-law. Both in *Orkem* and in *Solvay*, the Court partially annulled Commission decisions requesting information under Article 11 of the then Regulation (EEC) No 17.[98] The Court found that, insofar as some of the questions posed might have involved an admission on the part of the undertaking in question of the existence of an infringement which it was incumbent upon the Commission to prove, they infringed the rights of defence of those undertakings.[99] Notably, some of those questions could be described as being wholly or largely factual. In *Commission* v *SGL Carbon*, the Court confirmed that the Commission could not oblige an undertaking, which had acknowledged warning other undertakings in the graphite electrodes industry of the possibility of being made subject to Commission investigations, to disclose the names of those undertakings.[100] That question too can be considered entirely factual.

94 — Recital 23 refers, as mentioned, to 'factual questions'. The problem of finding the best terms to identify the type of questions which, because of their factual content, cannot infringe the right not to incriminate oneself appears also from the case-law. For example, in his Opinion in *Commission* v *SGL Carbon* (C-301/04 P, EU:C:2006:53, point 77) Advocate General Geelhoed referred to questions which 'concern facts of an objective kind'. The General Court has generally used the term 'purely factual' questions or 'questions of purely factual nature' (see, for example, judgments in *Mannesmannröhren-Werke* v *Commission*, T-112/98, EU:T:2001:61, paragraph 77, and *Raiffeisen Zentralbank Österreich and Others* v *Commission*, T-259/02 to T-264/02 and T-271/02, EU:T:2006:396, paragraph 539). Interestingly, the European Court of Human Rights has, at times, excluded a breach of the right not to incriminate oneself by reference to questions requiring individuals to 'state a simple fact' which 'was not in itself incriminating' (see *Weh v. Austria*, no. 38544/97, ECHR 2004; and *O'Halloran and Francis v. United Kingdom*, nos. 15809/02 and 25624/02, ECHR 2008).

95 — Judgment in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 35, and *Solvay* v *Commission*, 27/88, EU:C:1989:388, paragraph 32.

96 — In French (language of procedure in *Orkem* and in *Solvay*) the paragraph is equally meaningful. In the relevant part, it reads as follows: 'la Commission ne saurait imposer à l'entreprise l'obligation de fournir des réponses par lesquelles celle-ci *serait amenée* à admettre l'existence de l'infraction' (emphasis added).

97 — Judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582 ('*PVC II*'), paragraph 273 (emphasis added).

98 — Council Regulation of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-1962, p. 87).

99 — See judgments in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraphs 38, 39 and 41, and *Solvay* v *Commission*, 27/88, EU:C:1989:388, paragraphs 35 to 37.

100 — C-301/04 P, EU:C:2006:432, paragraphs 66 to 70, and Opinion of Advocate General Geelhoed in the same case, EU:C:2006:53, points 70 to 77.

158. Thus, a question may, in some circumstances, be objectionable because the answer thereto might imply an admission of guilt even when it concerns only facts and no opinion on those facts is requested. The General Court, consequently, committed a legal error when interpreting the right not to incriminate oneself.

159. A fortiori, unlike what the Commission implies, questions may infringe an undertaking's right not to incriminate itself even where the recipient is not asked to carry out a legal assessment or to provide a legal opinion. That stems very clearly from the case-law mentioned in point 157 above: none of the questions censured by the Court required the undertakings concerned to provide legal evaluation. Therefore, the fact that question 1D did not require HeidelbergCement to express opinions of a legal nature does not necessarily exclude the possibility that that question might infringe the right not to incriminate oneself.

160. Having reached that conclusion, for the sake of completeness, I will now examine whether the right not to incriminate oneself was applied wrongly in the case under consideration.

161. In paragraph 132 of the judgment under appeal, the General Court found that the assessment that HeidelbergCement was required to provide under question 1D was 'effectively a commentary on the level of its profit margins' and that it might 'constitute evidence pointing to the existence of anticompetitive practices'. Although the wording of the judgment under appeal is not entirely clear, it seems to state that, by replying to that question, the appellant could in fact have been induced to admit its participation in the presumed infringements.

162. However, the General Court then went on to state that, despite the self-incriminatory character of question 1D, account had also to be taken of the fact that the applicant was entitled, at a later stage of the administrative procedure or in the course of an appeal against the Commission's final decision, to put forward an alternative interpretation of its answer to that question, an interpretation which could differ from that possibly adopted by the Commission.[101] For that reason, the General Court dismissed HeidelbergCement's arguments.

163. The General Court's reasoning is rather puzzling. The fact that HeidelbergCement could also have challenged the self-incriminatory nature of question 1D if and when the Commission adopted a decision imposing a fine upon it (either for not providing an answer to that question, or for having infringed Article 101 TFEU) does not mean that the EU Courts cannot (and should not) censure the Commission's breach of that undertaking's right of defence in the context of the present proceedings. As indicated in points 86 and 145 above, the General Court's reasoning on this point would deprive the recipient of a decision of its right to have that act reviewed by the EU Courts, as expressly provided for in Article 18(3) of Regulation No 1/2003.

164. The need to safeguard immediately an undertaking's right of defence is — in a situation such as the appellant's — all the more important because the Court has, so far, not taken a position as to whether an undertaking which replies to a compulsory self-incriminatory question is, in doing so, waiving its rights and, consequently, the Commission is entitled to use that reply as evidence.[102] According to certain commentators, in such circumstances the undertaking in question cannot subsequently challenge the use of that information on the ground that the question had infringed its rights of defence and, as such, it should never have been asked.[103]

101 — Paragraph 133 of the judgment under appeal.

102 — See, for example, *PVC II*, paragraphs 286 to 292.

103 — See, e.g., Nuijten, J., 'The Investigation of Cartels — Public Enforcer's Perspective', in Wijckmans, Tuytschaever (eds), *Horizontal Agreements and Cartels in EU Competition Law*, Oxford University Press, 2015, at p. 128.

165. The key issue on which the General Court should have focused its analysis, in this context, is whether providing an answer to question 1D could have been, for HeidelbergCement, *equivalent* to an admission of an infringement.

166. The General Court seems however to bypass the issue and not to take a firm stance on it. Personally, I note that the drafting of question 1D bears certain similarities to two questions which the Court considered objectionable in *Orkem* and *Solvay* as they could compel the undertaking to acknowledge its participation in an agreement prohibited by (then) Article 85 EEC.[104] In the case under consideration too, it cannot be clearly ruled out that, by asking the undertaking's opinion on the best method to calculate quarterly gross margins, the Commission sought to induce that undertaking to admit its collusion in fixing or coordinating prices with its competitors.

167. Yet, since it is evident that the General Court has, in any event, wrongly interpreted the right not to incriminate oneself, I find it unnecessary to delve further into that aspect.

168. In the light of the above, I am of the view that the judgment under appeal should accordingly be set aside insofar as, in paragraphs 115 to 139, it dismissed the appellant's plea related to a breach of its right to avoid self-incrimination.

VI – **Consequences of the assessment**

169. Under the first paragraph of Article 61 of the Statute of the Court of Justice, the Court is to set aside the judgment of the General Court if the appeal is well founded. Where the proceedings so permit, it may itself give final judgment in the matter. It may also refer the case back to the General Court.

170. I have concluded that five of the seven grounds of appeal put forward by the appellant should be upheld and the judgment under appeal set aside accordingly.

171. In the light of the facts available and the exchange of views before the General Court and before this Court, I consider it possible for the Court to give final judgment on this matter.[105]

172. In its application before the General Court, HeidelbergCement submitted five pleas in support of its request for annulment of the contested decision.

173. In the light of the considerations developed above, it is my view that the contested decision was unlawful for three main reasons: it contained an insufficient statement of reasons regarding the purpose of the request (see points 31 to 55 of this Opinion); it did not fulfil the requirement of necessity (see points 70 to 95 of this Opinion), and it misinterpreted the notion of 'information' within the meaning of Article 18 of Regulation No 1/2003 (see points 98 to 123 of this Opinion). Each of those legal errors is, by itself, sufficient for the annulment of the whole decision. As a consequence, I find it unnecessary to examine whether the other pleas put forward by the appellant at first instance were well founded.

104 — See, in particular, judgments in *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 39, and *Solvay* v *Commission*, 27/88, EU:C:1989:388, paragraph 36.

105 — This is true for all grounds of appeal except the sixth. If the Court were to uphold only that ground of appeal, the judgment under appeal should be annulled only so far as concerns paragraphs 109 to 114 and — because of the inadequate statement of reasons in that judgment on the appellant's plea concerning the lack of detail of certain questions — be referred back to that court for a fresh assessment of that issue.

VII – **Costs**

174. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party.

175. If the Court agrees with my assessment of the appeal, then, in accordance with Articles 137, 138 and 184 of the Rules of Procedure, the Commission should pay the costs of these proceedings, both at first instance and on appeal.

VIII – **Conclusion**

176. Having regard to all the above considerations, I propose that the Court:

— set aside the judgment of the General Court of 14 March 2014 in *HeidelbergCement* v *Commission*, T-302/11;

— annul Commission Decision C(2011) 2361 final of 30 March 2011 in proceedings pursuant to Article 18(3) of Council Regulation (EC) No 1/2003 (Case 39520 — Cement and related products);

— order the Commission to pay the costs at both instances.