



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28 IX 2005  
**SG-Greffe(2005) D/ 205249**

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**COMMISSION DECISION REJECTING A COMPLAINT**

**Subject: Case COMP/F-2/38.401 EN 197-1 Standard – EMC/EUROPEAN CEMENT PRODUCERS**

Dear Mr Lygren,

I refer to your complaint of 15 March 2002 pursuant to Article 3(2) of Council Regulation 17/62<sup>1</sup> (now Article 7(2) of Council Regulation 1/2003<sup>2</sup>) regarding alleged infringements of Articles 81 and/or 82 of the EC Treaty by European Portland cement producers, Cembureau and the European Committee for Standardisation (hereinafter: “the complaint”).

According to your complaint, the European Portland producers implemented a series of behaviours that constitute serious violations of Article 81. These behaviours can be summarised as follows: a) the European Portland producers, via Cembureau and the CEN, adopted the EN 197-1 Standard; b) they constitute a "cartel" in order to create barriers to entry in the European cement market; c) they divided geographically the European cement market. In general, in your complaint, you claim to experience, for several years now, great difficulties to enter the cement market with a product believed to offer an overwhelming combination of performance, cost competitiveness and environmental benefits. According to your complaint, this inability to enter the market shows that illegal barriers to market entry exist. The most important of these barriers is the EN 197-1 Standard.

By this decision, I inform you that, for the reasons set out below, there are insufficient grounds for the Commission to act on your complaint.

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<sup>1</sup> Council Regulation (EC) No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 [now 81 and 82] of the Treaty, OJ 21.2.1962, p. 13.

<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on the competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1.

## **A. PROCEDURE**

1. By letters of 3 January 2002 and 14 March 2002, registered on 15 March 2002 as a complaint pursuant to Article 3(2) of Council Regulation 17/62 (now Article 7(2) of Council Regulation 1/2003) EMC maintained the existence of infringements of Articles 81 and/or 82 of the EC Treaty by European Portland cement producers, Cembureau (see below, paragraph 22) and European Committee for Standardisation (see below, paragraphs 23 to 26 - hereinafter: "CEN").
2. According to the complaint, these undertakings and associations of undertakings have set up a strategy to gain and maintain the dominance of Portland cement in the market to the detriment of EMC Development AB (hereinafter: "EMC").
3. On 9 October 2001, EMC, after various communications with DG Enterprise, DG Environment and the Directorate B of DG Competition, contacted Directorate E of DG Competition expressing its concerns relating to the new European Cement Standard EN 197-1<sup>3</sup> (see below, paragraphs 31 to 34 - hereinafter: "EN 197-1 Standard") and the behaviour of the European cement industry in general.
4. DG COMP met with EMC on 23 October 2001 in order to allow EMC to further substantiate its allegations. Additional information and remarks were provided in several communications of later date.
5. On 3 January 2002, EMC addressed a letter to M. Monti in which it summarised its concerns and insisted on action being taken by the Commission.
6. In communications dated 12 and 19 February 2002, DG Enterprise and DG Internal Market informed EMC that they did not consider that EN 197-1 Standard constitutes a regulatory barrier to entry into the cement market. These Directorates General concluded that the EN 197-1 Standard does comply with the Construction Product Directive 89/106/EEC<sup>4</sup> (see below, paragraphs 27 to 30 - hereinafter "CPD"). EMC replied to these Directorates General explaining the reasons for which it does not share their opinion. A copy of these replies of EMC was transmitted to DG Competition.
7. On 14 March 2002, EMC send a letter to DG Competition maintaining that the Portland cement industry, Cembureau and CEN violated articles 81 and 82 of the EC Treaty. On 15 March 2002, the letters of EMC were registered as a formal complaint.
8. In June 2002, in order to hear the opinion of the challenged parties, DG Competition requested EMC for a non-confidential version of the complaint. This document was received on 10 July 2002.

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<sup>3</sup> European Cement Standard EN-197-1:2000 "Cement – Part 1: Composition, specifications and conformity criteria for common cements". The text of this Standard was published by CEN in June 2000.

<sup>4</sup> Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, OJ L 40 of 11.2.1989, p. 12.

9. On 23 July 2002, the non-confidential version of the complaint was sent to Cembureau and CEN for their observations. Cembureau and CEN both submitted their observations on 4, and respectively, 6 September 2002.
10. On 20 December 2002, a non-confidential version of the submissions of CEN and Cembureau concerning the complaint was transmitted to EMC.
11. On 10 March 2003, EMC transmitted to the Commission its observations concerning the submissions of CEN and Cembureau.
12. By its letter of 29 January 2004, the Commission informed EMC that, pursuant to Article 6 of Commission Regulation 2842/98<sup>5</sup> (now Article 7 of Commission Regulation 773/2004<sup>6</sup>), that it took the preliminary view that there were insufficient grounds for granting its application.
13. In accordance with Article 6 of Commission Regulation 2842/98 (now article 7 of Commission Regulation 773/2004), the Commission invited EMC to present its comments in writing to DG Competition within two months of receipt of this letter.
14. Pursuant to the Commission Notice published on 23.01.1997<sup>7</sup>, the Commission offered to EMC the opportunity to acquaint itself with the documents on which the Commission's position is based.
15. By letter of 22 March 2004, EMC presented its comments in writing concerning the Commission's letter of 29 January 2004.
16. By several submissions after this date, EMC presented other elements for the assessment of the case.
17. On 8 June the Commission afforded EMC the opportunity of express orally its views.
18. On 11 June of 2004, EMC sent to DG Competition a letter summarizing EMC's record of the meeting of 8 June 2004 and providing additional comments on the case. EMC stated that these comments were "without prejudice to [its] position on all other submissions that have been made or may be made in the future".
19. By letter of 24 July 2004, DG Competition recalled to EMC the procedural rules governing complaints. This letter also communicated to EMC that DG Competition "cannot endlessly add new documents to the case's file and go on with unlimited exchange of questions and replies".
20. In the meantime, DG Enterprise had written to EMC some letters concerning EN 197-1 Standard. In particular, on 2 March 2005, DG Enterprise informed EMC that

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<sup>5</sup> Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 [now 81 and 82] of the EC Treaty, OJ L 354, 30.12.1998, p. 18.

<sup>6</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18.

<sup>7</sup> Commission Notice on internal rules of procedure for processing requests for access to the file in cases under Articles 85 and 86 [now 81 and 82] of EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, OJ 2323.01.1997, p. 3, point II. D. 1.

it was considering to amend mandate M/114 (i.e. mandate concerning EN 197-1 Standard – see below, paragraphs 31 and 32) in order to add an open sub-family under the common cements which would allow new technical specifications to be developed. On 1<sup>st</sup> June 2005, DG Enterprise informed EMC that at 61<sup>st</sup> meeting of the Standing Committee for Construction held on 12/13 April 2005, the reaction of Member States on the proposed amendment of mandate M114 has shown that the majority of them is opposed to such an amendment and that therefore the Commission concluded not to further explore this way.

By letter of 1<sup>st</sup> July 2005, EMC asked Mrs. Kroes, Member of the Commission, to carefully examine the CPD's requirements with respect of cement produced by EMC.

## **B. THE COMPLAINT**

### **B. 1. The complainant – EMC**

21. EMC Development AB is a Swedish company based in Luleaa in northern Sweden. The company is involved in the continuous testing, further development and commercial exploitation of a method of producing an alternative type of cement known as “Energetically Modified Cement” (hereinafter: “EM Cement”).

### **B.2. The challenged parties**

#### **B.2.1. Cembureau**

22. Cembureau is the European Cement Association, constituted under Belgian law and established in Brussels. The association represents 25 national cement industry associations and cement companies in Europe. Its stated objective is advancing its Members' interests through active representation of the European cement industry at European and international levels.

#### **B.2.2. CEN**

23. The European Committee for Standardisation, CEN, is an independent organisation whose members are the national standard setting bodies of 28 European countries. The European Commission is not a member of CEN but acts as a counsellor to the CEN Technical Board.
24. CEN is a Standardisation Body recognised under Directive 98/34/EC<sup>8</sup> (see Article 1(7) and annex I of this Directive). CEN promotes voluntary technical harmonisation in Europe in conjunction with worldwide bodies and its partners in Europe. These voluntary standards are aimed to promote free trade, the safety of workers and consumers, interoperability of networks, environmental protection, exploitation of research and development programmes and public procurement.
25. The rules for proposal, development and adoption of European Standards are defined in CEN/CENELEC Internal Regulations. The public BOSS on-line resource

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<sup>8</sup> Directive 98/34/CE of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and information, OJ L 204, 21.7.1998, p. 37.

([www.cenorm.be/boss](http://www.cenorm.be/boss)) enables CEN statutes, the Internal Regulations, together with supporting guidance material of CEN and the process of standards development, to be viewed by anyone.

26. The European standards are developed by Technical Committees. Participation in the European standardisation process is open to all interested stakeholders, is voluntary and is at first instance managed at national level (by the national Standardisation bodies). Meetings of CEN Technical Committees are attended by delegations from those national standards organisations that are interested in the subject being discussed. The national delegations comprise experts who could come from a wide range of technical backgrounds, often industrial. The delegations are decided by each National Standard organisation. The Working Groups, which are responsible to the Technical Committees for the drafting of the work, are comprised of experts responsible in the field of standardisation under consideration
27. Standards are developed by the achievement of a consensus of those participating. Consensus can be characterised by the “absence of substantial opposition”.

Two key processes must take place during the development of a European Standard. These are the Public Enquiry and the Formal Vote.

The Public Enquiry starts when the draft standard is made available for public consultation in all the Member States. Any group or member of the public can submit comments in order to shape the national view and response to the drafts. The time allowed for this commenting period is five months (previously six months).

After the close of Enquiry, the Technical Committee, through its Working Group, is obliged to consider all comments submitted and to respond to each of them through a “comments resolution report”. A revised draft is prepared by the Working Group and submitted to Technical Committee. If the Technical Committee reaches consensus on the content of revised draft, this draft is submitted for a formal vote.

The Formal Vote, through which CEN National Members decide to adopt the revised draft as European Standard, is a “yes” or “no” vote. If the necessary numbers of positive votes are not given during this stage to adopt the revised draft as European Standard, then the draft is not approved and cannot be implemented as a European Standard. If the result of Formal Vote is positive, all CEN National Members are obliged to publish the Standard as an identical national Standard and to withdraw any pre-existing national Standard that conflicts with the new European Standard. This obligation holds even for those National Members that vote against adoption.

The transparency of the CEN work is assured through national mirror committees managed by the CEN National Members as well through the public consultation at the Public Enquiry stage. All Members have the right to appeal against the adoption of a Standard according to mechanism set out by CEN Internal Regulation.

### B.3. The Construction Product Directive 89/106/EEC

28. The objective of Construction Product Directive 89/106/EEC (see footnote 4 above - hereinafter: “CPD”) is the approximation of laws, regulations and administrative provisions of the Member States relating to construction materials.

According to the CPD, construction products intended for use in construction works may be placed on the market only if they are suitable for the intended use i.e. they have such characteristics that the works in which they are to be incorporated satisfy the essential requirements set out by this Directive. Member States shall allow onto their markets the products complying with the CPD and bearing the EC mark. The EC mark shall indicate that the products: a) comply with the national standards transposing the harmonized standards adopted in conformity of CPD rules (see below, paragraph 29); or b) comply with an European Technical Approval (see below, paragraph 30 - hereinafter: “ETA”); or c) comply with the national technical specifications recognised by CPD.

29. The harmonized standards for construction materials could be drawn up by private bodies (like CEN) and must remain non-mandatory. The products which comply with the harmonised standards can obtain the EC mark. According to Article 7(1) of CPD, the harmonized standards shall be established by the CEN on the basis of a mandate given by the Commission. According to Article 7 (2) of CPD, the “resulting standards shall be expressed as far as practicable in product performance terms, having regard to the interpretative documents”. Once the standards have been established by CEN, the Commission shall publish the references of the Standards in the “C” series of the Official Journal (Article 7(3) of CPD).
30. According to Article 8 of the CPD, a European Technical Approval (ETA) may be granted to products for which there is neither a harmonized standard, nor a recognized national standard, nor a mandate for a harmonized standard, and for which the Commission considers that a standard could not, or not yet, be elaborated and for products which differ significantly from harmonised Standard or recognised national Standard.

ETA is a favourable technical assessment of the fitness for use, based on fulfilment of the essential requirements for building works for which the product is used (Article 8(1) of CPD).

31. From the above paragraphs 28 to 30, it has to be concluded that there are three categories of products that can be legally placed on the market:
- a) products that satisfy the harmonized standard’s requirements;
  - b) products that obtained an ETA;
  - c) products that satisfy recognized national specification requirements.

For all these products, the manufacturer can receive the EC mark. By this mark, all these products have the same right to be legally put onto the market in the European Community.

#### **B.4. The European Cement Standard EN 197-1**

32. The EN 197-1 Standard (see above, footnote 3) was developed by the CEN and its Technical Committee CEN/TC-51 (hereinafter: “CEN/TC 51”)<sup>9</sup> under a mandate given by the European Commission and the European Free Trade Association, pursuant to CPD (hereinafter: “Mandate M-114”). Cements complying with EN 197-1 Standard can obtain the EC mark. The EN 197-1 is not, however, mandatory for the cements sold in the European Community.
33. In conformity with the CPD, Mandate M/114 states that the standard shall be expressed as far as practicable in product performance terms, having regard to the interpretative documents. The mandate defines its field of application and enumerates the list of products that have to be taken into consideration.
34. EN 197-1 Standard’s purpose is described as specifying the composition, requirements and conformity criteria for the 27 distinct *common cement* products, being those common cements described as “traditional” and “well tried” by the different national standardisation-bodies within CEN. The requirements set out in the Standard are stated to be based on the results of tests on cement in accordance with EN 196-1, -2, -3, -5, -6, -7 and -21 (i.e. normative references relating to different ‘Methods of testing cement’). Furthermore, EN 197-1 Standard states that those performance tests for cement available (i.e. setting time, strength and soundness) have been included.
35. Accordingly, EN 197-1 Standard defines each of the 27 common cement products – further grouped in five main cement types – according to the proportions in which the main constituents are to be combined to produce these distinct products in a range of six strength classes. This definition includes requirements the constituents have to meet and mechanical, physical, chemical and durability requirements of the 27 products and strength classes. EN 197-1 Standard also states the conformity criteria and the related rules.

#### **B.5. The Product**

##### **B.5.1. The product in general**

36. Cement can be described as a fine, grey powder, which sets after a few hours when mixed with water, and then hardens in a few days into a solid, strong material. Basically, cement is produced in two steps: in the first one cement clinker is produced from raw materials (basic elements for cement are limestone and clay). In the second step, the grinding of cement clinker produces cement. Possibly additional raw materials are added, forming different types of cement.

##### **B.5.2. Cement complying with EN 197-1 Standard’s criteria**

37. EN 197-1 Standard concerns the so-called “common cements”, distinct from special cements and cements with different hardening processes. They include all common cements which are described by the respective national standardisation bodies within CEN as traditional and well tried.

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<sup>9</sup> The Chairman of CEN/TC 51 was an employee of a Portland Cement Producer.

38. The ‘hydraulic’ hardening of these CEM cements (i.e. cement conforming to EN 197-1 Standard) is primarily due to the hydration of calcium silicates. When appropriately batched and mixed with aggregate and water, they are capable of producing concrete or mortar, which retains its workability for a sufficient time, and after defined periods attains specified strength levels and also possesses long-term volume stability.
39. EN 197-1 Standard distincts 27 common cement products, which are clustered in five main types (CEM I-V). Each cement-type is composed of a certain percentage Portland cement clinker combined with varying levels of constituents (blast furnace slag, silica fume, pozzolanic materials, fly ash, burnt shale or limestone).

#### B.5.2.1. Portland cement

40. Portland cement is EMC’s main concern. Indeed, in its complaint it alleges the existence of substantial barriers to entry into the European cement market for those products able to compete with Portland cement.
41. EMC defines Portland cement as being made by heating limestone (and some other ingredients) to 1450 degrees centigrade in a kiln. The resulting “clinker” is then ground with a small amount of gypsum into a powder.
42. Taking reference of EN 197-1, EMC and Cembureau both consider only cement products complying with the category “CEM I” of the Standard as real Portland cement.
43. According to EMC, Portland cement represents between 80% and 90% of the overall cement market.

#### B.5.2.2. Blended cement types

44. Taking reference of EN 197-1 Standard, blended cement corresponds with the cements in the other four main cement types (CEM II-V). All have Portland cement as the main constituency blended with varying levels of constituents (blast furnace slag, silica fume, pozzolanic materials, fly ash, burnt shale or limestone).

### **B.6. Energetically Modified Cement (EM Cement)**

45. Energetically Modified Cement (EM Cement) technology was developed at Luleaa University of Technology in Luleaa, Sweden by Dr. Vladimir Ronin in the early 1990’s. The EM Cement technology employs a chemical activation process to increase the reactivity of Ordinary Portland Cement (OPC) with high filler and pozzolan replacements.
46. EM Cement is produced by high intensive grinding/activation of Ordinary Portland Cement (hereinafter: “OPC”) together with different materials such as fly ash, blast furnace slag or fine quartz sand. This surface activation of the Portland clinker minerals is believed to create a network of sub-micro cracks, micro defects and dislocations of the cement particles that provide deeper penetration of the water into the cement particles. Accordingly, in EM Cement a greater percentage of the potential binding capacity than the 50 % binding capacity for ordinary Portland cement is achieved. As a result, it is believed that inter grinding Portland cement



with materials as fly ash, blast furnace slag or fine quartz sand, the need for Portland cement production and thus green house gases from cement production can be reduced by about 50 %.

47. According to the complainant, tests comparing the essential properties of EM Cement, mainly EM Cement-50 (i.e. where 50% of the binder consists of quartz sand) with those of OPC have shown that the technical performance of EM Cement is in line with those of ordinary Portland cement.
48. According to the complainant, the benefits of EM Cement are the following:
  - it reduces pollution from cement production by about 50%;
  - it would, if applied globally, reduce total CO2 emissions in the world by about 4%;
  - it reduces the costs of producing cement;
  - it increases the amount of waste materials, such as fly ash that can be used as replacement for Portland cement;
  - it delivers cement products that provide equal and, in some areas, better performance compared to those offered by the cement industry at present.

#### **B.7. The arguments of EMC concerning a violation of Article 81**

49. According to EMC the European Portland producers implemented a series of behaviours that constitute serious violations of Article 81. These behaviours can be summarised as follows :
  - a) the European Portland producers, via Cembureau and the CEN, adopted the EN 197-1 Standard ;
  - b) they constitute a "cartel" in order to create barriers to entry in the European cement market ;
  - c) they divided geographically the European cement market.
50. In general, EMC claims to experience, for several years now, great difficulties to enter the cement market with a product believed to offer an overwhelming combination of performance, cost competitiveness and environmental benefits. This inability to enter the market shows according to EMC that illegal barriers to market entry exist. The most important of these barriers is the EN 197-1 Standard.

##### **B.7.1. The EN 197-1 Standard**

51. The main criticisms of the complainant against the EN 197-1 Standard are the following:
  - a) the EN 197-1 Standard grants the CE conformity marking only to the cements that are "traditional and well tried". EN 197-1 Standard therefore excludes from the market all new cements, like EM Cement;

- b) the EN 197-1 Standard is not a performance based standard but a prescriptive standard. EN 197-1 Standard is prescriptive in that it sets limitations on materials composition of cements rather than taking into consideration their performance.
52. EMC alleges these elements constitute barriers to entry for EMC. EMC states that EN 197-1 Standard results from a strategy planned and executed by the European cement industry, represented by Cembureau, within the CEN. The EN 197-1 Standard therefore breaches Article 81 EC Treaty.
53. EMC alleges that the EN 197-1 Standard has been created by the European Portland cement industry, inter alia through its trade body Cembureau, operating as a cartel to preclude from the market any product or technology, such as EM Cement, other than Portland cement.
54. The complainant claims that the EN 197-1 Standard produces anti-competitive effects on the European cement market, since it precludes from certification any product that contains a lower percentage of Portland cement than prescribed or the use of replacement materials other than those prescribed. As a consequence, products such as EM Cement, even though they perform in line with or better than the performance criteria laid down in the standard, have been excluded from certification and thus from the European market.
55. According to EMC, the anti-competitive effects would be the result of the intentional adoption of a prescriptive standard, which is in breach with the CPD that states that the European standards “shall be expressed as far as practicable in product performance terms”. The complainant considers the adoption of a performance-based standard was practicable.
56. EMC rejects the Cembureau’s argument according to which the introduction of prescriptive elements of the EN 197-1 Standard is justified by the fact that prescriptive criteria reflect the current limit on what, scientifically, can be expressed in performance terms. EMC maintains that there are scientific criteria in order to evaluate the cement on the basis of strict performance terms.
57. EMC alleges that Cembureau, CEN and the Portland cement producers knew about EMC’s technology and patent application for its product. Adopting a performance-based standard would therefore enable EM Cement to enter to market and threaten the dominance of Portland cement. On that account, Cembureau and several Portland cement producers would have “infiltrated” the EN 197-1 Standard writing process and hereby caused this standard to be adopted in a prescriptive form directly prejudicial to EMC’s interests.
58. Moreover, EMC pretends that the standard adoption process was flawed. It believes that the Standard has not been developed in a non-discriminatory and transparent process and that it especially discriminates against products that do not meet the unnecessary prescriptive requirements and who were denied participation to the market.
59. EMC claims that the adoption process of the EN-197-1 Standard demonstrates that Cembureau and CEN (acting through the chairman of the CEN/TC 51 –see above, footnote 9) conspired between them in order to adopt a standard excluding all cements that could compete with Portland cements.

60. In its comments to the Commission's letter of 29 January 2004, EMC provided several letters, sent during the years 1996, 1997 and 1998. These letters were exchanged between Cembureau and DG Enterprise, DG Enterprise and a Dutch producer of Portland cement, DG Enterprise and the CEN and between EMC and DG Enterprise. In these letters, the authors express their views on the criteria that should have been chosen by the CEN for the draft of the new standard. EMC considers that these letters "irrefutably" demonstrate that Cembureau and the Chairman of the CEN/TC 51 acted together in order to ensure that the finalized EN-197-1 Standard fitted entirely the products of Portland cement producers. EMC therefore maintains that Cembureau used its powers in order to impose to CEN the adoption of a standard based on prescriptive criteria that safeguard the dominance of Portland cement to the exclusion of products that could threaten that dominance under a performance based standard.
61. According to EMC, this objective has been realised by means of a control of Cembureau over CEN/TC 51 exercised by the co-operation of the chairman of CEN/TC 51. This latter is an employee of a cement Portland producer member of Cembureau. It was therefore obvious that the Chairman of CEN/TC 51 acted in order to facilitate the Cembureau's strategy concerning the drafting of new standards.
62. EMC maintains that Cembureau's "dominance" has been exercised vis-à-vis the Commission. In this respect EMC quotes the text of a letter addressed to DG Enterprise on 26 March 1996. In this letter Cembureau maintains that it would have to seriously consider its position "should regulation under the Directive be deemed to be only applicable to a small percentage of [Cembureau] products or if an inadequate Standard is proposed as a basis for CE marking". EMC considers that this letter is unmistakable designed to be purposefully intimidating: Cembureau threatens to withdraw its co-operation in the Standard-writing process unless it garners sufficient promises from the Commission towards Cembureau getting its own way, namely a prescriptive standard reserved to Cement Portland producers members of Cembureau.
63. In its comments to the Commission's letter of 29 January 2004, EMC claims that the Commission failed to investigate the role played by Cembureau and by the Chairman of CEN's TC 51 in the adoption process. In particular, the Commission should have investigated and verified if Cembureau controlled CEN/TC 51.

#### **B.7.2. The alleged "cartel" between cement producers**

64. EMC alleges that certain the Portland producers acting together and Cembureau concluded an agreement in order to create barriers to entry in the European cement market. The barriers serve dual purpose of preventing market entry by a product likely to threaten the dominant position of Portland cement, ergo likely to threaten the dominant position of Portland producers in the market. The purpose was achieved through a series of actions executed by the cartel, Cembureau and other participants, by way of a series of concerted practices.
65. According to EMC, the purpose of the participants to the cartel was achieved by lobbying activities undertaken by Cembureau during the CEN/TC-51 process.

66. EMC alleges, without providing any substantive information in this regard, that the participants to the cartel resulted in increased barriers to the entry in the cement market by their horizontal integration and by vertical integration between them and concrete producers and aggregate producers. The participants to the cartel also developed a strategy of misinformation in order to prevent new entries in the cement market.

### **B.7.3. The division of markets**

67. EMC alleges that, by virtue of the foregoing, the Portland cement producers, together with Cembureau, have acted to artificially divide the geographic markets for cement. Again, EMC has submitted no information in support of this allegation.

## **B.8. The arguments of EMC concerning a violation of Article 82**

68. EMC maintains that the above mentioned behaviours of the European cement producers violate not only Article 81 but also Article 82 of EC Treaty.
69. Indeed, EMC claims that the European Portland cement producers dominate the cement market collectively.
70. In this respect, reference is made to Cembureau's website allegedly describing the cement industry as a "natural oligopoly". Additionally, EMC emphasises that 90% of the market consists of Portland cement which production is 100% controlled by the Portland cement producers.
71. According to EMC, the Portland cement producers have upheld their dominance through horizontal integration by a spate of ongoing mergers and acquisitions and by taking the initiative to and guiding the standard-writing process in such a way as to prevent competing products from complying with the standard and thus entering the market. Furthermore, EMC claims that to further strengthen their dominance, the industry actively engaged in gaining a 30-70% control over the concrete and aggregates producers in the EU (vertical integration).
72. EMC strongly believes that in order to secure their dominant position on the cement market, the Portland cement producers aim to eliminate from the market any product or technology other than Portland cement. In this respect, EMC claims that the Portland cement producers use their dominance over the concrete producers to prevent them from purchasing EM Cement. According to EMC, concrete producers are discouraged to purchase its product due to a threat of supply interruption issued by Portland cement producers.

## **C. LEGAL ASSESSMENT**

### **C.1 Article 81**

#### **C.1.1. The EN 197-1 Standard**

##### **C. 1.1.1. The agreement between undertakings**

73. As explained in paragraph 162 of the “Guidelines on horizontal co-operation agreements” (hereinafter “the Guidelines”)<sup>10</sup>, when assessing agreements to set standards under Article 81(1) of the Treaty, one needs to take into account whether the agreement is concluded between private undertakings or set under the aegis of public bodies or bodies entrusted with the general economic interest, such as standards bodies recognised under Directive 98/34/EC.
74. CEN is a standards body recognised under Directive 98/34/EC (see above, paragraph 15) and therefore it has to be considered a body entrusted with the general economic interest. The members of the CEN are not undertakings but national standardisation organisations (see above, paragraph 25). However, it must be underlined that the standards are developed by Technical Committees whose meetings are attended by national delegations. These delegations comprise also representatives of the undertakings interested by the standardisation (see above, paragraph 25).
75. Taking into account the fact that the 197-1 Standard has been developed by the Technical Committee TC-51, whose members are to a large extent representatives of European cement producers, the question arises whether this Standard can be considered an agreement between undertakings, or a decision by an association of undertaking within the meaning of Article 81 of the EC Treaty. It is not necessary to examine this issue in detail in the present case, in view of the analysis below (see paragraphs 80 to 112).

#### **C. 1.1.2. The relevant product market**

76. According to the investigation conducted, the relevant product market is the cement market in general. The EM Cement belongs to this market.
77. According to Commission practice, confirmed by the case law of the Court of First Instance, in terms of relevant product market, grey cement, white cement and clinker constitute separate markets, since each product meets different requirements<sup>11</sup>. On the basis of the data provided by the parties, EM Cement and Portland cement belong to the grey cement market.

#### **C.1.1.3. The relevant geographical market**

78. According to the Commission practice, in terms of relevant geographic market, the cement market may be seen as a set of markets, centred on the various factories, overlapping one another and covering the whole of Europe<sup>12</sup>. The size of each market and the extent of market overlapping, are determined by the distance from the factory.

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<sup>10</sup> Commission notice – Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements, OJ L 3, 6.1.2001, p.2.

<sup>11</sup> Commission Decision of 30 November 1994, Cement, OJ L 343, 30.12.1994, p.1; Judgment of Court of First Instance of 15 March 2000 in joined cases T-25/95 and others, Cimenteries CBR and Others/Commission, [2000] ECR II-491, paragraphs 825-831.

<sup>12</sup> Commission Decision of 30 November 1994 (see previous footnote); Commission Decision of 7 April 2000 in Case No COMP/M.1874- Lafarge/Blue Circle.

#### C.1.1.4. The restriction of competition

79. The EN 197-1 Standard is a standardisation agreement. In this respect, as explained in paragraph 163 of the Guidelines, the Commission normally considers that “standardisation agreements, which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition” and therefore do not fall under Article 81(1) EC. According to the Guidelines, “this normally applies to standards adopted by the recognised standards bodies which are based on non-discriminatory, open and transparent procedures”.

##### C.1.1.4.1. The not-mandatory nature of EN 197-1 Standard

80. The EN 197-1 Standard is not legally mandatory in so far it does not set an obligation for the cement producers to comply with its provisions.
81. However, EMC maintains that the EN 197-1 Standard, notwithstanding the fact that it is *de jure* not-mandatory, in reality it is *de facto* mandatory. In fact, cement not complying with the EN 197-1 Standard has no real possibility to have access to the European markets. The EN 197-1 Standard constitutes therefore an insurmountable barrier to entry into these markets for all cements not complying with its requirements.
82. As indicated above (paragraphs 28 to 31), the products that satisfy the essential requirements set out by CPD can be legally put on the market. The conformity of a product with CPD is certified by EC mark. The EC mark can be given to three different categories of products: a) products that comply with a harmonised standard; b) products that have obtained the ETA; c) products that comply with a recognised national specification.
83. Products that have obtained the EC mark in one of the above mentioned ways are legally put on equal footing and they have the same opportunities to have access to the European markets. There is no difference relating to the manner in which a product obtained the EC mark. All the products that have an EC mark have the same legal status and the buyers can freely chose to buy the product, bearing the EC mark, they prefer.
84. It follows that the cements complying with the EN 197-1 Standard are not the sole cements that can access to the European market. Also cements not complying with EN 197-1 Standard can have such an access, particularly cements having obtained an ETA. The conformity of cement with the EN 197-1 cannot be therefore considered as a *condition sine qua non* for the access to European markets. In these circumstances, the EN 197-1 Standard cannot be considered as a *de facto* mandatory Standard.
85. Cements not falling within EN 197-1 Standard scope, like cement produced by EMC, can have access to European market through the ETA. In this case, they will have equal opportunities than cements complying with EN 197-1 Standard.

86. EMC maintained that the ETA is expensive and that it needs too long delays in order to obtain it. However, EMC failed to provide any details and/or examples about these alleged difficulties. On the contrary, the Commission considers that the ETA process is working adequate and therefore constitutes a real and efficient way to have access to European markets.
87. EMC maintains that numerous contracting authority procurements regulation are specifically drafted only in terms of cement products set out under the European Standard EN 197-1, thus excluding the other cement products bearing the EC mark.
88. In this respect, it has to be underlined that Article 6 of CPD states that Member States shall not impede the free movements of products which satisfy the provision of such directive. In addition, Member States shall ensure that the use of such products shall not be impeded by public bodies or private bodies acting as public undertaking or acting as a public body on the basis of a monopoly position. These principles are applicable to all products satisfying the CPD requirements and bearing the EC mark, including the products having obtained this mark through the ETA process. It has to be therefore concluded that the procurement regulations excluding some cement products bearing EC mark could be assessed on the basis of their compatibility with CPD rather than on the basis of competition rules.
89. According to EMC, the sales of Portland cement, complying with the EN 197-1 Standard, represent between 85% and 90% of total sales of cement in Europe. EMC considers that this fact demonstrates that EN 197-1 Standard is *de facto* mandatory. This assumption cannot be accepted. The fact that Portland cement is prevalent in Europe simply reflects consumers' preferences. This fact has to be analysed taking into consideration that the Portland cement, introduced into the market during the 19th century, is by far the most known and well tried category of cement in the world. It is therefore not astonishing that Portland cement is so widespread in Europe. In these circumstances, the size of Portland cement's sales cannot be considered as an evidence of the *de facto* mandatory nature of EN 197-1 Standard.
90. On the basis of the above, it has to be considered that EN 197-1 Standard is not mandatory, neither *de jure* nor *de facto*. In this respect, EN 197-1 Standard satisfies the condition laid down by the Guidelines in order to consider that a Standard does not restrict competition within the meaning of Article 81(1) of EC Treaty.

#### C. 1.1.4.2. The adoption process of EN 197-1 Standard

91. According to the Guidelines, the Commission normally considers that non mandatory standardisation agreements adopted by the recognised standard bodies which are based on non-discriminatory, open and transparent procedures, do not fall under Article 81(1) EC
92. The EN 197-1 Standard has been adopted by a recognised body that applies non-discriminatory, open and transparent procedures.
93. EMC however maintains that in the case of the adoption process of the EN 197-1 Standard, CEN did not respect these principles. According to EMC, the Standard adoption process was flawed. EMC maintains that the EN 197-1 Standard has not been developed in a non-discriminatory and transparent process especially because it discriminated against products that do not meet the unnecessary prescriptive requirements and it denied to these products participation to the market.

94. EMC claims that the adoption process of the EN-197-1 Standard demonstrates that Cembureau and CEN (acting through the chairman of the CEN/TC 51 – see above footnote 9 and paragraph 32) conspired between them in order to adopt a Standard excluding all cement that could compete with Portland cements.
95. The Commission does not agree with EMC's opinion according to which the letters, exchanged during the years 1996, 1997 and 1998 (see above paragraph 60) "irrefutably" demonstrate that Cembureau and the Chairman of the CEN/TC 51 acted together in order to ensure that the finalized EN-197-1 Standard fitted entirely the products of Portland cement producers. These letters indeed are not sufficient in order to demonstrate an agreement restricting competition.
96. For the reasons indicated in paragraph 101 below, the same conclusion has to be expressed towards the EMC's allegation according to which Cembureau controlled CEN/TC 51 through the chairman of CEN/TC 51, an employee of a cement Portland producer member of Cembureau (see above paragraph 61).
97. The allegations of EMC concerning the adoption process of EN-197-1 Standard cannot therefore be accepted.
98. As mentioned above (paragraph 25) CEN rules state that participation in the European standardisation process is open to all interested stakeholders, is voluntary and is managed at national level. The documents provided by EMC did not demonstrate that these rules were not respected during the adoption process of EN 197-1 Standard. These documents did not mention any case in which national standardisation authorities have been excluded. Furthermore, these documents did not mention any other irregularities in respect to these rules.
99. The documents provided by EMC only prove that, from the beginning of the adoption process of EN-197-1 Standard, EMC was strongly against the criteria drafted by CEN/TC 51. These documents also prove that EMC clearly showed its position, provided several argument in order to justify this opposition and proposed alternative criteria. EMC in particular contacted, at several times, DG Enterprise and the chairman of CEN/TC 51. However, the fact that CEN/TC 51 and DG Enterprise did not agree with the EMC's position and did not accepted EMC's proposals does not prove that the adoption process of EN-197-1 Standard has been not open, discriminatory and non transparent.
100. According to CEN's rules, meetings of CEN Technical Committees are attended by delegations from those national standards organisations that are interested in the subject being discussed. The national delegations comprise experts who could come from a wide range of technical backgrounds, often industrial. The delegations are decided by each national standard organisation (see above, paragraph 25).
101. As mentioned above (paragraph 26), often happens that the national delegations include persons that are employees of enterprises interested by the standard. That fact appears logical and justified, considering that these are normally the experts in relation to the issues discussed. For these reasons, it is not surprising that the Chairman of CEN/TC 51 was an employee of a Portland cement producer. This fact therefore does not prove that the adoption process of EN-197-1 Standard has been not open, discriminatory and non transparent



102. EMC furthermore maintains that Cembureau controlled the activities of CEN/TC 51 and acted with the aim of protecting the products of its members and exclude the products of other producers. The documents provided by EMC do not prove the existence of such a control nor the intention to exclude products from other producers. It is obvious that Cembureau action was directed to protect the interest of its members and that action was exercised towards the entities that could influence the drafting of the Standard, i.e. the Commission services and CEN/TC 51. But documents provided by EMC (see, in particular, the letter mentioned above at paragraph 62) do not demonstrate that the Cembureau's action exceeded the normal "lobbying" activity exercised by all associations gathering the enterprises of an industry in order to protect and promote the interests of the members. The activities exercised by Cembureau during the adoption process of EN-197-1 Standard cannot demonstrate that this process has been not open, discriminatory and non transparent.
103. More in general, the fact that the adoption process of EN-197-1 Standard was characterised by a close cooperation between Cembureau and CEN/TC 51, does not prove in itself that that this process has been not open, discriminatory and non transparent.
104. Furthermore, it has to be underlined that that the competent Commission services (DG Enterprise) were informed about the various steps of adoption process of EN-197-1 Standard. Even if on occasion they expressed some criticism concerning the proposed criteria, they nevertheless concluded that the CEN/TC 51 approach had to be accepted. It has also to be underlined that the Commission published the references of the EN-197-1 Standard in the "C" series of the Official Journal. Furthermore, the Commission services, at several times, expressed the view that the EN-197-1 Standard is compatible with CPD. If the Commission services observed that the adoption process of EN-197-1 Standard had been not open, discriminatory and non transparent they would neither have published in the Official Journal the references of this Standard nor expressed publicly the view that the Standard is compatible with CPD.
105. On the contrary, the documents of CEN acquired by the Commission prove that the adoption process of EN-197-1 Standard has been non-discriminatory, open and transparent.
106. On the basis of the above, it has to be considered that EN 197-1 Standard has been based on non-discriminatory, open and transparent procedure. In this respect, EN 197-1 Standard satisfies the condition laid down by the Guidelines in order to consider that a Standard do not restrict competition within the meaning of Article 81 (1) of EC Treaty.

#### C.1.1.4.3. The nature of the terms of EN 197-1 Standard

107. Taking account of the above, the Commission considers that it is not necessary, in order to assess the compatibility of EN 197-1 Standard with Article 81 of EC Treaty, to examine the question if this Standard is expressed in prescriptive or performance based terms. This question could possibly be relevant for the assessment the compatibility of EN 197-1 Standard with CPD. This assessment however is outside the scope of present proceeding.

108. However, for sake of completeness, the Commission intends to develop some considerations on this question.
109. According to CPD, the Standard shall be expressed as far as practicable in product performance terms, having regard to the interpretative documents. The Mandate M/114 of the Commission services reaffirms this principle.
110. As mentioned above, the competent Commission services (namely DG Enterprise) stated, at several times, that EN 197-1 Standard complies with CPD. These statements demonstrate that these services considered that the EN 197-1 Standard is drafted according to sufficient performance based terms.
111. The Commission considers that the discussion on the prescriptive or performance based terms of EN 197-1 Standard cannot be re-opened in the framework of a proceeding concerning the application of Articles 81 and 82 of EC Treaty.

#### C.1.1.4.5. Conclusion on restriction of competition

112. On the basis of the above arguments, the Commission concludes that the EN 197-1 Standard does not restricts competition within the meaning of Article 81 (1) of EC Treaty.

#### C.1.2. The “cartel” between cement producers

113. EMC alleges the existence of a cartel between certain Portland producers. However, EMC failed to indicate the participants to this alleged cartel and the specific actions that they would have undertaken. EMC limits to maintain that the purpose of these actions is to create barriers to entry in the cement market. The only specific reference done by EMC is to a lobbying activity of Cembureau and its members in the Committee TC-51 responsible for the EN 197-1 Standard. Taking account that the EN 197-1 Standard is not restrictive, as demonstrated before, it cannot be considered that this alleged lobbying activity, even if it would be proved, would be contrary to Article 81.
114. The mere participation of cement producers, inter alia through Cembureau, in the adoption of EN 197-1 can hardly support this assumption. Also, the reference to Cembureau’s website stating that it has “*pioneered work on the development of standards (...) for cement (...)*” does not allow concluding to the alleged cartel. Moreover, the adoption process did not enable Cembureau alone and/or in concert with the Portland cement producers to control the adoption process of EN 197-1 Standard. Indeed, according to CEN’s Internal Regulation, only the CEN national members have a decisive vote. Interested third parties, such as Cembureau, are able to participate, but they are only given a “liaison status” according to which they have a right to make representations, but not to vote.
115. EMC thus failed to provide any evidence to show that Cembureau and the Portland cement producers acted as a cartel and/or made an agreement restricting competition.

#### C.1.3. The market division

116. EMC does not give any explanation concerning the manner in which the European cement producers would have shared the cement market geographically between them.
117. It follows from the foregoing that the elements of information at the Commission's disposal do not indicate the existence of an infringement of Article 81(1) of the EC Treaty in this respect.

## **C.2 Article 82**

### **C.2.1. Collective dominant position**

118. EMC claims that in the European cement market the Portland cement producers are in a situation of collective dominance.
119. According to the Court of Justice, "a dominant position may be held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity"<sup>13</sup>. For the purposes of analysis under Article 82 of the Treaty, "it is necessary to consider whether the undertakings concerned together constitute a collective entity vis-à-vis their competitors, their trading partners and consumers on a particular market. It is only where that question is answered in the affirmative that it is appropriate to consider whether that collective entity actually holds a dominant position and whether its conduct constitutes abuses"<sup>14</sup>. In order to establish the existence of a collective entity, "it is necessary to examine the economic links or factors which give rise to a connection between the undertakings concerned"<sup>15</sup>. The existence of an agreement or other links in law is not indispensable to a finding of a collective dominance position. Such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question"<sup>16</sup>.
120. EMC failed to provide substantiated evidence relating to the circumstances in which the Portland cement producers collectively hold a dominant position. Indeed, EMC has not given any indication of the existence of any link or factors which give rise to a connection between the European cement producers. The mere fact that Portland cement producers are members of Cembureau and that their representatives take part in meetings of the Technical Committee of CEN is not sufficient in order to prove the existence of a collective dominant position.
121. Furthermore, EMC maintains that the Portland cement producers are vertically integrated into concrete and aggregates production. In this regard, it has to be underlined that the vertical integration in itself does not suffice, in itself, to establish

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<sup>13</sup> See judgment of the Court of 16 March 2000 in joined cases C-395/96 P and 396/P, *Compagnie Maritime Belge Transports SA and others /Commission*, paragraph 36.

<sup>14</sup> *Ibidem*, paragraph 39.

<sup>15</sup> *Ibidem*, paragraph 41.

<sup>16</sup> *Ibidem*, paragraph 45.

the existence of a collective dominant position in the upstream market (i.e. the cement market).

122. On the basis of the above, it is not possible to consider that the European Portland cement producers are in a position of collective dominance in the European cement market. In the absence of a dominant position, Article 82 of the EC Treaty is not applicable.

#### **C.2.2. Abuse of dominant position**

123. Given the absence of evidence to suggest that the European Portland cement producers are in a position of collective dominance, it is not necessary to examine if the conduct referred to by the complainant falls under Article 82 of EC Treaty.

### **D. CONCLUSION**

As there are, for the reasons set out above, insufficient grounds for acting on your complaint, the Commission rejects your complaint.

An action challenging this Decision may be brought before the Court of First Instance of the European Communities in accordance with Article 230 of the EC Treaty.

Yours sincerely,

For the Commission,

*Signed*

Neelie Kroes  
Member of the Commission