JUDGMENT OF THE COURT (Second Chamber)

17 June 2010 (*)

(Appeal – Agreements, decisions and concerted practices – Plasterboard – Distortion of the clear sense of the evidence – Burden of proof – No proper statement of reasons – Regulation No 17 – Article 15(2) – Penalty – Repeated infringement – Stage at which the deterrent effect of the fine is to be taken into account)

In Case C-413/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 18 September 2008,

Lafarge SA, established in Paris (France), represented by A. Winckler, F. Brunet, E. Paroche, H. Kanellopoulos and C. Medina, avocats,

appellant,

the other parties to the proceedings being:

European Commission, represented by F. Castillo de la Torre and N. von Lingen, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Council of the European Union,

intervener at first instance,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, P. Lindh, U. Lõhmus, A. Ó Caoimh and A. Arabadjiev (Rapporteur), Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 22 October 2009,

after hearing the Opinion of the Advocate General at the sitting on 11 February 2010,

gives the following

Judgment

1 By its appeal, Lafarge SA ('Lafarge') seeks the setting aside of the judgment of 8 July 2008 of the Court of First Instance of the European Communities (now 'the General Court') in Case T-54/03 *Lafarge* v *Commission* ('the judgment under appeal'), by which it dismissed Lafarge's application for annulment of Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 — Plasterboard) (OJ 2005 L 166, p. 8; 'the contested decision').

Legal context

2 Article 15(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provided:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81] (1) or Article [82] of the Treaty; or

…

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

3 The Commission Notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3; 'the 1998 Guidelines') states in its preamble:

'The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. …

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.'

4 In the terms of Section 1, entitled 'Basic amount', of the 1998 Guidelines:

'The basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17.

A. Gravity

…

It will also be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

Generally speaking, account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognize

that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law.

…'

5 Under Section 2 of the 1998 Guidelines, the basic amount may be increased where there are aggravating circumstances such as repeated infringement of the same type by the same undertaking or undertakings.

Facts

6 In the judgment under appeal, the General Court summarised the factual background to the dispute in the following terms:

'1 The applicant … is a French undertaking active on a worldwide level in the building materials sector. It owns 99.99% of the capital of Lafarge Gypsum International SA ('Lafarge Plâtres'), which manufactures and markets various plaster based products including plasterbroad.

2 Four main producers are active in the plasterboard sector in Europe: BPB PLC [('BPB')], Gebrüder Knauf Westdeutsche Gipswerke KG ('Knauf'), Gyproc Benelux NV ('Gyproc') and Lafarge Plâtres.

3 On the basis of information received, on 25 November 1998 the Commission carried out unannounced inspections at the premises of eight undertakings operating in the plasterboard sector, including Lafarge Plâtres at l'Isle-sur-la-Sorgue (France) and Lafarge in Paris (France). On 1 July 1999, it pursued its investigations at the premises of two other undertakings.

4 The Commission then sent requests for information under Article 11 of Regulation No 17… to the various undertakings concerned, including, on 21 September 1999, Lafarge. Lafarge replied thereto on 29 October 1999.

5 On 18 April 2001, the Commission initiated the administrative procedure and adopted a statement of objections which it addressed to BPB, Knauf, Lafarge, Etex SA and Gyproc. …

…

8 On 27 November 2002, the Commission adopted the [contested] decision.

9 The operative part of the [contested] decision states:

'Article 1

BPB … , the Knauf Group, … Lafarge … and Gyproc … have infringed Article 81(1) [EC] by participating in a set of agreements and concerted practices in the plasterboard business.

The duration of the infringement was as follows:

(a) BPB …: from 31 March 1992, at the latest, to 25 November 1998

(b) [the] Knauf [Group]: from 31 March 1992, at the latest, to 25 November 1998

(c) … Lafarge …: from 31 August 1992, at the latest, to 25 November 1998

(d) Gyproc …: from 6 June 1996, at the latest, to 25 November 1998

…

Article 3

In respect of the infringement referred to in Article 1, the following fines are imposed on the following undertakings:

(a) BPB …: EUR 138.6 million

(b) … Knauf …: EUR 85.8 million

(c) … Lafarge …: EUR 249.6 million

(d) Gyproc …: EUR 4.32 million

…’

10 The Commission found in the [contested] decision that the undertakings concerned participated in a single and continuous agreement which was manifested in the following conduct constituting agreements or concerted practices:

– the representatives of BPB and Knauf met in London (United Kingdom) in 1992 and expressed the common desire to stabilise the plasterboard markets in Germany, the United Kingdom, France and the Benelux;

– the representatives of BPB and Knauf established, as from 1992, information exchange arrangements, to which Lafarge and subsequently Gyproc acceded, relating to their sales volumes on the German, French, United Kingdom and Benelux plasterboard markets;

– the representatives of BPB, Knauf and Lafarge exchanged information, on various occasions, prior to price increases on the United Kingdom market;

– in view of particular developments on the German market, the representatives of BPB, Knauf, Lafarge and Gyproc met at Versailles (France) in 1996, Brussels (Belgium) in 1997 and The Hague (Netherlands) in 1998 with a view to sharing out or at least stabilising the German market;

– the representatives of BPB, Knauf, Lafarge and Gyproc exchanged information on various occasions and concerted their action on the application of price increases on the German market between 1996 and 1998.

11 For the purpose of calculating the amount of the fine, the Commission applied the methods set out in [the 1998] Guidelines … .

12 In fixing the starting amount of the fines, determined according to the gravity of the infringement, the Commission initially considered that the undertakings concerned had committed an infringement which was very serious by its very nature in so far as the aim of the practices at issue was to put an end to the price war and to stabilise the market through exchanges of confidential information. The Commission also considered that the practices at issue had had an impact on the market, because the undertakings in question represented almost all plasterboard supply and the various manifestations of the cartel had been put into practice in a market which, in addition, was highly concentrated and oligopolistic. As regards the geographic extent of the relevant market, the Commission considered that the cartel had covered the four

main European Community markets, namely Germany, the United Kingdom, France and the Benelux.

13 Considering, next, that there was a considerable disparity between the undertakings concerned, the Commission took a differentiated approach, relying for that purpose on the sales turnover for the product concerned on the relevant markets during the last complete year of the infringement. On that basis, the starting amount of the fines was set at EUR 80 million for BPB, EUR 52 million for Knauf and Lafarge and EUR 8 million for Gyproc.

14 In order to ensure that the fine had a sufficiently deterrent effect having regard to the size and global resources of the undertakings, the starting amount of the fine imposed on Lafarge was increased by 100%, becoming EUR 104 million.

15 In order to take account of the duration of the infringement, the starting amount was then increased by 65% for BPB and Knauf, by 60% for Lafarge and by 20% for Gyproc, the infringement being classified by the Commission as of long duration in the case of Knauf, Lafarge and BPB and of medium duration in the case of Gyproc.

16 In respect of aggravating circumstances, the basic amount of the fines imposed on BPB and Lafarge was increased by 50% on account of repeated infringement.

17 Next, the Commission reduced by 25% the fine imposed on Gyproc on account of attenuating circumstances, in that it had acted as a destabilising element helping to limit the impact of the cartel on the German market and it was absent from the United Kingdom market.

18 Finally, the Commission reduced the amount of the fines by 30% for BPB and by 40% for Gyproc, pursuant to Section D.2 of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; ‘the Leniency Notice’). Accordingly, the final amount of the fines imposed was EUR 138.6 million for BPB, EUR 85.8 million for Knauf, EUR 249.6 million for Lafarge and EUR 4.32 million for Gyproc.’

The judgment under appeal

7 Lafarge brought an action for annulment of the contested decision by application lodged at the Registry of the General Court on 14 February 2003. In the alternative, it requested the General Court to reduce the fine imposed on it.

8 By the judgment under appeal, the General Court dismissed that action in its entirety.

Forms of order sought by the parties

9 By its appeal, Lafarge claims that the Court of Justice should:

– set aside the judgment under appeal;

– grant the form of order sought, primarily, at first instance by setting aside the contested decision insofar as it imposed a fine on Lafarge;

– in the alternative, set aside, in part, the judgment under appeal;

– grant the form of order sought, in the alternative, at first instance by reducing the amount of the fine imposed on Lafarge by the contested decision; and

– order the Commission to pay the costs.

10 The Commission contends that the Court of Justice should:

– dismiss the appeal; and

– order the appellant to pay the costs.

The appeal

11 In support of the form of order it seeks, Lafarge raises six grounds of appeal, the first and primary of which seeks the setting aside of the judgment under appeal in its entirety and the five others, in the alternative, seek the setting aside, in part, of that judgment.

The first ground of appeal, alleging distortion of the clear sense of the evidence

Arguments of the parties

12 Lafarge complains that the General Court distorted the clear sense of the evidence in that it systematically referred to the 'overall context' to establish each of the actions held to be infringements. In particular, it submits that such distortion is clear from the statements in the judgment under appeal as regards the circumstances surrounding the system of exchange of information (paragraphs 270 and 271 of the judgment under appeal), the exchange of information specific to the United Kingdom (point 303 of the judgment under appeal), the price rises in the United Kingdom for the period prior to 7th September 1996 (paragraph 324 of the judgment under appeal), the existence of an agreement to stabilise the German market (paragraphs 398 and 402 of the judgment under appeal) and the price rises in Germany in 1994 and 1995 (paragraphs 426 and 430 of the judgment under appeal).

13 The General Court is alleged to have relied on an overall context, whereas its existence is not established and can be established only on the basis of other infringing conduct which is, itself, thus characterised by the General Court only on the basis of that same 'overall context'. The General Court's reasoning is therefore said to be circular.

14 The Commission contends that Lafarge does not indicate, in most of the cases, which evidence was distorted and does not show the errors of appraisal which led the General Court to such distortion. In any event, the Commission contends, the General Court cannot be accused of having referred to a general context which was not established or of having based its decision on circular reasoning, given that it undertook a meticulous examination of various items of evidence.

Findings of the Court

15 It is settled case-law that the Court of Justice has no jurisdiction to establish the facts or, without exception, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it (see Case C-122/01 P *T.Port* v *Commission* [2003] ECR I-4261, paragraph 27, and Case C-167/06 P *Komninou and Others* v *Commission* [2007] ECR I-141, paragraph 40). Save where that evidence has been distorted, its appraisal therefore does not constitute a point of law which is subject, as such, to review by the Court of Justice (see, in particular, Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 26).

16 Where an appellant alleges distortion of the evidence by the General Court, he must, pursuant to Article 225 EC, the first paragraph of Article 51 of the Statute of the Court of Justice

and Article 112(1)(c) of its Rules of Procedure, indicate precisely the evidence alleged to have been distorted and show the errors of appraisal which, in his view, led to such distortion (see, to that effect Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 50).

17 Such distortion exists where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect (see Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 37).

18 The only specific evidence which Lafarge alleges to have been distorted is an internal memorandum of October 1994 discovered at BPB's premises. Lafarge submits that it contains nothing which could lead to the conclusion that competitors had had contacts with each other.

19 In that regard, at paragraph 430 of the judgment under appeal, the General Court rejected Lafarge's statement that it was through customers that BPB was aware of the price increases by Knauf, announced in the memorandum in question. The General Court observed that 'having first summarised the situation on the market, the author of that memorandum explains that Gyproc's sales manager had complained that his firm had lost market share and had to win it back. Further, the memorandum envisaged a price freeze at the level referred to therein and that a price increase would take place from 1 February 1995. That last comment is particularly revealing. If the notification of the price rise announcements by Knauf was unilateral and if the other producers merely followed that price rise, BPB could not have known in October 1994 that a price rise was planned for 1 February 1995, given that Knauf announced that price rise only in November 1994'. Next, the General Court took into consideration other specific evidence, namely, first, the fact that Knauf had stated, in reply to a request for information from the Commission, that there was a long established practice of sending announcements of price increases with price lists directly to competitors at the same time as to customers, secondly, the fact that, during its investigation at BPB's and Lafarge's premises, the Commission had discovered numerous copies of announcements of competitors' price increases and, thirdly, the fact that a price increase had actually taken place on 1 February 1995.

20 It is therefore clear from the judgment under appeal that the General Court examined the internal memorandum in question, not in isolation but in conjunction with other specific items of evidence in the file. Consequently, the complaint relating to that memorandum cannot succeed.

21 As to the remainder, the appellant has not indicated precisely the other evidence which it alleges the General Court distorted. Indeed, it confines itself to indicating the passages in the judgment under appeal in which the General Court referred to an 'overall context', namely paragraphs 271, 303, 324, 398, 402, 426 and 430, without however identifying the actual evidence of which the General Court is said to have made a manifestly incorrect assessment.

22 In circumstances such as those of the present case, the question whether the clear sense of the evidence has been distorted must be examined in light of the fact that it is normal, given that the prohibition on participating in anti-competitive practices and agreements and the penalties which offenders may incur are well known, that the activities which those practices and agreements entail take place in a clandestine fashion, for meetings to be held in secret, very often in a non-member country, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraphs 55 to 57).

23 Although it alleges distortion of the clear sense of the evidence, the appellant is seeking, in reality, to obtain a fresh appraisal thereof, which the Court of Justice has no jurisdiction to undertake.

24 The first ground of appeal must, accordingly, be rejected as being in part inadmissible and in part unfounded.

25 In those circumstances, the appellant's alternative grounds of appeal must be examined.

The second ground of appeal, alleging breach of the rules on the burden of proof, of the principle of the presumption of innocence and of the in dubio pro reo *principle (the principle that the accused be given the benefit of the doubt)*

Arguments of the parties

26 The appellant complains that the General Court infringed the rules on the burden of proof, the principle of the presumption of innocence and the *in dubio pro reo* principle in concluding that the Commission had established to the requisite legal standard that Lafarge's participation in the infringement went back to 31 August 1992. In the regard, the appellant submits that, according to the Court's settled case-law the Court must satisfy itself that the general principles of Community law and the Rules of Procedure applicable to the burden of proof and the taking of evidence have been complied with. In addition, the burden of proving an infringement and its duration lies on the Commission.

27 In this case, the General Court decided, in paragraphs 507, 508 and 510 of the judgment under appeal, that the Commission had established, to the requisite legal standard, Lafarge's participation in the infringement dating from 31 August 1992, since Lafarge stated neither the exact date that its participation started nor the circumstances which led it to engage in an anti-competitive exchange of information. By so doing, the General Court is alleged to have reversed the burden of proof. Such reversal of the burden of proof is also claimed to amount to an infringement of the presumption of innocence and of the *in dubio pro reo* principle.

28 The Commission denies Lafarge's allegations and argues that the General Court merely decided that the evidence referred to in paragraphs 503, 507 and 512 of the judgment under appeal is sufficient to prove Lafarge's participation in the infringement from the middle of 1992, but that Lafarge could have adduced evidence to the contrary, which it failed to do.

Findings of the Court

29 It is clear from the Court's settled case-law that it is for the party or the authority alleging an infringement of the competition rules to prove it and that it is for the undertaking or association of undertakings raising a defence against a finding of an infringement of those rules to demonstrate that the conditions for applying the rule on which such defence is based are satisfied, so that the authority will then have to resort to other evidence (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 78).

30 Even if the burden of proof rests, according to those principles, on the Commission or on the undertaking or association concerned, the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the rules on the burden of proof have been satisfied (see, *Aalborg Portland and Others* v *Commission*, paragraph 79).

31 It is clear from paragraph 515 of the judgment under appeal that the General Court considered that the Commission had established to the requisite legal standard that BPB had

informed Lafarge, at the latest at the end of August 1992, of the agreement between BPB and Knauf on the exchange of information and that, on that occasion, Lafarge had adhered to that agreement. To reach that conclusion the General Court relied, first, on a number of statements by BPB (paragraph 503 et seq. of the judgment under appeal) and, second, on the fact that Lafarge's market share on the main European markets was described in terms of absolute value and as a percentage in tables held by BPB since 1991 (paragraph 512 of the judgment under appeal).

32 Therefore, by stating, in paragraph 508 of the judgment under appeal, that Lafarge had confined itself to emphasising the lack of detail in BPB's statements without however providing the exact date or circumstances which led it to engage in such an exchange of information, the General Court decided, applying the Court's case-law referred to in paragraphs 29 and 30 of the present judgment, that the evidence presented by the Commission was of such a kind as to require the other party to provide an explanation or justification, failing which it was permissible to conclude that the Commission had satisfied its obligations as regards the burden of proof. The General Court thus confined itself to stating that Lafarge had failed to adduce evidence in support of its allegation that its adherence to the agreement to exchange information was necessarily later than June 1993, and even at the start of 1994.

33 It follows that the General Court did not infringe the rules on the burden of proof.

34 Since the complaints alleging breach of the presumption of innocence and of the *in dubio pro reo* principle are based on the alleged reversal of the burden of proof, they must also be rejected.

35 Accordingly, the second ground of appeal is unfounded.

The third ground of appeal, alleging failure to state reasons and breach of the principle of equal treatment

Arguments of the parties

36 Lafarge complains that the General Court did not address its argument alleging unequal treatment between Gyproc and itself, as pleaded in paragraphs 374 and 375 of its application at first instance, and that it thus failed in its obligation to state properly the reasons for its decision. In paragraphs 500 to 518 of the judgment under appeal, the General Court decided, as regards Lafarge, that the evidence accepted by the Commission, namely the reference to Lafarge's market shares in Mr [D's] tables and BPB's statements, prove to the requisite legal standard Lafarge's participation in a single, complex and continuous infringement from 31 August 1992, whereas, as regards Gyproc, the Commission decided that those two elements were not sufficient proof. In its reply, Lafarge adds that it pleaded breach of the principle of equal treatment also in paragraphs 124, 511 and 512 of its application at first instance, without the General Court dealing with it.

37 The Commission submits that the third ground of appeal is inadmissible, since the appellant cannot raise, on appeal, a plea in law which it did not raise before the General Court. In addition, as regards breach of the principle of equal treatment, the Commission observes that Lafarge cannot claim that its situation is the same as Gyproc's, since Gyproc did not participate directly in the exchange of information in 1996 and did not participate at all in such an exchange as regards the United Kingdom market, because it was not active on it. The Commission also contends that the additional matters which Lafarge pleaded in its reply constitute a new plea in law, which was inadmissible at the stage of the reply.

Findings of the Court

38 As regards the General Court's alleged failure to state the reasons for its decision in that it failed to address, in the judgment under appeal, the appellant's argument pleaded in paragraphs 374 and 375 of its application at first instance, as regards unequal treatment between Gyproc and itself, it should be noted that those paragraphs were worded as follows:

'Since [Lafarge's] participation was not established before the end of 1993, or even the start of 1994, the exchange of information was not the first "manifestation" for [Lafarge], since the exchange on sales volumes and the contacts on the subject of prices alleged by the Commission which specifically concerned the British market started earlier.

That being the case, neither one nor the other of those two manifestations – even on the assumption that they were established – obviously could, as such, constitute adherence by [Lafarge] to a single, complex and continuous infringement covering the four main European markets. In addition, the Commission decided that Gyproc's participation in those same manifestations could not be sufficient to establish adherence to a single, complex and continuous infringement'.

39 It is appropriate to observe, first, that no allegation as regards breach of the principle of equal treatment is expressly pleaded in the passage reproduced above. Second, on the assumption that such an allegation could be extracted from it, it is neither sufficiently clear nor precise nor based on detailed evidence intended to support it.

40 The principle of equal treatment precludes, in particular, comparable situations from being treated differently unless such treatment is objectively justified (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95). Yet, as the Commission correctly contends, Lafarge has not even sought to show that its situation was comparable to that of Gyproc, which would have been all the more necessary given that the participation of those two undertakings in the infringement in question is characterised by significant factual differences. The scope of the allegation contained in the last sentence of paragraph 375 of the application at first instance is, consequently, hardly clear.

41 It is settled case-law that the requirement that the General Court give reasons for its judgments cannot be interpreted as meaning that it is obliged to respond in detail to every single argument submitted by the applicant, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence (see Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 121; Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 81; and Case C-404/04 P *Technische Glaswerke Ilmenau* v *Commission* [2007] ECR I-1, paragraph 90).

42 In its reply, the appellant complained that the General Court did not respond to other paragraphs of its application at first instance, namely paragraphs 124, 511 and 512. It is, however, appropriate to point out that those paragraphs cover various findings in the contested decision and relate to very different pleas in law raised before the General Court. As the Commission correctly contends in its rejoinder, the General Court examined, particularly in paragraphs 559 and 637 of the judgment under appeal, Lafarge's allegations relating to the principle of equal treatment. Lafarge did not, in its appeal, criticise those paragraphs of the judgment under appeal.

43 It follows that, by the additional allegations pleaded in its reply, Lafarge is raising, essentially, a new plea in law in the course of the proceedings. Under Articles 42(2) and 118 of the Court's Rules of Procedure, the introduction of new pleas in the course of proceedings is prohibited unless they are based on matters of law or of fact which come to light in the course of the procedure (see, in particular, order of 13 June 2006 in Case C-172/05 P *Mancini* v *Commission*, paragraph 20). Since it was only at the stage of the reply that Lafarge raised this

ground of appeal and since it is not based on matters which have come to light in the course of the appeal it must be rejected as being too late.

44 Accordingly, the third ground of appeal must be rejected as being in part inadmissible and in part unfounded.

The fourth ground of appeal, alleging breach of the principles of proportionality and equal treatment

Arguments of the parties

45 Lafarge submits that the judgment under appeal infringes the principles of proportionality and equal treatment in that it confirms the basic amount of the fine fixed by the Commission in respect of Lafarge, which is disproportionate compared to the basic amount of the fines fixed in respect of the other undertakings concerned by the contested decision. Lafarge contests the statement made by the General Court, in paragraph 634 of the judgment under appeal, that the amounts of fines may be calculated independently of undertakings' turnover. Even if that statement were correct, the Commission chose, in the contested decision, to divide the undertakings concerned into categories based on their respective market shares. It is clear from paragraphs 223 to 232 of the judgment in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181 that once the Commission decides to establish categories on the basis of a criterion such as market shares, the Commission and the General Court must ensure a proportional relationship between, on the one hand, the thresholds of the different categories and, on the other, an undertaking's market share and its classification in one or other category.

46 The basic amount of Lafarge's fine is 6.5 times higher than that of Gyproc's fine even though Lafarge's market share (24%), in category 2, was only 3.4 times higher than that of Gyproc (7%), in category 3. Moreover, whereas Lafarge's market share in 1997 was less than 81% of that of Knauf, those two undertakings were placed in the same category and the basic amount of their fines was fixed at EUR 52 million.

47 In its reply, Lafarge states that it raised a plea in law to that effect before the General Court.

48 The Commission submits that this ground of appeal is inadmissible, because such arguments were not raised by Lafarge in the proceedings at first instance.

49 In addition, Lafarge's arguments are manifestly unfounded. Thus, the Court has confirmed that the members of a cartel may be divided into different categories, the Commission referring in that regard to paragraphs 52 and 53 in the judgment in Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977. Where the Commission decides to divide the undertakings concerned into categories on the basis of their market shares it is not required to ensure that the basic amount of the fine on each undertaking is strictly proportional to its market share. As different undertakings' market shares are generally different that would oblige the Commission to create the same number of categories as there were undertakings concerned, which would defeat the purpose of their division into categories.

50 The Commission maintains also that it chose to divide the undertakings into three categories on the basis of their market shares covered by the cartel during the last complete year of participation in it (namely 1997). Thus, BPB was, as a result of its market share (42%) and its position as largest producer, placed in the first category. Knauf and Lafarge who respectively had market shares of 28% and 24% were placed in the second category. Finally Gyproc, with a market share of 7% and as a very small player, was placed in the third category.

Findings of the Court

51 Lafarge confined itself to arguing before the General Court that, whilst its economic capacity on the German and United Kingdom markets did not enable it to distort competition on those markets and whilst that was the key determinant of competition during the period of the infringement, that fact was not reflected in the basic amount of the fine imposed upon it. By contrast, in connection with this ground of appeal, Lafarge challenges the Commission's entitlement to establish categories of undertakings on the basis of their market shares or, at the very least, the method followed by the Commission to that effect. It follows that Lafarge is making a criticism in that regard for the first time before the Court of Justice.

52 To allow a party to put forward for the first time before the Court of Justice a plea in law and arguments which it has not raised before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the court below (see Case C-266/97 P *VBA* v *VGB and Others* [2000] ECR I-2135, paragraph 79, and Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 114). To that extent, this ground of appeal is inadmissible.

53 So far as it is based on the Lafarge's allegation that the General Court decided, in paragraph 634 of the judgment under appeal, that the amounts of fines can be calculated independently of undertakings' turnover, it must be held that the present ground of appeal is based on an erroneous reading of the judgment under appeal.

54 In fact, on that point, the General Court noted that the Court of Justice held, in paragraphs 255 and 312 of its judgment in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, that the Commission is not required to calculate fines from amounts based on the turnover of the undertakings concerned nor to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their relevant turnover.

55 The fourth ground of appeal must, consequently, be rejected as being in part inadmissible and in part unfounded.

The fifth ground of appeal, alleging errors in law and failure to state reasons as regards increasing the fine for repeated infringement

56 This ground of appeal divides into two parts.

The first part, relating to the existence of a legal basis for increasing the fine for repeated infringement and the limitation period for taking such infringement into account

Arguments of the parties

57 Lafarge complains that the General Court infringed, in paragraphs 724 and 725 of the judgment under appeal, the *nulla poena sine lege* principle in that it decided that the Commission had a legal basis for increasing the fine on Lafarge for repeated infringement. It submits that in almost all the legal systems of the Member States, the courts can increase a fine for repeated

infringement only in the cases and on the conditions strictly laid down by the law. Regulation No 17, it submits, does not empower the Commission to increase fines for repeated infringement.

58 Lafarge also submits that the General Court infringed, in paragraph 725 of the judgment under appeal, the general principle of legal certainty, in that it decided that the Commission could find that there was repeated infringement without any limitation period. In its submission, according to a general principle common to the laws of the Member States, the law fixes, for the application of repeated infringement, a maximum period between the time of commission of the infringement examined and any earlier sanction. In that regard, Lafarge refers to the criminal codes of several Member States. It also cites the judgments of 21 February 1994 of the European Court of Human Rights in *Öztürk*, Series A No 73 and of 25 August 1987 in *Lutz*, Series A No 123-A, from which it is claimed to follow that, given the nature and degree of severity of the sanctions under competition law, those sanctions pertain to 'criminal matters', as defined by that court.

59 In addition, Lafarge invites the Court to reconsider whether its judgment in Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331 is in conformity with the above-mentioned general principles.

60 The Commission notes that precisely the same arguments as those presently submitted by Lafarge were rejected by the Court in that judgment. It contends that, in the present case, it is not necessary to determine whether the findings by the General Court are such that they would make it perpetually possible to increase a penalty for repeated infringement, since the General Court established that Lafarge's subsidiary had continued to participate actively in the cartel for four years after it had been notified of Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 81 of the EC Treaty (Cases IV/33.126 and 33.322 – *Cement*) (OJ 1994 L 343, p. 1), whereas, in the case which gave rise to the judgment in *Groupe Danone* v *Commission*, the Court decided that a period of less than ten years between two infringements was evidence of a tendency not to draw the appropriate conclusions from a finding of infringement of the competition rules.

Findings of the Court

61 As regards the existence of a legal basis for increasing the fine for repeated infringement, it is important to point out that such increases meet the imperative of punishing repeated infringements of the competition rules by the same undertaking.

62 Article 15(2) of Regulation No 17 empowers the Commission to impose fines on undertakings and associations of undertakings for infringements of Articles 81 EC and 82 EC. Under that provision, in determining the amount of the fine, the duration and the gravity of the infringement in question must be taken into consideration.

63 In that regard, as the General Court stated in paragraph 722 of the judgment under appeal, any repeated infringement is among the factors to be taken into consideration in the analysis of the gravity of the infringement in question (see *Aalborg Portland and Others* v *Commission*, paragraph 91, and *Groupe Danone* v *Commission*, paragraph 26).

64 It follows that Article 15(2) of Regulation No 17 constitutes the relevant legal basis for taking repeated infringement into consideration in calculating the fine (see, to that effect, *Groupe Danone* v *Commission*, paragraphs 27 to 29).

65 Consequently, by upholding the Commission's finding that there had been repeated infringement by Lafarge and the characterisation of that repeated infringement as an aggravating circumstance, the General Court did not breach the *nulla poena sine lege* principle.

66 As regards a maximum period outside which repeated infringement cannot be taken into account, it must be emphasised, at the outset, that neither Regulation No 17 nor the 1998 Guidelines prescribe any such period.

67 The Court held in that regard, in paragraph 37 of its judgment in *Groupe Danone* v *Commission*, that the absence of such a period does not infringe the principle of legal certainty.

68 However, Lafarge invites the Court to reconsider the conclusion it reached in that judgment. Lafarge seems to deduce from that judgment that it would be possible for the Commission to increase a fine for repeated infringement with no limitation in time for doing so.

69 Such a deduction, however, is based on an erroneous interpretation of that judgment. In fact, the Court there emphasised that the Commission may, in each individual case, take into consideration the indicia which confirm an undertaking's tendency to infringe competition rules, including, for example, the time that has elapsed between the infringements in question (*Groupe Danone* v *Commission*, paragraph 39).

70 Moreover, the principle of proportionality requires that the time elapsed between the infringement in question and a previous breach of the competition rules be taken into account in assessing the undertaking's tendency to infringe those rules. For the purposes of judical review of the Commission's measures in matters of competition law, the General Court and, where appropriate, the Court of Justice may therefore be called upon to scrutinise whether the Commission has complied with that principle when it increased, for repeated infringement, the fine imposed, and, in particular, whether such increase was imposed in the light of, among other things, the time elapsed between the infringement in question and the previous breach of the competition rules.

71 In the present case, the General Court observed, in paragraph 727 of the judgment under appeal, that the history of the infringements found against Lafarge shows a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed the competition rules, since it had already been the subject of Commission measures imposed previously under Decision 94/815, and since its subsidiary nonetheless continued to participate actively in the cartel in question until 1998, that is for four years after that decision had been notified to it.

72 Accordingly, the General Court did not err in law in holding that the principle of legal certainty had not been infringed because there was no fixed limitation period for taking repeated infringement into account.

73 As regards the complaint alleging breach of a general principle common to the Member States that repeated infringement outside a maximum period cannot be taken into account, that complaint must be rejected as inoperative since, as follows from paragraph 70 of the present judgment, European Union competition law does not authorise the Commission to take account of repeated infringement without any limitation in time.

74 The appellant seeks, in addition, to show, by referring briefly to the judgments in *Öztürk* and *Lutz*, that a penalty imposed by the Commission under competition law comes within the concept of a 'criminal offence' for the purposes of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

75 However, that argument cannot succeed. Even if a penalty imposed by the Commission under competition law were to be regarded as coming within the ambit of a 'criminal offence' for the purposes of Article 6 of that convention, Lafarge has not shown how the General Court infringed its right to a fair hearing as required by that article.

76 The first part of the fifth ground of appeal must, consequently, be rejected.

The second part, relating to the existence of repeated infringement without the first finding of infringement having become definitive

Arguments of the parties

77 Lafarge claims that the General Court infringed a general principle common to the laws of the Member States as well as the principle of legal certainty and the principle that offences and penalties be strictly defined by law, when it found that the Commission was entitled to increase the amount of the fine for repeated infringement even though the decision establishing a previous infringement for similar facts had not become definitive at the time of the facts covered in the contested decision.

78 It submits that under the criminal laws of the Member States, a person is generally considered to be a repeat infringer only if, after he has been convicted definitively for a previous infringement, he commits another. One of the essential elements of repeated infringement is a definitive finding of infringement which requires the exhaustion of legal remedies by the time the second infringement is committed. In the present case, the Commission relied on Decision 94/815 for its finding that Lafarge was a repeat infringer. Lafarge however brought an action for annulment of that decision and the General Court delivered its judgment on 15 March 2000 in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491. Since Lafarge did not appeal against it, that judgment became definitive two months after its notification to Lafarge. The practices covered in the contested decision ended, according to the Commission, in November 1998. Accordingly, at that date, Lafarge had not been the subject of a finding of infringement which had become definitive, since Decision 94/815 was not definitive as the General Court had not yet ruled on that action for annulment.

79 In addition, Lafarge maintains that the General Court also erred in law and, furthermore, failed in its duty to state properly the reasons for its decision by stating, in paragraph 737 of the judgment under appeal, that the Commission's power to find, in a decision, that there had been repeated infringement even in the absence of the earlier decision finding an infringement having become definitive is justified by the recommencement of the time limits for bringing an action for annulment against the second decision where, after the adoption of that decision, the earlier decision is annulled. In actual fact, it submits, no provision of Community law provides for such recommencement of the time limit. Lafarge submits that that error should entail the annulment of the judgment under appeal, since it is contrary to the principles of legal certainty and the sound administration of justice to encumber the person concerned with the burden of vindicating its right, where that right has been violated by an incorrect definition of the meaning of repeated infringement.

80 Although the Commission contends that this part of the present ground of appeal is unfounded, it none the less shares Lafarge's view that no provision of Community law provides for any possibility of recommencement of the time limit for bringing an action for annulment against a Commission decision. The Commission suggests that the Court should make a substitution of grounds since the annulment of an earlier decision penalising an infringement of competition law on which a finding of repeated infringement is based for the purposes of a second decision gives rise to a right, for the undertaking concerned, to apply to the Commission for a re-examination of the second decision. The Commission refers in that regard to Article 233 EC.

Findings of the Court

81 The General Court held, in paragraph 734 of the judgment under appeal, that it is sufficient for the Commission to be entitled to take account of repeated infringement that the undertaking has previously been found guilty of an infringement of the same type, even if the decision concerned is still subject to review by the courts. In that regard, it noted correctly, in paragraph 736 of the judgment under appeal, that decisions of the Commission are presumed to be lawful until such time as they are annulled or withdrawn (see, to that effect, Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 48).

82 In the same paragraph of the judgment under appeal, the General Court noted, again correctly, that actions before the Court do not have suspensory effect. Indeed, Article 242 EC expressly so provides.

83 It follows that, even if a Commission decision is still subject to judicial review, it continues to be of full effect, unless the General Court or the Court of Justice decides otherwise.

84 Accordingly, the appellant's argument that the bringing of an action for annulment of a Commission decision entails the suspension of that decision's application during the legal proceedings, at least so far as concerns the consequences arising from the finding, in a later decision, of any repeated infringement, has no legal basis, but, on the contrary, is inconsistent with, in particular, the wording of Article 242 EC.

85 In addition, if Lafarge's argument were to be accepted, infringers would be encouraged to bring purely dilatory actions, with the sole aim of avoiding the consequences of repeated infringement whilst proceedings were pending before the General Court and the Court of Justice.

86 The General Court's conclusion is therefore correct in law that it is sufficient for the Commission to be entitled to take account of repeated infringement that the undertaking has previously been found guilty of an infringement of the same type, even if the decision is still subject to review by the courts.

87 That conclusion is not undermined if the decision on the basis of which the fine for another infringement was increased in a later decision is annulled by the Courts of the European Union after the adoption of the latter decision.

88 In such a case, the Commission is required, under Article 233 EC, to take the measures necessary to comply with the judgment of the Court, by amending, as appropriate, the later decision in so far as it includes an increase of the fine for repeated infringement.

89 Contrary to Lafarge's submission, that system complies with the general principles of sound administration of justice and procedural economy, since, first, it requires the institution from which the measure in question emanates to take the necessary measures to comply with the judgment of the Court even in the absence of a request to do so from the undertaking concerned and, second, it prevents purely dilatory actions.

90 However, even assuming that the General Court erred in law, as both Lafarge and the Commission submit, in holding, in paragraph 737 of the judgment under appeal, that if an earlier decision, which served as the basis for an increased fine for repeated infringement in a later decision, is annulled after the latter decision has become definitive, there arises a new fact entailing the recommencement of the time limit for bringing an action relating to the second decision, such error cannot give rise to the annulment of that judgment if the operative part of the judgment is shown to be well founded for other legal reasons (see, to that effect, Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 58 and the case-law cited).

91 It follows, in particular, from paragraphs 734 to 736 and 739 of the judgment under appeal that such is the case here. In fact, the General Court based its decision not only on the considerations developed in paragraphs 734 and 736 of the judgment under appeal and set out in paragraph 81 of the present judgment, but also noted, in paragraph 735 of the judgment under appeal, that the assessment of the specific characteristics of a repeated infringement depends on an appraisal of the circumstances of the case by the Commission in the exercise of its discretion. In addition, the General Court distinguished, in paragraph 739 in the judgment under appeal, the present case from the case which gave rise to the judgment in Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-374, in which the greater part of the infringement took place before the first decision, whereas, in the present case, Lafarge continued to participate in the cartel in question for more than four years after the adoption of Decision 94/815, which gave rise to the judgment in *Cimenteries CBR and Others* v *Commission*.

92 As regards the complaint alleging breach of the general principle of legal certainty, it is important to point out that Lafarge confined itself to pleading such a breach, without showing how precisely that principle had been infringed.

93 In that regard, the General Court stated, in paragraph 720 of the judgment under appeal, that Section 2, entitled 'Aggravating circumstances', of the 1998 Guidelines establishes a non-exhaustive list of the circumstances which can lead to an increase in the basic amount of the fine, such as repeated infringement. What is precisely referred to, in the terms of Section 2, is 'repeated infringement of the same type by same undertaking or undertakings' without any requirement for the decision establishing the infringement to be 'definitive' being mentioned. It is settled case-law that the Commission's Guidelines ensure legal certainty for the undertakings concerned by defining the method which the Commission has imposed on itself in order to set the amount of fines imposed under Article 15(2) of Regulation No 17 (see Case C-266/06 P *Evonik Degussa* v *Commission and Council* [2008] ECR I-81, paragraph 53).

94 As regards the complaint of alleged breach of the general principle that offences and penalties be strictly defined, it is appropriate to recall that that principle requires the law to define clearly offences and the penalties sanctioning them (*Evonik Degussa* v *Commission and Council*, paragraph 39). According to the case-law of the European Court of Human Rights, the clarity of a law is assessed having regard not only to the wording of the relevant provision but also to the information provided by settled, published case-law (see, to that effect, its judgment of 27 September 1995 in *G* v *France*, Series A No 325-B, § 25). In addition, the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see the judgment of 25 February 1992 in *Margareta and Roger Andersson* v *Sweden*, Series A No 226, § 75).

95 It is important to note in that regard that, although Article 15(2) of Regulation No 17 leaves the Commission a wide discretion, it nevertheless limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Thus, first, the amount of the fine that may be imposed is subject to a quantifiable and absolute ceiling, so that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Second, the exercise of that discretion is also limited by rules of conduct which the Commission has imposed on itself in the Leniency Notice and Guidelines. In addition, the Commission's known and accessible administrative practice is fully subject to review by the Courts of the European Union, the settled and published case-law of which specifies the undefined concepts which Article 15(2) of Regulation No 17 could contain. A prudent trader, if need be by taking legal advice, can foresee in a sufficiently precise manner the method and order of magnitude of the fines which he incurs for a given line of conduct, and the fact that that trader cannot know in advance precisely the level of the fines which the Commission will impose in

each individual case cannot constitute a breach of the principle that penalties must have a proper legal basis (see, to that effect, *Evonik Degussa* v *Commission and Council*, paragraphs 50 to 55).

96 In the light of all the foregoing considerations, the second part of the fifth ground of appeal must be rejected.

97 It follows that the fifth ground of appeal must be rejected in its entirety.

The sixth ground of appeal, alleging error in law relating to the increase of the basic amount of the fine for deterrent effect

Arguments of the parties

98 Lafarge claims that the General Court infringed, in paragraphs 680 to 684 of the judgment under appeal, Article 81 EC and Regulation No 17 by finding that the Commission was entitled to assess the necessity of increasing the amount of the fine for deterrent effect at the stage of the calculation of the basic amount of the fine, and not at the conclusion of the calculation of the amount of the fine. Lafarge submits that increasing, for deterrent effect, the amount of the fine calculated on the basis of the gravity and duration of the infringement and any aggravating or attenuating circumstances is permissible only when that amount appears insufficient to convince the undertaking and all economic operators of the gravity of the infringement and the need not to repeat it.

99 Lafarge refers also to the Commission Notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') according to which the need for a 'specific increase [of the amount of the fine] for deterrence' is to be assessed in the light of the final amount of the fine, that is to say after the determination of the basic amount and its adjustment by reference to aggravating or attenuating circumstances.

100 The Commission observes that the 2006 Guidelines are not relevant to this case, because the contested decision was adopted under the 1998 Guidelines, which provide that the size and global resources of the undertaking may be taken into account in the assessment of the gravity of the infringement (point 1.A) before taking into account duration (point 1.B). The Commission was entitled to modify its policy on fines in the field of Community competition law. The terms of the 1998 Guidelines and the 2006 Guidelines are similar as they both enable the Commission to take into account the size and global resources of undertakings in the calculation of fines. Moreover, the stage at which the size of the undertaking is taken into account is not relevant as the increase in the fine on that basis is independent of the final amount of the fine.

Findings of the Court

101 As the General Court held in paragraph 657 of the judgment under appeal, the increase of 100% to the basic amount of the fine, as determined with respect to the gravity of the infringement, had its basis in the need to ensure that the fine had sufficient deterrent effect taking into account Lafarge's size and global resources.

102 It should be noted that deterrence is one of the factors to be taken into account in calculating the amount of the fine. It is settled case-law that the fines imposed for infringements of Article 81 EC, as laid down in Article 15(2) of Regulation No 17, are designed to sanction the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other economic operators from infringing, in future, the rules of European Union competition law. The link between, first, undertakings' size and global resources and, second, the need to ensure that a fine has deterrent effect cannot be denied. Accordingly, when the Commission

calculates the amount of the fine it may take into consideration, inter alia, the size and the economic power of the undertaking concerned (see, to that effect, Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 16 and the case-law cited).

103 Lafarge does not take issue with its size and global resources being taken into account, as such, in order to ensure that the fine has sufficient deterrent effect, but complains of the stage at which that consideration took place.

104 It must be emphasised in this regard that the size and global resources of the undertaking in question being taken into consideration in order to ensure that the fine has sufficient deterrent effect resides in the impact sought for on that undertaking, and the sanction must not be negligible in the light, particularly, of its financial capacity.

105 The Court of Justice has thus held that the General Court was justified in taking the view that an undertaking, owing to its 'enormous' worldwide turnover by comparison with the turnovers of the other members of the cartel, could more readily raise the necessary funds to pay its fine, which, if the fine was to have a sufficiently deterrent effect, justified the application of a multiplier (see *Showa Denko* v *Commission*, paragraph 18).

106 In this case, since the fine was calculated by applying multipliers, the order in which those multipliers were applied has no effect on the final amount of the fine, irrespective of the stage at which the multiplier in question was applied.

107 In addition, Lafarge has not attempted to support its assertion that the amount of the fine, had it been determined without taking into account the multiplier for deterrent effect, would have been sufficient to ensure that the fine had such effect.

108 Finally, as regards the appellant's argument based on the 2006 Guidelines, they are not, as the Commission correctly contended, applicable to the facts which gave rise to these proceedings.

109 As to the remainder, the deterrence factor which the calculation of the fine imposed on an undertaking may include is assessed by taking into account a large number of matters and not merely the particular situation of the undertaking concerned (see, to that effect, *Showa Denko* v *Commission*, paragraph 23). It cannot therefore be excluded that the stage of the calculation at which the deterrence factor is taken into consideration could be relevant in the light of the matters taken into account for assessing that factor other than the size and global resources of the undertaking concerned. The appellant has not however shown that that is so in the present case.

110 The sixth ground of appeal must, therefore, be rejected as unfounded.

111 It follows from the foregoing considerations that the appeal must be dismissed in its entirety.

Costs

112 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appeal has been dismissed, the appellant ought to be ordered to pay all the costs. However, as examination of the judgment under appeal has disclosed an error of law pleaded by the appellant in its appeal, the parties should, pursuant to Article 69(3), be ordered to bear their own costs.

113 On the other hand, since the appellant's application for annulment has been dismissed, paragraph 2 of the operative part of the judgment under appeal must be confirmed as regards the costs of the proceedings at first instance.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the parties to bear their own costs of the appeal. The costs of the proceedings at first instance leading to the judgment of the Court of First Instance of the European Communities of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission* shall be borne in the manner set out in paragraph 2 of the operative part of that judgment.**

[Signatures]

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* Language of the case: French.