OPINION OF ADVOCATE GENERAL
WAHL
delivered on 15 October 2015 (1)

Case C-267/14 P

Buzzi Unicem SpA
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 — Proportionality — Statement of reasons — Self-incrimination — Best practices for the submission of economic evidence)

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 Buzzi Unicem SpA ('Buzzi Unicem' 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 four 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 Buzzi Unicem. In those other three proceedings too, I will deliver my Opinion today. (3) The present Opinion should thus be read together with those Opinions.

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 the premises of Buzzi Unicem, and those of Dyckerhoff AG and Cimalux SA, two companies that the appellant directly or indirectly controls. 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 5 November 2010, the Commission notified Buzzi Unicem 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. Buzzi Unicem submitted its observations to the Commission on 17 November 2010.

8. On 6 December 2010, the Commission notified Buzzi Unicem 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 anti-competitive practices in the cement market and related product markets.

9. On 30 March 2011, the Commission adopted Decision C(2011) 2356 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 of adopting 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 preamble to the contested decision), the Commission, by decision, required the appellant to answer the questionnaire set out in Annex I. Notably, Annex I comprised 79 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 anti-competitive 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 preamble to the contested decision).

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

'Article 1

Buzzi Unicem SpA, 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 Buzzi Unicem SpA together with its subsidiaries located in the European Union under its direct or indirect control.'

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

13. By application lodged on 10 June 2011, Buzzi Unicem brought an application for annulment of the contested decision.

14. By separate application on the same day, Buzzi Unicem applied for the case to be decided under an expedited procedure pursuant to Article 76a of the Rules of Procedure of the General Court. By decision of 14 September 2011, the General Court rejected that application.

15. By judgment of 14 March 2014 in *Buzzi Unicem* v *Commission*, T-297/11 ('the judgment under appeal'), (5) the General Court dismissed the action and ordered Buzzi Unicem to pay the costs.

IV – Procedure before the Court and forms of order sought

16. In its appeal, lodged with the Court on 23 May 2014, Buzzi Unicem claims that the Court should:

– set aside the judgment in Case T-297/11;

– annul Commission Decision C(2011) 2356 final in proceedings pursuant to Article 18(3) of Regulation No 1/2003 (Case 39520 — Cement and related products);

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

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

– dismiss the appeal;

– order Buzzi Unicem to pay the costs.

V – Assessment of the grounds of appeal

18. Buzzi Unicem submits five grounds of appeal. Broadly speaking, those grounds of appeal relate to whether the General Court correctly interpreted the Commission's powers to request information under Regulation No 1/2003.

19. The key legislative provisions and case-law relating to the Commission's powers to request information are dealt with in my Opinion in *HeidelbergCement* v *Commission*, (6) also delivered today.

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

A – *Purpose of the request for information*

1. Arguments of the parties

21. By its first ground of appeal, Buzzi Unicem contends that the General Court erred in law when dismissing its plea alleging an inadequate statement of reasons in the contested decision. In particular, the contested decision lacked sufficient detail as regards the presumed infringements and the period covered by the Commission's inquiry. In the appellant's view, the General Court also erred in law by considering a simple reference to the decision to initiate proceedings sufficient to satisfy the requirement to state reasons. Moreover, the appellant submits that the judgment under appeal is also affected by an inadequate statement of reasons in that some of its arguments on this point have been dismissed without an acceptable explanation.

22. The Commission contends that this ground is inadmissible as, in reality, the appellant raises questions of facts disguised as questions of law. In the alternative, the Commission contends that the plea should be rejected. The Commission emphasises that the General Court made no error in law when assessing the Commission's duty to state reasons and correctly held, according to settled case-law, that a statement of reasons for an EU act may refer to other acts.

2. Assessment

23. As a preliminary point, it is my opinion that the plea of inadmissibility raised by the Commission should be dismissed. By its first ground of appeal, the appellant relies upon two errors which both concern the adequacy of the statement of reasons in the contested decision and in the judgment under appeal, respectively. To address those claims, the Court need not re-evaluate the facts established at first instance or the evidence provided in the context of those proceedings, but only to state the law under Article 18(3) of Regulation No 1/2003 and Article 296 TFEU.

24. I am also of the view that the second part of this ground of appeal should be dismissed. The judgment under appeal contains, in paragraphs 31 to 38, an adequate illustration of the reasons why the General Court took the view that the contested decision included an adequate statement of reasons.

25. Conversely, I am of the opinion that the first part of the appellant's first ground of appeal, which concerns the statement of reasons in the contested decision, is well founded.

26. 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. (7)

27. 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, inspections usually 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. (8)

28. 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. (9)

29. 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 addressee to exercise its rights of defence and assess its duty to cooperate with the Commission and, on the other hand, to permit the exercise of judicial review by the EU Courts?

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

31. In paragraph 36 of the judgment under appeal, the General Court finds that the statement of reasons in the contested decision was drafted 'in very general terms which would have benefited from greater detail

and [warrant] criticism in that regard'. To my mind, that can hardly be contested: three important aspects of the statement of reasons lack, in fact, sufficient detail. I refer, in particular, to the description of the presumed infringements, the geographical scope thereof, and the products concerned by the infringements.

32. As regards 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 anti-competitive 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 anti-competitive 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.

33. 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, (10) 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.

34. 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 the 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).

35. Although I do not believe that a decision under Article 18 of Regulation No 1/2003 necessarily requires the indication of the presumed period in which the alleged infringement has taken place — as the appellant seems to imply — such an indication could have been helpful in the contested decision. Given the generic descriptions referred to above, and in the light of the fact that the questions covered a whole decade, more detail on the relevant period of time could have helped the appellant to understand better the scope of the Commission's investigation.

36. According to the General Court, (11) 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.

37. The appellant 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.

38. In my view, EU acts imposing obligations which interfere with the private sphere of individuals or undertakings and which, if not complied with, carry the risk of hefty financial penalties, should, as a matter of principle, have a self-standing statement of reasons. (12) Indeed, it is important to enable those individuals or undertakings to grasp the reasons for such an act without an excessive interpretative effort, (13) 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.

39. 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. (14)

40. Nevertheless, if it is true that the first decision included more significant detail on the geographical scope of the presumed infringements (listing the Member States potentially affected), 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.

41. 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. (15) Indeed, even if only indirectly or implicitly, the subject-matter of the questions asked 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.

42. In the present case, however, the opposite is actually true. The questions put to Buzzi Unicem are extraordinarily numerous and cover very diverse types of information. It is, to my mind, extremely difficult to identify a connecting thread between many of the questions included in the questionnaire. (16) Moreover, some questions 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 require a particularly significant amount of information over a 10-year period) are not limited to the Member States identified as possibly concerned by the decision to initiate proceedings.

43. Incidentally, if the connecting thread tying some of 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.

44. 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 some questions concerned information which was not purely factual and included a value judgement, (17) and other questions were relatively vague. (18) That being so, in respect of those questions, the risk of providing self-incriminatory answers could not easily be ruled out by the appellant. (19)

45. 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. 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.

46. I agree with the Commission that the amount of detail required in a statement of reasons depends, inter alia, on the information which the Commission has in its possession when a decision under Article 18 is adopted. (20) Yet, to my mind, this necessarily implies that a statement of reasons which may 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.

47. 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, Buzzi Unicem was still 'left in the dark' regarding the precise scope of the Commission's investigation.

48. Furthermore, I believe that the appellant is right in arguing that the exercise of judicial review by the EU Courts of the legality of the contested decision has been made significantly more difficult. As I have explained in more detail in my Opinion in *HeidelbergCement*, (21) given the scanty information on the presumed infringements contained in the contested decision (even when read against the background of the decision to open the proceedings), it becomes hard for the Court to verify the fulfilment of requirements of necessity and proportionality of the request. (22) As for the former element, the Court is supposed to assess whether the correlation between the putative infringement and the information requested is sufficiently close to justify the Commission's request. With regard to the latter, the Court must determine whether or not the efforts required from an undertaking are justified in the public interest and not excessive.

49. For those reasons, I am of the view that the General Court has wrongly interpreted and applied Article 296 TFEU and Article 18(3) of Regulation No 1/2003 as regards the required statement of reasons in a decision to request information. The judgment under appeal must, thus, be quashed in so far as the General Court thereby held, for the reasons indicated in paragraphs 19 to 39 of that judgment, that the contested decision contained an adequate statement of reasons.

B – *Misuse of powers and reversal of the burden of proof*

1. Arguments of the parties

50. In its second ground of appeal, Buzzi Unicem disputes the General Court's review of its plea alleging misuse of powers and reversal of the burden of proof stemming from the contested decision. In the appellant's view it is clear, because of the type and quantity of information requested, that the Commission did not have sufficient indicia of an infringement of Article 101 TFEU when it issued the contested decision. That decision could thus be regarded as a 'fishing expedition', which is not permitted under Article 18 of Regulation No 1/2003. Had the Commission the intention of undertaking a sectorial inquiry, it should have acted under Article 17 of the same regulation. According to the appellant, the General Court has not properly addressed those arguments. In particular, the appellant criticises the General Court for not ordering any measures of inquiry to verify whether the Commission was in possession of sufficient indicia to adopt a decision under Article 18.

51. The Commission, for its part, argues that the plea is inadmissible as it raises questions of fact and is, in any event, unfounded.

2. Assessment

52. In its second ground of appeal, directed against paragraphs 45 to 48 of the judgment under appeal, the appellant essentially criticises the General Court's review of its arguments relating to misuse of powers and reversal of the burden of proof.

53. I agree with the Commission in that this ground of appeal is partly inadmissible and partly unfounded.

54. First, to the extent that the appellant submits that the General Court erred in evaluating the elements put forward at first instance in support of its plea relating to a misuse of powers, the appellant is essentially requiring the Court to carry out a new assessment of those elements. This is, however, not permissible on appeal.

55. Second, as regards the criticism of the General Court's decision not to order *ex officio* measures of inquiry or of organisation of procedure so as to verify the actual existence of sufficient indicia of an infringement, that criticism too ought to be dismissed. It is established case-law that the General Court is the sole judge of any need to supplement the information available to it in respect of the cases before it. Whether or not the evidence before it is sufficient is a matter to be appraised by it alone and is not subject to review by the Court on appeal, except where that evidence has been distorted or the substantive inaccuracy of the findings of the General Court is apparent from the documents in the case. (23) A fortiori, this principle is even more valid when it is a question of adopting measures of inquiry or of organisation of procedure *ex officio*. (24)

56. In the present case, it was open to the appellant to request the General Court to adopt any such measure with a view to verifying whether the Commission was in possession of sufficient indicia. In fact, in the 'parallel' case *Cementos Portland Valderrivas* v *Commission*, the General Court, faced with an express

request from the applicant, ordered the Commission to produce the evidence in its possession so that it could satisfy itself that the contested decision was not arbitrary. (25)

57. Yet, in the present case the appellant did not submit such a request. Thus, I find it hardly objectionable that the General Court, considering the elements of a generic nature adduced by the appellant (an assessment which cannot be reviewed on appeal), and failing any specific request, decided that there was no need to investigate the matter further. (26)

58. Third, no criticism is, in my view, warranted on the adequacy of the statement of reasons contained in the judgment under appeal regarding the alleged misuse of powers and reversal of the burden of proof. First of all, it is apparent that the General Court did in fact assess the appellant's plea relating to misuse of powers in paragraphs 46 and 47 of the judgment under appeal. That court also addressed the appellant's plea regarding the reversal of the burden of proof in paragraph 61 and following of the judgment under appeal.

59. It is true that the judgment under appeal is, at times, relatively concise on the reasons why certain arguments are dismissed, or addresses a number of arguments only jointly. Yet, the General Court cannot, to my mind, be reproached for this since it had to deal with an application which included several pleas and arguments which were, at times, repetitive or not presented with the required degree of clarity.

60. Therefore, the second ground of appeal is, in my view, destined to fail.

C – *Nature of the information requested*

1. Arguments of the parties

61. By its third ground of appeal — directed against paragraphs 54 to 83 of the judgment under appeal — Buzzi Unicem argues that the General Court erred in law and failed to provide a sufficient statement of reasons on its plea alleging a misuse of powers by the Commission under Article 18 of Regulation No 1/2003. The appellant criticises the General Court for failing to censure the Commission's request for three types of information; self-incriminatory information, information in the public domain and information which was not in its possession. As regards, in particular, self-incriminatory information, the appellant submits that the General Court erred in finding that questions 5R, 5S, 5T and 5V were purely factual and that question 1D was not self-incriminatory.

62. The Commission argues, in the first place, that this ground of appeal is inadmissible as the appellant is, in essence, repeating the same arguments developed before the General Court. This ground of appeal is, according to the Commission, also inadmissible insofar as the appellant requests the Court to re-evaluate the nature of certain questions, which were found to be 'purely factual' by the General Court. In the second place, this ground of appeal is also unfounded — the Commission adds — as the General Court has correctly interpreted and applied Article 18 of Regulation No 1/2003

2. Assessment

63. By its third ground of appeal, Buzzi Unicem essentially submits that the General Court misinterpreted and misapplied Article 18 of Regulation No 1/2003, as regards the nature of information which the Commission is entitled to request from an undertaking.

64. Before dealing with the substance of the issue which I believe to be the most problematic in this context (that relating to self-incrimination), I must address some preliminary arguments put forward by the parties.

65. First, as regards admissibility, I must state that the fact that the arguments included in the appeal on this point have largely been taken, verbatim, from the application lodged before the General Court is irrelevant, to the extent that the appellant identifies the specific passages or paragraphs of the judgment under appeal which allegedly contain errors of law and the reasons for those errors. In the present case, the appeal seems to me to meet these requirements as regards the third ground of appeal.

66. Furthermore, I would also point out that whether certain specific questions included in the contested decision concern only facts, is certainly an issue of fact not reviewable on appeal. Conversely, whether

certain questions are self-incriminatory for the purposes of EU law is an issue which concerns the legal qualification of facts, as such reviewable on appeal.

67. The third ground of appeal is thus admissible within those limits. (27)

68. Second, as regards the substance of the ground of appeal, it seems to me that parts of it can be dismissed as unfounded.

69. With regard to the appellant's argument relating to the submission of information not in its possession, it seems to me that this argument is based on an erroneous reading of the judgment under appeal. Indeed, nowhere does that judgment state that the Commission is permitted to ask an undertaking for information which is not in its possession. In paragraphs 80 and 81, the judgment under appeal states, first, that Article 18 of Regulation No 1/2003 does not exclude the possibility that, in order to respond to a Commission's request for information, an undertaking may need to compile or marshal data in its possession. However, it then goes on to state that that principle does not apply to data not in the undertaking's possession.

70. Obviously, I can agree with the General Court on this issue. In addition to the validity of the well-known legal maxim *ad impossibilia nemo tenetur*, I would also largely subscribe to the following considerations of Advocate General Darmon: 'the Commission may only require an undertaking to produce information of which it is already in possession, even though, if necessary, it may have to marshal the information concerned. The request for information may not be designed to make an undertaking seek information held by third parties. Thus, a request for information which the Commission knows is not or cannot be in the possession of the undertaking concerned would certainly be improper'. (28)

71. With regard, then, to the argument alleging an inadequate statement of reasons in the judgment under appeal on the issue of whether the Commission is entitled to request the parties to provide information which is publicly available, I would note the following. The appellant wrongly contends that the General Court has not explicitly addressed that argument. Indeed, the General Court has examined it from the angle of the proportionality and necessity of the information requested. (29) The fact that the judgment under appeal is very concise on this aspect can be explained by the fact that this aspect was raised in a single point of Buzzi Unicem's application, and not much more developed in Buzzi Unicem's reply. In those passages, the appellant essentially complained that a certain amount of information was not 'exclusively in its possession', stating that the Commission could have obtained that information 'autonomously'. No explanation, even brief, was provided of the reasons why Article 18 of Regulation No 1/2003 should be interpreted as preventing the Commission from asking for information it can obtain from other sources, let alone on where and how that information could have been obtained.

72. In those circumstances, no criticism is to be leveled at the General Court for not having addressed this argument more thoroughly.

73. I shall now turn, finally, to what seems to me to be the key issue raised by the present ground of appeal: the interpretation and application, by the General Court, of the right to avoid self-incrimination.

74. 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. (30) 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.

75. Against this background, I will 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.

76. In paragraph 63 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 the subsequent paragraphs 64 and 65, the General Court found that certain questions which merely required the

undertaking to compile data had a purely factual dimension and, as such, could not infringe that undertaking's rights of defence.

77. 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, (31) 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 decisive. 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.

78. The Court has consistently referred to questions which 'might *involve* an admission on its part of the existence of an infringement'. The terms chosen by the Court are not devoid of significance. 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. (32)

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

80. 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.

81. The interpretation of the right to avoid self-incrimination proposed is also supported by the Court's case-law, and in particular by the judgments in *Orkem*, *Solvay* and *SGL Carbon*. In all those cases the Court considered self-incriminatory, and thus impermissible, questions which were purely factual. (33)

82. 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.

83. A fortiori, unlike what the Commission implies, questions may infringe an undertaking's right not to incriminate itself even where the addressee 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 81 above: none of the questions censured by the Court required the undertakings to provide legal evaluation. Therefore, the fact that question 1D did not require the appellant to express opinions of a legal nature does not necessarily exclude the possibility that that question might infringe the right not to incriminate oneself.

84. 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.

85. In paragraph 73 of the judgment under appeal, the General Court found that the assessment that Buzzi Unicem 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 anti-competitive 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.

86. 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. (34) For that reason, the General Court dismissed the appellant's arguments.

87. The General Court's reasoning is rather puzzling. The fact that Buzzi Unicem 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. 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.

88. 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 Buzzi Unicem, *equivalent* to an admission of an infringement.

89. 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. (35) 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.

90. 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.

91. Accordingly, I am of the view that the judgment under appeal should be set aside insofar as, in paragraphs 57 to 79, it dismisses the appellant's plea related to a breach of its right to avoid self-incrimination. The rest of this ground of appeal should be declared partly inadmissible and partly unfounded.

D – *Proportionality and necessity*

1. Arguments of the parties

92. By its fourth ground of appeal — directed against paragraphs 84 to 115 of the judgment under appeal — Buzzi Unicem submits that the General Court committed an error of law in interpreting and applying the requirements of the necessity and proportionality of the information requested in the contested decision.

93. The Commission argues that this ground of appeal should be dismissed: the General Court has correctly recognised the broad discretion the Commission is to enjoy when deciding what information is necessary for its investigations. It also adds that the General Court was correct in concluding that the contested decision was proportionate.

2. Assessment

94. This ground of appeal should logically be divided into two distinct parts, of which one concerns the necessity of the information requested in the contested decision, and the other the overall proportionality of that decision. The two examinations seem in fact complementary. On the one hand, the examination of the requirement of necessity calls for an analysis of whether, from the perspective of the Commission acting at the time of adoption of the request, the information sought from an undertaking is likely to help it when verifying whether the presumed infringement has taken place, and to determine its precise nature and scope. On the other hand, the examination of the requirement of proportionality requires an analysis of whether, from the perspective of the recipient of a Commission decision, the information requested represents an excessive and intolerable burden.

95. However, from a closer examination of the arguments put forward by the appellant in the present case, it emerges that: (i) the two requirements are almost always referred to together by the appellant, and (ii) in substance, the arguments put forward by the appellant are mostly meant to show the excessive and intolerable burden placed on the appellant by the contested decision.

96. Therefore, for reasons of judicial economy, I will not treat separately the arguments which could concern the lack of necessity of the information requested. For general considerations on this issue, I refer to my Opinion in *HeidelbergCement*, points 70 to 76.

97. I will accordingly deal immediately with the arguments pertaining to the proportionality of the contested decision.

98. At the outset, I would like to recall that 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. (36) In particular, a measure of investigation is disproportionate when it constitutes an excessive and, thus, intolerable interference with those rights. (37)

99. Obviously, there is no clear-cut test for determining whether a specific request for information addressed to a given undertaking is excessive or not. Only a case-by-case assessment which takes into account all the relevant circumstances can provide an answer to that question.

100. Two elements in particular should be weighed against each other to assess the proportionality of a specific request for information. (38) On the one side of the scales lies the public interest which justifies the Commission's investigation, and the necessity for that institution of rec**e**iving information enabling it to perform the tasks assigned to it by the Treaty. The more harmful a suspected infringement is to competition, the more the Commission ought to be entitled to expect an undertaking to make an effort to provide the information requested, in fulfilment of its duty of active cooperation. The other side of the scales consists of the workload generated for an undertaking by a request for information. The greater the workload generated, diverting the attention of the undertaking's staff from their normal business tasks and adding extra costs, the more excessive that request for information might be considered.

101. In the case under consideration, the Commission argues that the appellant's alleged conduct constitutes a very serious infringement of the EU competition rules. Despite the little information given on that in the contested decision, or in the decision to initiate proceedings, the Commission's view that the consequences of the suspected infringements for European consumers could, if proven, be particularly serious can probably be shared. (39)

102. Notwithstanding that fact, the workload generated for the appellant by the contested decision (described as provoking a 'particularly significant workload' in the judgment under appeal) (40) appears excessively and unreasonably onerous.

103. It cannot be seriously disputed that the contested decision required the submission of an extraordinary quantity of data, which covered almost all economic activities of the appellant, in 12 Member States, over a decade.

104. Buzzi Unicem **s**tated, without being contradicted by the Commission, that the mere compilation of some of the data requested generated an important workload for its staff: some of the questions obliged it to review almost all economic transactions concluded over the last 10 years, so as to extrapolate the data requested. Some of that data, however, especially for older transactions, was not included in its databases. The appellant thus had to verify, one by one, thousands of financial documents and then manually encode the relevant data in Excel files formatted according to the Commission's instructions.

105. Another reason for the significant workload generated by the contested decision lies in the format imposed by the Commission for the submissions of the information requested. Indeed, in the digital era, the fact that a request for information requires the submission of a very large amount of information may often be of secondary importance. In many cases, the workload generated by a request for information will mainly depend on the manner in which the Commission requires the recipient of that request to submit the information. In other words, the format imposed by the Commission for the information requested may frequently be what creates the greatest workload for an undertaking.

106. In that respect, I observe that Annex II (detailed instructions for answering the questionnaire) and Annex III (answer templates) to the contested decision together amount to almost 30 pages of extreme complexity. The format imposed was of the greatest strictness and the instructions exceptionally detailed.

107. Regarding the strictness of the model, I would stress that full compliance with the required format was ensured by an explicit threat of penalties. 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.'

108. As regards the exceptionally detailed nature of the instructions, I would merely refer to the overly meticulous prescriptions concerning the responses which the Commission requested to be provided in an Excel file. The appellant could use only those templates included in Annex III, and was required to follow

strictly the instructions regarding, among other things, the number of files to be provided, the number of spreadsheets for each file, the name of each spreadsheet, the abbreviations to be used, the names and numbers of columns or lines, the format of dates, and the use of spaces, special characters or symbols. (41)

109. Furthermore, the numerous and almost cryptic codes which the recipient of the decision was required to use — as the Commission stressed, 'uniformly' and in 'the answers to all questions' (42) — clearly neither enhanced the readability and user-friendliness of the contested decision, nor facilitated the undertaking's task of compiling the answers.

110. It is safe to say that, even to an experienced businessman, the format in question would, at first glance, appear to be a brain-racking puzzle.

111. As I have explained in my Opinion in *HeidelbergCement*, the notion of 'information' for the purposes of Article 18 of Regulation No 1/2003 cannot be interpreted as permitting the Commission to require undertakings to submit the information requested according to a specific format. Recipients of requests for information are obviously obliged to respond to a request by providing information which is not only correct and complete, but also precise and clear. Moreover, where required to marshal information so as to provide a useful answer, they can also be expected, by virtue of their duty of active cooperation, to take into consideration the format requested by the Commission. Yet, the Commission cannot require undertakings to carry out such extensive, complex and time-consuming clerical and administrative tasks when submitting the information requested that the preparation and building of a case against those undertakings seems, in real terms, to be 'outsourced' to them. It is after all for the Commission to prove an infringement of the EU competition rules. (43)

112. Be that as it may, irrespective of a possible infringement of Article 18 (which the applicant has not raised), it seems to me that the format imposed by the contested decision has clearly generated a very significant workload for the appellant. This is even less acceptable insofar as the formatting operations required by the Commission often concerned data which was already in the Commission's possession or publicly available.

113. On the first aspect, it should not be overlooked that the contested decision came after other particularly burdensome requests for information (which took the form of simple requests under Article 18(2) of Regulation No 1/2003) had been answered by Buzzi Unicem. Those previous requests largely concerned the same kind of information, with some different details or according to a different format.

114. The contested decision thus obliged the appellant — because of the format required for the submission of the information — to make additional efforts for a mere reformatting of data already provided to the Commission. I cannot find any justification for such a request. In those circumstances, the Commission's request for a very large amount of data to be reformatted could, *mutatis mutandis*, be compared to a request for numerous and lengthy documents in an undertaking's possession 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.

115. Had the Commission, in its requests for information issued under Article 18(2) of Regulation No 1/2003, drafted its questions in the way that they were formulated in the contested decision, or subsequently accepted only the submission of the information requested in any other format, the appellant would have been spared a significant amount of work.

116. On the second aspect, the contested decision required the appellant to marshal information which was 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.' It is unclear why those calculations could not be made by the Commission's own staff. (44)

117. For all these reasons, I am of the view that the appellant was correct in stating that the General Court erred in law in interpreting and applying the principle of proportionality. The appellant's fourth ground of appeal should consequently be upheld and the judgment under appeal set aside accordingly.

E – *Best Practices*

1. Arguments of the parties

118. By its fifth and final ground of appeal, the appellant argues that the General Court erred in law by failing to uphold the appellant's rights under the 'Best Practices for the submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 and in merger cases (Staff working paper)' (45) (the 'Best Practices'). According to the appellant, if the Commission chooses to follow its Best Practices by consulting the undertaking on the draft request for information, it is then obliged to take account of the undertaking's comments or requests for clarification. The General Court consequently erred in law by disregarding that obligation.

119. The Commission contends that this line of argument should be rejected.

2. Assessment

120. Section 3.4.3 of the Best Practices reads as follows: 'When appropriate and useful, DG Competition will send a "draft" Data Request for quantitative data in order to facilitate a better identification of the format and to allow for basic consistency checks (see section 3.3.2). The purpose of the draft Data Request is to invite parties to propose any modifications that could alleviate the compliance burden while producing the necessary information. Any reduction on the scope of the Data Request can only be accepted if it does not risk harming the investigation and may trigger, particularly in merger cases, a reduction in the deadline for response initially anticipated.'

121. I am of the view that the General Court was correct to recall the case-law which states that where the Commission lays down an indicative rule of conduct designed to produce external effects, it may not depart from that rule without giving reasons that are compatible with the principle of equal treatment. However, as also pointed out by the General Court, the Best Practices clearly lay down a discretionary power for the Commission to consider observations 'when appropriate and useful' and follow the undertaking's observations where those would 'not risk harming the investigation'. (46)

122. The wording of the Best Practices cannot therefore, lead me to conclude that the Commission meant to adopt, on this point, a clear and unequivocal line of conduct.

123. More importantly, it seems to me also counterintuitive to argue that, by sending a draft decision to the potential addressees, the Commission binds itself to follow any observation submitted by them. There is no basis for such an argument, nor any logic behind it. I do not see any other possible obligation for the Commission arising out of section 3.4.3 of the Best Practices than that of giving due consideration to the observations submitted by the undertakings consulted. In that respect, Buzzi Unicem has not offered any concrete element showing that the Commission has not given due consideration to its observations.

124. Finally, I also note that sections 7 and 8 of the Best Practices clearly indicate that the Commission may vary its approach under those practices and that the document is not intended to produce new legal effects or alter the Commission's decision-making practice. In addition, the non-binding character of the Best Practices is further confirmed by the fact that they have been issued only as a 'Staff working paper' of the Commission's Directorate-General for Competition, and not as a document to be adopted by the whole Commission (i.e. agreed by the College of Commissioners). In fact, the Best Practices have never been published in the *Official Journal of the European Union*. Although it may be wondered why the Commission publishes communications whose value it then downplays when those communications are invoked in court proceedings by another party, the fact remains that the Best Practices were clearly not intended to lay down binding rules.

125. For the reasons listed above, I am of the view that the General Court did not err in law by rejecting the appellant's plea as regards the infringement of the Best Practices. The fifth ground of appeal should consequently be dismissed.

VI – Consequences of the assessment

126. 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.

127. I have concluded that three of the five grounds of appeal put forward by the appellant should be, in whole or in part, upheld and the judgment under appeal set aside accordingly.

128. 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.

129. In its application before the General Court, Buzzi Unicem had submitted five pleas in support of its request for annulment of the contested decision.

130. In the light of the considerations developed above, it is my view that the contested decision was unlawful for two main reasons: it contained an insufficient statement of reasons regarding the purpose of the request (see points 23 to 49 of this Opinion), and it did not fulfil the requirement of proportionality (see points 94 to 117 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 are well founded.

VII – Costs

131. 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.

132. 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

133. 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 *Buzzi Unicem* v *Commission*, T-297/11;

– annul Commission Decision C(2011) 2356 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.

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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 – *HeidelbergCement* v *Commission*, C-247/14 P; *Schwenk Zement* v *Commission*, C-248/14 P; and *Italmobiliare* v *Commission*, C-268/14 P.

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).

5 – EU:T:2014:122.

6 – C-247/14 P, points 22 to 27.

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

8 – Ibidem, paragraphs 34 to 37 and case-law cited.

9 – 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(3) 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'.

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

11 – Paragraphs 35 and 36 of the judgment under appeal.

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

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

14 – See case-law referred to in point 26 of this Opinion.

15 – Cf. Opinion of Advocate General Kokott in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:223, point 52.

16 – For more detail, see my Opinion in *HeidelbergCement* v *Commission*, C-247/14 P, points 46 and 47.

17 – Question 1D. See infra, point 85 of this Opinion.

18 – See my Opinion in *HeidelbergCement* v *Commission*, C-247/14 P, points 138 to 146.

19 – See infra, points 73 to 91 of this Opinion.

20 – See my Opinion in *HeidelbergCement* v *Commission*, C-247/14 P, point 50.

21 – C-247/14 P, points 52 to 54.

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

23 – See judgment in *Der Grüne Punkt — Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:456, paragraph 163 and the case-law cited.

24 – See, to that effect, judgment in *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraphs 65 and 66.

25 – T-296/11, EU:T:2014:121, paragraphs 41 to 56.

26 – Paragraph 45 of the judgment under appeal.

27 – In my view, it is thus not for the Court to check that questions 5S, 5R, 5T and 5V are concerned only with facts which, in any event, seems to me hardly disputable.

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

29 – See paragraphs 87 and 88 of the judgment under appeal.

30 – 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.

31 – 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 is also apparent from the case-law. See case-law referred to in footnote 94 of my Opinion in *HeidelbergCement* v *Commission*, C-247/14 P.

32 – 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).

33 – See my Opinion in *HeidelbergCement* v *Commission*, C-247/14 P, point 157.

34 – Paragraph 74 of the judgment under appeal.

35 – 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.

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

37 – See, to that effect, judgments in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraphs 76 and 80 and case-law cited.

38 – The other elements include, among others, the nature of the involvement of the undertaking concerned, the importance of the evidence sought, and the amount and type of useful information which the Commission believes to be in the possession of the undertaking in question.

39 – I am taking into account, among other things, the number of companies involved, the geographic scope of the suspected infringements and the hard core restrictions included in the suspected agreements.

40 – Paragraph 129 of the judgment under appeal.

41 – See points 2, 6, 7, 8, 9, 13, 14 and 15 of Annex III. For similarly complex instructions, see also, among others, Question 1A and Question 2 in Annex I.

42 – See points 16 and 17 of Annex II.

43 – See Article 2 of Regulation No 1/2003.

44 – Cf. my Opinion in *HeidelbergCement* v *Commission*, C-247/14 P, point 120.

45 – Document published on the website of DG Competition, European Commission.

46 – See paragraphs 140 and 141 of the judgment under appeal and case-law cited.