

JUDGMENT OF THE COURT (Second Chamber)

1 July 2010

(Appeal – Agreements, decisions and concerted practices – Plasterboard – Access to the file – Inculpatory and exculpatory evidence – Concept of ‘undertaking’ – Economic unit – Company responsible for the economic unit’s actions – Argument raised for the first time during the judicial proceedings)

In Case C-407/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 19 September 2008,

Knauf Gips KG, formerly Gebrüder Knauf Westdeutsche Gipswerke KG, established in Iphofen (Germany), represented by M. Klusmann and S. Thomas, Rechtsanwälte,

appellant,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Second Chamber),

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

Advocate General: J. Mazák,

Registrar: K. Malacek, 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, Knauf Gips KG, formerly Gebrüder Knauf Westdeutsche Gipswerke KG (‘Knauf’ or ‘the appellant’), seeks the setting-aside of the judgment of 8 July 2008 of the Court of First Instance of the European [Union] (now ‘the General Court’) in Case T-52/03 *Knauf Gips v Commission* (‘the judgment under appeal’), by which it dismissed Knauf’s application for annulment of Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under [Article 101 TFEU] 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 [101] and [102] 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 101(1) TFEU] or [Article 102 TFEU] ...

...’

Facts

- 3 In the judgment under appeal, the General Court summarised the facts which gave rise to the proceedings before it as follows:

- ‘1 The applicant, Knauf ..., manufactures and markets plaster-based building materials.
- 2 The applicant is a limited partnership created under German law. All its capital is owned by 21 members of the Knauf family and a company which holds the shares of four other members. The personally liable managing partners are Mr B and Mr C.
- 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 the applicant and other undertakings in the Knauf Group. 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. It requested information concerning certain documents obtained from those undertakings’ premises during the inspections in November 1998 and July 1999. Knauf replied thereto on 14 September 1999.
- 5 On 18 April 2001, the Commission initiated the administrative procedure in this case and adopted a statement of objections [“the statement of objections”], which it addressed to the undertakings BPB PLC [“BPB”], Knauf, Société Lafarge SA (‘‘Lafarge’’), Etex SA and Gyproc Benelux NV (‘‘Gyproc’’). The undertakings concerned submitted their written observations and were given access to the Commission’s investigation file in the form of a copy on CD-ROM which was sent to them on 17 May 2001.
- 6 The applicant replied to the statement of objections by letter of 6 July 2001.
- 7 Hearings took place on 17 July 2001. BPB and Gyproc presented part of their case *in camera*.
- 8 By letter of 10 August 2001, the Hearing Officer sent non-confidential versions of BPB’s and Gyproc’s documents to the applicant.
- 9 By letter of 20 August 2001, the applicant requested access to all the documents which had been added to the file since the dispatch of the CD-ROM and, in particular, to the replies of the other undertakings concerned by the administrative procedure to the statement of objections.

- 10 On 7 September 2001, the Hearing Officer sent to the applicant three additional documents which Lafarge had sent to the Commission following the hearing of 17 July 2001.
- 11 By letter of 11 September 2001, the Commission rejected the applicant's request of 20 August 2001 for access to the other documents in the file.
- 12 On 19 November 2002, the Hearing Officer adopted his report.
- 13 On 27 November 2002, the Commission adopted the [contested] decision.
- 14 The operative part of the [contested] decision states:

“Article 1

BPB ..., the Knauf Group, ... Lafarge ... and Gyproc ... have infringed [Article 101(1) TFEU] 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;

...”

- 15 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 [“the London meeting”] 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.
- 16 For the purpose of calculating the amount of the fine, the Commission applied the methods set out in its 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; ...).
- 17 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, since the undertakings concerned represented almost all plasterboard supply and the various manifestations of the cartel had been put into practice in a highly concentrated and oligopolistic market. As regards the geographic extent of the relevant market, the Commission considered that the cartel had covered the four main European [Union] markets, namely Germany, the United Kingdom, France and the Benelux.
- 18 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.
- 19 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.
- 20 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.
- 21 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.
- 22 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.

- 23 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; ...). 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

- 4 Knauf brought an action for annulment of the contested decision by application lodged at the Registry of the General Court on 13 February 2003. In the alternative, it requested the General Court to reduce the amount of the fine imposed on it.
- 5 By the judgment under appeal, the General Court dismissed that action in its entirety.

Forms of order sought by the parties

- 6 By its appeal, Knauf claims that the Court of Justice should:
- set aside the judgment under appeal;
 - in the alternative, refer the case back to the General Court for a fresh decision;
 - in the further alternative, reduce the fine imposed on the appellant by Article 3 of the contested decision in an appropriate manner and, in any event, by at least EUR 54.51 million;
 - order the Commission to pay the costs.
- 7 The Commission contends that the appeal should be dismissed and Knauf ordered to pay the costs.

The appeal

- 8 In support of its appeal, Knauf relies on three grounds of appeal, alleging breach, first, of the rights of the defence, second, of [Article 101 TFEU] and, third, of Article 15 of Regulation No 17.

The first ground of appeal, alleging breach of the rights of the defence

- 9 This ground of appeal divides into two distinct limbs which it is appropriate to examine in turn.
- The first limb of the first ground of appeal, relating to the refusal of access to inculpatory evidence
- Arguments of the parties
- 10 Knauf challenges, in essence, paragraphs 49 and 50 of the judgment under appeal in that the General Court unlawfully failed in its obligation to examine the consequences of the Commission's refusal to give it access to certain items of inculpatory evidence. It submits that since it had identified the inculpatory documents which were not disclosed to it and the passages of the contested decision based exclusively on that evidence, no additional information is necessary to conclude that, had that evidence been excluded, the corresponding parts of that

decision would have been different. Given that those parts concern the material element of the infringement as a whole, the result to which the contested decision led would have been different.

- 11 The Commission contends that the first limb of the first ground of appeal is inoperative, because it criticises a superfluous argument, as is apparent from paragraph 63 of the judgment under appeal. In addition, the Commission claims that Knauf has not shown that the result at which the contested decision arrived would have been different if the appellant had had access to the undisclosed inculpatory documents.

– Findings of the Court

- 12 The General Court held, in paragraph 49 of the judgment under appeal, that, with the exception of some more detailed examples, the appellant merely listed the recitals in the preamble to the contested decision in which the documents to which access was refused are mentioned and concluded that such listing was insufficient to satisfy the obligation under the case-law that an applicant must show that the result at which the Commission arrived in its decision would have been different if the documents in question had been disallowed as evidence against it. Consequently, as is stated in paragraph 50 of the judgment under appeal, the General Court examined the alleged breach of the right of access to the documents as containing inculpatory evidence only in the light of the complaints expressly raised by the appellant.
- 13 In that regard, it is settled case-law that the failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document. If there were other documentary evidence of which the parties were aware during the administrative procedure that specifically supported the Commission's findings, the fact that an incriminating document not communicated to the person concerned was inadmissible as evidence would not affect the validity of the objections upheld in the contested decision. It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraphs 71 to 73).
- 14 The mere listing of the recitals in the preamble to the contested decision in which the documents to which access was refused are mentioned is not capable of showing, by itself, that the result at which the Commission arrived in that decision would have been different if those documents had been disallowed as evidence.

- 15 Accordingly, the first limb of the first ground of appeal must be rejected as unfounded.

The second limb of the first ground of appeal, relating to the refusal of access to exculpatory evidence

– Arguments of the parties

- 16 First, Knauf complains that the General Court erroneously summarised, in paragraphs 64 and 65 of the judgment under appeal, its argument concerning the Commission's refusal to give it access to certain items of exculpatory evidence.
- 17 Secondly, Knauf submits that, in paragraphs 70 to 78 of the judgment under appeal, the General Court incorrectly applied the Court of Justice's case-law relating to exculpatory evidence. Thus, an applicant is required to show not that if it had had access to the replies provided by the other undertakings concerned to the statement of objections the contested decision would have been

different in content, but only that it could have used those documents for its defence. Yet, it alleges, the General Court considered whether the exculpatory evidence cited by the appellant could have had repercussions on the result of that decision.

- 18 Thirdly, Knauf challenges the General Court's finding that BPB's reply to the statement of objections contained no exculpatory evidence. It claims that, according to the general principles concerning evidence, statements made by the other undertakings concerned constitute evidence. Moreover, the fact that the appellant deployed the same arguments in the course of the administrative procedure does not change the nature of such statements.
- 19 Lastly, the appellant complains that the General Court failed to take account of certain passages, which it had invoked as undisclosed exculpatory evidence, in BPB's reply to the statement of objections.
- 20 The Commission contends that the General Court correctly applied the Court of Justice's case-law and did not distort the appellant's argument.
- 21 The Commission contends also that Knauf has confined itself to reproducing the arguments which it had already deployed before the General Court, seeking thus to obtain a further examination of its claims by the Court of Justice, which makes the second limb of the first ground of appeal inadmissible. Moreover, the appellant has not demonstrated how the undisclosed evidence in question would have been helpful for its defence.

– Findings of the Court

- 22 A corollary of the principle of respect for the rights of the defence, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence. Those documents include both incriminating and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (*Aalborg Portland and Others v Commission*, paragraph 68 and the case-law cited).
- 23 As regards failure to disclose an exculpatory document, it is settled case-law that the undertaking concerned need establish only that the non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision. It is thus sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence, in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in any decision, at least as regards the gravity and duration of the conduct in which the undertaking was found to have engaged and, accordingly, the level of the fine (*Aalborg Portland and Others v Commission*, paragraphs 74 and 75 and the case-law cited).
- 24 It follows that it is for the appellant to establish not only that it did not have access to certain exculpatory evidence, but also that it could have used that evidence for its defence.
- 25 The General Court held in that regard, in paragraphs 72 to 77 of the judgment under appeal, that the appellant had not shown that it could have used the undisclosed documents in question for its defence, given that, during the administrative procedure, it had raised the same arguments as those contained in those documents and that those arguments had been rejected by the Commission in the contested decision. It was on that basis that the General Court could conclude, in paragraph 78 of that judgment, that, even if the appellant had been able to avail itself of those documents during the administrative procedure, the Commission's findings could not have been influenced by them.

- 26 The appellant has not put in issue the General Court's findings that it had not shown that it could have used for its defence the documents which were not disclosed to it during the administrative procedure.
- 27 Accordingly, even if the documents in question do, as the appellant claims, constitute exculpatory evidence, that cannot entail the setting-aside of the judgment under appeal.
- 28 Likewise, if, as the appellant argues, the General Court erroneously applied, in paragraph 74 of the judgment under appeal, the case-law referred to in paragraph 23 of the present judgment in holding that the information contained in an undisclosed exculpatory document, namely paragraph 4.2.1 of BPB's reply to the statement of objections, could not have changed the 'final result' of the contested decision, that error could not entail the setting-aside of the judgment under appeal since the appellant did not try to show that it could have used that information for its defence in the light, particularly, of the General Court's finding that the Commission had already taken account of such arguments in that decision.
- 29 That complaint must, therefore, be rejected as inoperative.
- 30 The complaint alleging distortion of the arguments presented by Knauf at first instance, which it alleges were summarised erroneously in paragraph 65 of the judgment under appeal, cannot succeed either.
- 31 An appellant alleging distortion of its own arguments must, under Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and indent (c) of the first subparagraph of Article 112(1) of its Rules of Procedure, indicate precisely the arguments alleged to have been distorted by the General Court (see, by analogy, *Aalborg Portland and Others v Commission*, paragraph 50). However, the appellant has not indicated precisely those of its arguments which it alleges were distorted in the judgment under appeal.
- 32 Moreover, since the appellant does not complain that the General Court failed to respond to its pleas in law and claims at first instance, the question whether the General Court erroneously summarised the appellant's arguments is irrelevant to the result of these proceedings.
- 33 Nor can this Court uphold the complaint alleging failure, by the General Court, to take account of certain passages in BPB's reply to the statement of objections and, particularly, of paragraphs 4.1.16 and 4.2.3 thereof.
- 34 As regards paragraph 4.1.16 of that reply, its main import lies in the statement that 'competition remained intense across the various European markets' despite the 'alleged undertaking' reached at the London meeting. However, the issue of continued competition was addressed by the General Court in paragraphs 72 and 75 of the judgment under appeal.
- 35 As regards paragraph 4.2.3 of BPB's reply to the statement of objections, BPB stated that the figures exchanged between it and its competitors did not form part of its planning process. However, the General Court responded implicitly to the appellant's argument when it examined, in paragraphs 73 and 74 of the judgment under appeal, the statements concerning the purpose of that exchange of information and the alleged fact that the information thus exchanged was known only to Mr D, a director of Gyproc and Chief Executive Officer of BPB.
- 36 Consequently, the second limb of the first ground of appeal must be rejected.
- 37 Hence, Knauf's first ground of appeal must be rejected.

The second ground of appeal, alleging breach of [Article 101(1) TFEU]

Arguments of the parties

- 38 Knauf claims that the General Court concluded that [Article 101(1) TFEU] had been infringed relying, in paragraphs 140 to 298 of the judgment under appeal, on findings based on undisclosed inculpatory evidence. Thus, the General Court did not comply with its own statement, in paragraph 63 of that judgment, that it would not take that inculpatory evidence into account when it examined the substance of the case.
- 39 In addition, the appellant submits that, even taking the undisclosed inculpatory evidence into account, none of the five elements of the infringement found against it, namely the London meeting in 1992, the exchange of information concerning sales volumes in Germany, France, the Benelux and the United Kingdom from 1992 to 1998, the exchange of information on price increases in the United Kingdom during the same period, the agreements on market shares in Germany (meetings at Versailles, Brussels and The Hague) from June 1996 and the agreements on price increases in Germany from 1996, fulfils the criteria for finding an infringement under [Article 101(1) TFEU].
- 40 The Commission submits that the second ground of appeal is inadmissible in its entirety as it concerns only findings of fact by the General Court.
- 41 Furthermore, the Commission notes that Knauf does not deny the existence of a single, continuous infringement on which the contested decision is based. The existence of an anti-competitive practice or agreement is to be inferred, it submits, 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.

Findings of the Court

- 42 As regards, first, the complaint that the General Court relied, to conclude that [Article 101(1) TFEU] had been infringed, on findings based on undisclosed inculpatory evidence, the appellant refers, only in summary fashion, to paragraphs 140 to 298 of the judgment under appeal, without indicating precisely the undisclosed inculpatory evidence on which it alleges that the General Court based its reasoning.
- 43 It follows from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice and indent (c) of the first subparagraph of Article 112(1) of its Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, in particular, Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 34; Case C-248/99 P *France v Monsanto and Commission* [2002] ECR I-1, paragraph 68; and Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, paragraph 121).
- 44 That complaint is, therefore, inadmissible.
- 45 As regards, secondly, the argument that none of the five elements of conduct found against the appellant was an infringement, the General Court found, in paragraph 306 of the judgment under appeal, that it is clear from the contested decision that 'the set of agreements and concerted practices in the present case form part of a series of actions by the undertakings in question pursuing a single economic aim, namely the restriction of competition, and constitute the various manifestations of a complex, continuous agreement the object and effect of which was to restrict competition. In view of the fact that the abovementioned agreements and concerted practices gave, without interruption from 1992 until 1998, substantive shape to the parties' common wish to stabilise, and hence restrict competition on, at least the German, French, United Kingdom and Benelux plasterboard markets, the Commission characterises the infringement as single, complex

and continuous'. In paragraph 321 of that judgment, the General Court rejected the appellant's arguments against the characterisation of the cartel as a single, continuous infringement.

- 46 Knauf does not challenge the General Court's finding of a single, continuous infringement, but confines itself to asserting that none of the elements constituting the infringement imputed to it substantiates an infringement of [Article 101(1) TFEU].
- 47 In that regard, it should be recalled that, in order to establish that there has been an infringement of [Article 101(1) TFEU], the Commission must produce firm, precise and consistent evidence (see, to that effect, Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 127). However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement.
- 48 Therefore, even if, as the appellant asserts, none of the different elements of the infringement in question constitutes, considered separately, an agreement or concerted practice prohibited by [Article 101(1) TFEU], such a conclusion does not prevent those elements, considered together, from constituting such an agreement or practice.
- 49 As the Court has already held, since the prohibition on participating in anti-competitive practices and agreements and the penalties which infringers may incur are well known, it is normal that the activities which those practices and agreements involve take place in a clandestine fashion, for meetings to be held in secret, frequently 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).
- 50 That complaint is, therefore, without foundation.
- 51 Accordingly, Knauf's second ground of appeal must be rejected as being, in part, inadmissible and, in part, unfounded.

The third ground of appeal, alleging breach of Article 15 of Regulation No 17 and [Article 101 TFEU]

Arguments of the parties

- 52 Knauf claims, at the outset, that it is apparent from the wording of paragraph 348 of the judgment under appeal that the General Court failed to act with objectivity and impartiality but, on the contrary, was prejudiced in considering that a fine should be imposed for the acts committed by Gebrüder Knauf Verwaltungsgesellschaft KG ('GKV') and its subsidiaries, although the finding that the subsidiaries had benefited from the infringement in question is not supported by any reasoning.
- 53 The appellant submits that the General Court also infringed Article 15 of Regulation No 17 by concluding that it formed an economic unit with the other companies owned by the Knauf family ('the Knauf Group'), and by imputing to it liability for the activities of those companies.
- 54 Knauf criticises the evidence on which the General Court based its conclusion that it formed an economic unit with GKV and its subsidiaries. In particular, it asserts that the judgment in Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925 is not applicable in this case

since the appellant is not controlled by and does not control another company. In addition, the judgment in Case T-66/99 *Minoan Lines v Commission* [2003] ECR II-5515, to which the General Court referred in paragraphs 350, 351 and 355 of the judgment under appeal, is not applicable either, since that judgment concerns commercial agency arrangements. The same applies to the judgment in Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, since the existence of an economic unit was based, in that judgment, on the fact that all the shares in the different companies were held by the same person, whereas, here, the appellant and GKV are owned by 22 persons, each with a minority shareholding.

- 55 Nor, it is submitted, may a finding of an economic unit be based on the joint control of the appellant and the other companies in the Knauf Group by the numerous shareholders belonging to the Knauf family, since joint control is excluded where shifting or varying majorities are possible among the shareholders. The family contract of 9 December 1994 ('the family contract'), mentioned by the General Court in paragraph 349 of the judgment under appeal, did not place the companies in question under joint control. Knauf submits, in that regard, that the judgment under appeal is inconsistent with the Court's case-law and, in particular, with the judgment in Case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005, in which, according to Knauf, it was held that the simple fact that the share capital of two separate commercial companies belongs to the same person or the same family is insufficient, in itself, to establish that those two companies constitute an economic unit.
- 56 In addition, the fact that the same two shareholders managed all the companies in the Knauf Group and that they represented them during the period when the infringement was observed is alleged to be irrelevant. The same is claimed to apply to the exchanges of information between the companies in that group, the communication of turnovers in connection with the administrative procedure, the fact that most of the documents found during the inspections were on Knauf's letterhead with its address and details, and its capacity as interlocutor during the administrative procedure.
- 57 As regards the imputation to the appellant of liability for the activities of the companies in the Knauf Group, it criticises paragraph 356 of the judgment under appeal, claiming that the fact that it is the only company not managed by GKV does not explain the reason for which the fine was imposed not on GKV but on Knauf alone.
- 58 Knauf argues that there is a contradiction between, on the one hand, the statement, contained in paragraph 357 of the judgment under appeal, that it coordinates the operational activities of the Knauf Group on the relevant market and, on the other hand, that contained in paragraph 337 of that judgment, to the effect that 'there is ... not one legal entity which, at [the] head [of the Knauf Group], could, as the body charged with coordinating the group's activities, be held responsible for the infringements committed by the various companies in the group'.
- 59 Finally, the appellant criticises paragraphs 359 and 360 of the judgment under appeal, according to which it should have challenged, during the administrative procedure, the conclusion that it constituted an economic unit with the other companies in the Knauf Group, or be faced with the prospect of no longer being able to do so before the General Court. It submits that such conclusion infringes the *in dubio pro reo* principle.
- 60 The Commission contests all the arguments put forward by the appellant in support of the third ground of appeal contending that the General Court's findings concerning the existence of an economic unit contain no error of law.

Findings of the Court

- 61 As regards, first, the allegation of the General Court's lack of objectivity and impartiality, based on the finding, in paragraph 348 of the judgment under appeal, that GKV's subsidiaries benefited

from the infringement in question, it is important to note that the Court of Justice has no jurisdiction, on appeal, to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. The appraisal of those facts and the evidence produced to the General Court does not therefore, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice (see Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others v Commission* [2009] ECR I-0000, paragraph 52 and the case-law cited).

- 62 Since the appellant has not alleged distortion of the clear sense of the evidence on which the General Court relied for its conclusion, in paragraph 348 of the judgment under appeal, that GKV's subsidiaries benefited from the infringement in question, its allegation seeks, in reality, to obtain a further appraisal of that evidence, which is not within the jurisdiction of the Court of Justice to undertake. Consequently, that complaint must be rejected as inadmissible.
- 63 As regards, secondly, the allegation of breach of Article 15 of Regulation No 17, Knauf challenges both the General Court's conclusion that GKV and its subsidiaries, on the one hand, and the appellant, on the other, constitute an economic unit in the competition law sense and its conclusion that the appellant is the company responsible for the activities of the Knauf Group.
- 64 As regards the question of the existence of an economic unit, it is settled case-law that the competition law of the European Union covers the activities of undertakings and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-0000, paragraphs 54 and 55 and the case-law cited).
- 65 The existence of an economic unit may thus be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such a unit.
- 66 In this case, the General Court concluded that there was an economic unit on the basis of a body of evidence. Thus, in paragraph 344 of the judgment under appeal, it held, first, that the shareholders in the appellant and the other companies owned by the Knauf family, particularly those owned by GKV, are the same, namely 21 natural persons who are members of that family and a company formed by four other members of that family.
- 67 Secondly, the General Court pointed out, in paragraph 345 of the judgment under appeal, that the two managing shareholders in Knauf, Mr B and Mr C, are also managing shareholders in all the companies in the Knauf Group.
- 68 Thirdly, whilst holding, in paragraph 347 of the judgment under appeal, that GKV has shareholdings in several companies which operate on the plasterboard market and are controlled by the Knauf family, the General Court stated, in paragraph 348 of the judgment under appeal, that GKV is merely a holding company, without staff, managing the portfolio companies which it holds for the 22 shareholders who own it and that it depends for managers and premises on the appellant.
- 69 Fourthly, the General Court took account, in paragraph 349 of the judgment under appeal, of the family contract, Article 1(2) of which provides that its purpose is to ensure the single management and direction of the companies in the Knauf Group. According to paragraphs 3 and 4 of that article, the contract's object is also to guarantee, first, the single and concentrated exercise of the rights of the companies in the whole group and, second, the adoption of decisions concerning the direction, management, organisation and legal form of the company so that they are not hindered by a single shareholder or a small number of shareholders. Among those companies are, particularly, under Article 2 of the family contract, Knauf and GKV.

- 70 Fifthly, the General Court held, in paragraph 346 of the judgment under appeal, that all the appellant's sales figures exchanged in connection with the infringement in question referred to all the companies in the Knauf Group which operate on the plasterboard market and that there was no evidence that Mr B and Mr C did not represent that group in connection with the various manifestations of the infringement.
- 71 Finally, it is clear from paragraph 347 of the judgment under appeal that the appellant itself, without being presented with any requests to that end by the Commission, sent to the Commission all the turnovers of the Knauf Group in its reply of 19 September 2002 to the request for information made under Article 11 of Regulation No 17.
- 72 It was on the basis of that body of evidence that the General Court could conclude, correctly, in paragraph 350 of the judgment under appeal, that the companies belonging to the Knauf family constitute a single economic unit.
- 73 As regards the fact, expressly relied upon by Knauf, that both GKV and itself are owned by 22 shareholders, none of whom has a majority of shares or votes, which makes possible the formation of varying majorities within the different companies in the Knauf Group, the General Court took account of the fact that all those companies are held by the same 22 shareholders, who are, in addition, members of the Knauf family, only in so far as it is only one of the elements capable of establishing the existence of an economic unit. Moreover, the possibility of varying majorities forming within a group of companies does not, by itself, exclude the possibility of the existence of a single economic unit.
- 74 Contrary to Knauf's argument, the General Court did not misapply the judgment in *Aristrain v Commission*. Indeed, the Court of Justice found, in paragraph 99 of that judgment, that the simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit. As is clear from what is stated in the preceding paragraph, the General Court did not rely solely on the fact the companies in the Knauf Group are owned by the same family to conclude that there was an economic unit.
- 75 Knauf also challenges the relevance of the family contract to which the General Court referred in paragraph 349 of the judgment under appeal. In its submission, that contract is intended only to enable, in future, the shareholdings constituting the capital of the companies in the Knauf Group to remain in the possession of members of the Knauf family. Its purpose is, in addition, to prevent those companies being controlled by certain shareholders or groups of shareholders.
- 76 Even if the family contract's objectives are actually those mentioned in the preceding paragraph, the appellant does not deny that the contract's purpose, as expressly stated in its Article 1(2), is 'to ensure the single management and direction of the Knauf undertakings'.
- 77 The appellant submits, in addition, that the fact that Mr B and Mr C are the managers of all the companies in the Knauf Group is irrelevant as regards the existence of an economic unit, since that fact does not exclude the possibility that the different companies in that group are independent under competition law. However, the fact that those companies are managed by the two same shareholders actually permits the single management and direction thereof for the purposes of Article 1(2) of the family contract.
- 78 As regards the exchanges of sales figures of all the companies in the Knauf Group which operated on the plasterboard market in connection with the infringement in question, it is appropriate to point out that, contrary to the appellant's submission, that fact is an additional item of evidence tending to indicate that those companies acted, at least during the infringement, as an economic unit with a common interest.

- 79 The allegation that the General Court infringed the *in dubio pro reo* principle in holding, in paragraph 346 of the judgment under appeal, that there was no evidence that Mr B and Mr C did not represent the Knauf Group in connection with the infringement cannot be accepted. In fact, in paragraph 346, the General Court simply held that the evidence submitted to it indicated that Mr B and Mr C played a representational role for that group in connection with the infringement and that no evidence had been produced before it to establish that such was not the case.
- 80 In that regard, according to the Court's case-law, it is for the party or the authority alleging an infringement of the competition rules to prove the existence thereof and it is for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence. Thus, although according to those principles the legal burden of proof is borne either by the Commission or by the undertaking or association concerned, the factual 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 burden of proof has been discharged (see *Aalborg Portland and Others v Commission*, paragraphs 78 and 79).
- 81 Knauf also claims that certain judgments on which the General Court relied to arrive at the judgment under appeal are irrelevant.
- 82 As regards the judgment in *Stora Kopparbergs Bergslags v Commission*, it should be noted that the General Court did not refer to that judgment for the conclusion that there was an economic unit. Besides, the fact that, in the present proceedings, the subsidiary is not wholly owned by a parent company, contrary to the facts of the case which gave rise to that judgment, does not exclude the possible existence of an economic unit, in the competition law sense.
- 83 As regards the judgment in *Minoan Lines v Commission*, the General Court cited it only as a point of reference in support of considerations of general application in competition matters, without drawing any analogy between the specific facts of the case which gave rise to that judgment and those of the present case.
- 84 Indeed, the General Court observed, in paragraphs 350, 351 and 355 of the judgment under appeal, referring to settled case-law, that the concept of an 'undertaking' in competition law must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal, and that such an economic entity consists of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind in [Article 101(1) TFEU]. The General Court also decided that, where a group of companies constitutes one and the same undertaking, the Commission may impute liability for an infringement committed by the undertaking and impose a fine on the company responsible for the actions of the group in the context of the infringement.
- 85 The same applies to the judgment in *HFB and Others v Commission*, since it is clear from paragraph 343 of the judgment under appeal that the General Court referred to that judgment only as an example in order to illustrate the relevance, to the determination as to the existence of an economic unit, of certain factual matters, such as, in particular, the fact that the same person had key functions within the management bodies of the companies in the group and the fact that that person represented, at directors' meetings, the various companies and that those companies were allocated a single quota for the purposes of the cartel.
- 86 It follows from the foregoing that the General Court did not err in law in finding that the companies belonging to the Knauf family constitute an economic unit.

- 87 As regards the appellant's role within the Knauf Group, the General Court held, in paragraph 358 of the judgment under appeal, that it presented itself, during the administrative procedure, as sole interlocutor with the Commission and did not deny that capacity at any time during that procedure. In paragraph 359 of that judgment, the General Court pointed out that, while it appeared that the Commission considered, in the statement of objections, that the infringement concerned the entire Knauf Group and that, on the basis of the information contained in that statement, the appellant could not have been unaware that it was liable to be the addressee of a final decision of the Commission, it none the less replied to the Commission without putting in issue its role as the company responsible for the actions of that group in connection with the infringement.
- 88 The General Court concluded, in paragraph 360 of the judgment under appeal, that, in such a situation, the onus was on the appellant to react during the administrative procedure, or be faced with the prospect of no longer being able to do so, by demonstrating that, despite the factors relied on by the Commission, the appellant could not be held liable for the infringement committed by the companies in the Knauf Group.
- 89 In that regard, as the appellant correctly argues as regards the application of [Articles 101 and 102 TFEU], there is no requirement under the law of the European Union that the addressee of the statement of objections must challenge its various matters of fact or law during the administrative procedure, if it is not to be barred from doing so later at the stage of judicial proceedings.
- 90 Although an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well founded, it cannot restrict the actual exercise of a natural or legal person's right to bring proceedings before the General Court under the fourth paragraph of Article 263 TFEU.
- 91 In the absence of a specific legal basis, such a restriction is contrary to the fundamental principles of the rule of law and of respect for the rights of the defence. Moreover, the rights to an effective remedy and of access to an impartial tribunal are guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union which, under the first subparagraph of Article 6(1) TEU, has the same legal value as the Treaties. Under Article 52(1) of that charter, any limitation on the exercise of the rights and freedoms recognised by the charter must be provided for by law.
- 92 Consequently, in holding that the onus was on Knauf to react during the administrative procedure, or be faced with the prospect of no longer being able to do so before the Courts of the Union, the General Court erred in law.
- 93 Accordingly, first, the judgment under appeal must be set aside in so far as the General Court found, in paragraph 362 thereof, that the appellant was the company responsible for the actions of the Knauf Group in connection with the infringement, and, second, the rest of the appeal must be dismissed.

The plea in law before the General Court, alleging breach of Article 15(2) of Regulation No 17

- 94 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, that court must quash the General Court's decision. It may then itself give final judgment in the matter, where the state of the proceedings so permits. That is the case here.
- 95 As regards the appellant's role within the Knauf Group, it must be examined whether the Commission made an error of assessment in considering it solely responsible for the actions of

the companies in that group, which together constitute an economic unit, as has been established in paragraph 86 of the present judgment.

- 96 It is apparent from the group structure chart provided by the appellant in reply to a written question from the General Court that, in 2001, at the apex of that group were three companies, namely the appellant, GKV and Knauf Fiber Glass GmbH. The last company, the centre of activities of which is in the United States, did not, however, operate on the plasterboard market.
- 97 That same chart reveals that GKV owns, directly or indirectly, dozens of companies, many of which do operate on that market.
- 98 It should, therefore, be examined whether the Commission was entitled to impute liability for the infringement in question to Knauf and not to GKV.
- 99 That would be the case if GKV did not determine its conduct on the market in question independently.
- 100 In order to decide whether a company determines its conduct on the market independently, account must be taken of all the relevant factors relating to the economic, organisational and legal links which exist between it and the company in the same group which is considered to be responsible for the actions of that group, and which may vary from case to case and cannot therefore be set out in an exhaustive list (see, by analogy, *Akzo Nobel and Others v Commission*, paragraph 74).
- 101 In the present case, first, it has been established that GKV is only a holding company, with no staff, managing portfolio companies which it holds for the 22 shareholders who own it, and that finding has not been criticised by Knauf.
- 102 Secondly, it is clear from paragraph 497 of the contested decision that GKV depends on Knauf both for its premises and for its staff, at least in part; that finding has moreover not been challenged by the appellant.
- 103 Thirdly, it is established that Knauf is the only company in the Knauf Group which operates on the market in question and which is not managed by GKV.
- 104 Fourthly, most of the Knauf Group's documents seized by the Commission during the inspections were printed on the appellant's letterhead which gives its details. Even if that company was correct in arguing, as it did on the appeal, that those documents were photocopied by chance or selected intentionally by the Commission's officials responsible for the inspection, the fact remains that it has not adduced any evidence capable of supporting that argument.
- 105 Fifthly, according to the group structure chart mentioned in paragraph 96 of the present judgment, among the companies in the Knauf Group which operate on the plasterboard market, the appellant is the company with by far the largest relevant turnover. That fact indicates its predominance within that group, at least as regards that market.
- 106 It follows from the preceding findings that, in reality, GKV does not determine its conduct on that market independently, but is dependent in that regard on Knauf.
- 107 Contrary to the latter's argument, the fact that there is no single legal person at the apex of the Knauf Group is no obstacle to the appellant being held liable for the actions of that group.

- 108 Indeed, the legal structure particular to a group of companies, which is characterised by the absence of a single legal person at the apex of that group, is not decisive where that structure does not reflect the effective functioning and actual organisation of the group.
- 109 Consequently, the lack of subordinating legal links between the appellant and GKV cannot cast any doubt on the conclusion that the former of those two companies must be held liable for the activities of the Knauf Group, since it is established that, in reality, GKV does not determine its conduct on the plasterboard market independently.
- 110 It follows that the Commission made no error of assessment in holding that the appellant should be considered to be responsible for all the activities of the Knauf Group.
- 111 Accordingly, the fourth plea in law in the action brought by the appellant before the General Court, alleging breach of Article 15(2) of Regulation No 17, must be rejected.

Costs

- 112 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, it is to make a decision as to costs.
- 113 Under Article 69(2) of those rules which, under Article 118 thereof, applies to appeals, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 69(3) of those rules, the Court may, where each party succeeds on some and fails on other heads of claim, order that each party shall bear its own costs.
- 114 In this case, since both Knauf and the Commission have been unsuccessful in part in their claims on the appeal, it is appropriate to decide that each of them shall bear its own costs relating to the appeal.
- 115 By contrast, since the action for annulment brought by Knauf has been dismissed, paragraph 2 of the operative part of the judgment under appeal must be confirmed as regards the costs relating to the proceedings at first instance.

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

1. **Sets aside the judgment of 8 July 2008 of the [General Court] in Case T-52/03 *Knauf Gips v Commission* in so far as it imputes to Knauf Gips KG liability for the infringements committed by the companies constituting the Knauf Group;**
2. **Dismisses the rest of the appeal;**
3. **Dismisses the action brought by Knauf Gips KG for annulment of Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under [Article 101 TFEU] against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 – Plasterboard);**
4. **Orders each party to bear its own costs relating to the appeal and Knauf Gips KG to pay all the costs at first instance.**

[Signatures]