tion with para. 19; see also Opinion of Advocate General *Bot* of 26 January 2010, C-409/06 *Winner Wetten GmbH ./. Bürgermeisterin der Stadt Bergheim*, para. 76; ECJ *Placanica et als.*, *supra* [Fn. 9], paras. 67 and 69.

[21] ECJ *Winner Wetten*, *supra* [Fn. 15], para. 71; see also Opinion of Advocate General *Bot* of 26 January 2010, C-409/06 *Winner Wetten*, paras 84 and 110 *et seq*.

[22] For example ECJ of 6 November 2003, C-243/01 *Gambelli et al*, paras 62 *et seq*; ECJ *Placanica et als.*, *supra* [Fn. 9], para. 53; ECJ [1999] ECR I-7289 *Questore di Verona ./. Diego Zenatti*, paras. 35 and 36; see also *Talos/Stadler,* WOGLR [4/2009] 12-13.

[23] ECJ *Markus Stoß et als., supra* [Fn. 15], para 103; ECJ of 8 September 2010, Case C-46/08 *Carmen Media Ltd ./. Land Schleswig-Holstein,* para. 71.

[24] ECJ *Markus Stoß et als.*, *supra* [Fn. 15], para. 103.

[25] See *Carmen Media*, *supra* [Fn. 23], para. 71 and answer to the second preliminary question.

[26] *Idem.*, para. 70.

III.

Alexandr Svetlicinii, Florence*

Epilogue of the Plasterboard Litigation: How Much Legal Certainty in the Commission's Treatment of Repeated Infringements?

(Lafarge SA ./. European Commission, ECJ (Second Chamber), Judgment of 17 June 2010, C-413/08 P)

The ruling concerns the enforcement of the Commission's recidivism policy, i.e. taking into account prior infringements of competition law when calculating the amount of the fine. The ECJ reaffirmed the Commission's discretion in that area by rejecting any fixed limitation periods and dismissing the appellant's argument that Commission's prior infringement decisions have to become definite in order for the Commission to consider the existence of a repeated infringement.

(1) Facts and Procedure

On 27 February 2002 the Commission adopted its *Plasterboard* decision[1] establishing that four major players on the Community plasterboard market BPB, Knauf Group, Lafarge and Gyproc conspired to stabilize prices in Germany, France, UK and the Benelux. The Commission based its conclusion on various information, exchange arrangements and subsequent developments (concerted price increases) on the plasterboard markets. The Commission concluded that the undertakings concerned had committed an ***infringement of Article 81(1) EC*** (now Article 101(1) TFEU) which aimed at putting an end to a price war and stabilizing the market through exchanges of confidential information. For Lafarge the starting amount of the ***fine*** was set at EUR 52 million, which was then increased by 100% in order to ensure that the fine had a sufficiently deterrent effect. It was subsequently increased by 60% for the duration of the infringement and by 50% for aggravating circumstances (repeated infringement)[2], which brought the final amount of the fine imposed on Lafarge to EUR 249.6 million. On 14 February 2003 Lafarge challenged the Commission's decision before the ***General Court*** (GC). The appellant's claim was based on the alleged violation of procedural rights, manifest error of assessment, and infringement of the general principles in calculation of the fine. The appeal was dismissed by the GC.[3]

In the subsequent ***appeal*** of the GC's judgment before the Court of Justice (ECJ), Lafarge argued that the contested ***judgment*** was ***inadequately reasoned*** because the GC failed to address the argument raised by Lafarge at first instance relating to the ***unequal treatment*** of Lafarge as compared with Gyproc. Namely, the appellant noted that while the Commission concluded that reference to Lafarge's market share in certain documents presented a sufficient evidence for proving Lafarge's participation in a single, complex and continuous infringement, the same evidence appeared insufficient in relation to Gyproc. The Commission claimed that such a plea was inadmissible because the appellant failed to raise it at first instance. According to settled case law, the obligation of the GC to state reasons for its conclusions cannot be interpreted as requiring the Court to respond in detail to every single argument used by the appellant.[4] Although the words «discrimination» or «unequal treatment» were not used by Lafarge at first instance, AG *Mazak* considered that the substance of Lafarge's claim was sufficiently clear and should have been addressed by the GC. The total absence of reasoning with respect to the question of discrimination, according to AG *Mazak*, constituted a sufficient

ground for setting aside the GC's judgment because it did not allow the ECJ to decide whether the contested judgment is in breach of the principle of equal treatment.[5]

Apart from challenging the Commission's findings of the specified infringement, the appellant also contested the methodology used by the Commission in setting the amount of the fine; particularly the increase of the basic amount due to the existence of a ***repeated infringement*** on the part of Lafarge. Referring to earlier case law,[6] the GC stated that the presence of a repeated infringement is one of the factors to be taken in to account when assessing the gravity of an infringement.[7] Lafarge argued that the GC's approach infringed the principle of legal certainty by allowing the Commission to sanction the undertakings for their past behavior without any ***limitation*** period common to the national legal systems of the Member States. The Commission considered that such arguments were definitely rejected by the ECJ in the *Danone* case.[8] In that case the ECJ agreed with AG *Maduro* that repeated infringement is an important factor which the Commission must appraise, since the purpose of taking repeated infringement into account is to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct.[9] The ECJ also emphasized that the appraisal of the specific characteristics of a repeated infringement comes within the Commission's margin of discretion and that the Commission cannot be bound by any limitation period.[10] According to AG *Mazak*'s understanding of *Danone*, the ECJ merely indicated that a static and inflexible limitation period would undermine the discretion of the Commission in determining the amount of fines. At the same time, it should not mean that undertakings may be punished indefinitely for their past infringements of competition law.

Another issue raised by the appellant was related to the way in which the Commission determined the existence of the repeated infringement. According to the Commission's decision, the anti-competitive practices ended in November 1998. At that time Lafarge ***had not yet been condemned definitively*** for participation in the price cartel as the GC had not yet issued its *Cimenteries CBR* judgment, which established that Lafarge had taken part in an illegal agreement in the cement sector.[11] The GC held that it was sufficient that the undertaking was found guilty of an infringement of the same type even if the decision was still subject to review by the Court.[12] That holding was based on the presumption of lawfulness that should be accorded to the Commission's decisions until they are definitively annulled by the Court. The GC added that if the first decision punishing an infringement were to prove unfounded, that would constitute a new fact causing time for bringing an appeal to start running again («*si la première décision sanctionnant une infraction se révélait non fondée, il s'agirait d'un fait nouveau entraînant la réouverture des délais de recours*»).[13] The Commission argued that if an action which was brought against the first decision would prevent the Commission to take into account the «repeated infringement» factor, the objectives of the competition policy would be undermined.[14] It disagreed with the GC's approach and proposed an alternative scenario for resolution of such cases: (1) where the first decision finding a breach of competition law is annulled, the undertaking in question can ask the Commission to re-examine the second decision; and (2) a refusal by the Commission to carry out such a ***re-examination*** could be subject to annulment proceedings before the GC.

In its opinion AG *Mazak* argued that neither the Treaty nor any other provisions of EU law provide for a time limit for an action for annulment of Commission decisions to restart. The solution proposed by the GC, according to AG *Mazak*, «would impose an abnormal and unfair burden on the undertaking in question and would thus infringe the principle of sound administration of justice and procedural autonomy».[15] The Advocate General concurred with the appellant and the Commission on the point that the time for bringing an appeal is fixed by Article 230 EC (now Article 263 TFEU) and cannot start running again. It advised the ECJ to set aside the GC's judgment in so far as it rejected Lafarge's claim that the Commission had erred in finding that there was a repeated infringement while its first decision had not yet become definitive.[16]

(2) **Judgment**

In relation to Lafarge's plea alleging the GC's ***failure to state reasons*** and ***breach of the principle of equal treatment***, the ECJ noted that ***no allegation*** as regards breach of the principle of equal treatment ***was expressly pleaded*** in its application at first instance as suggested by the appellant. Even if such allegation could be extracted from the wording of the application indirectly, «it was neither sufficiently clear nor precise nor based on detailed evidence intended to support it».[17] The principle of equal treatment requires that comparable situations should

be treated alike unless there is an objectively justified reason for derogation from this principle.[18] Since in the present case the participation of Lafarge and Gyproc in the infringement was characterized by significant factual differences, the ECJ stated that it was on Lafarge to show that its situation was comparable to that of Gyproc.[19]

As to Lafarge's claim concerning the ***absence of any limitation periods*** for sanctioning the repeated infringement, the ECJ stated that it was based on an erroneous interpretation of the *Danone* judgment. In *Danone* the ECJ stated that the absence of such a limitation period does not infringe the principle of legal certainty.[20] According to the Court, Lafarge incorrectly interpreted this judgment by concluding that it would be possible for the Commission to increase the fine for repeated infringement with no limitation in time for doing so. The ECJ emphasized that the principle of proportionality requires the Commission to take into account the time elapsed between the infringement in question and the prior infringement(s) in order to assess the undertaking's ***tendency to breach competition rules*** again. Thus, instead of relying on a non-existing limitation period, the undertakings sanctioned for competition law violations can argue before the Court that the Commission did not comply with that principle. Taking into account the history of the infringements found against Lafarge and the fact that its subsidiaries continued to participate in the cartel following the adoption of the first Commission's decision, the ECJ concluded that the GC did not err in law by holding that the principle of legal certainty was not infringed because there was no fixed limitation period for considering the repeated infringements.[21]

The ECJ also addressed the second heading of Lafarge's claim concerning the existence of the repeated infringement in the ***absence of a definitive decision*** in that regard. The ECJ aligned with the GC on the point that decisions of the Commission should be ***presumed lawful*** until the time when they are annulled or withdrawn.[22] Furthermore, pursuant to Article 242 EC (now Article 278 TFEU) actions before the Court do not have suspensory effect. According to the ECJ, the acceptance of Lafarge's argument would encourage dilatory actions which would be initiated in order to avoid the consequences of repeated infringement.[23] The ECJ has thus endorsed the consideration of the «repeated infringement» factor even if the initial decision is still under review. The ECJ agreed with the Commission's statement that following an ***annulment of the initial decision***, the Commission, as required by Article 233 EC (now Article 266 TFEU), has to take corrective action and amend the fine, which was calculated taking into account the existence of the repeated infringement.[24] The above solution, according to the ECJ, provides a balance between the interests of the parties and objectives of the competition policy: (1) correcting measures have to be taken by the Commission; and (2) purely dilatory actions for annulment are prevented.[25] The ECJ did not address the approach taken by the GC that the annulment of the initial infringement decision constitutes a new fact entailing the recommencement of the time limit for bringing an appeal in relation to the second decision. The Court stated that, assuming that the GC erred in law, such an error cannot lead to the annulment of the judgment because its operative part is well founded on other legal grounds.[26]

(3) **Commentary**

The epilogue of the *Plasterboard* litigation[27] in the *Lafarge* case is notable *inter alia* for the discussion on the application of the Commission's policy on ***recidivism in EC competition law***. Although in this case the Commission's methods for setting the fines were reviewed under Regulation 17[28] and the 1998 Guidelines,[29] the discussion on the consideration of repeated infringement as an aggravating circumstance leading to an increase of the basic amount remains valid under Regulation 1/2003[30] and the 2006 Guidelines.[31] The wording of the 1998 Guidelines mandated an increase of the basic amount of the fine for «repeated infringement of the same type by the same undertaking(s)».[32] The 2006 Guidelines further explained that «repeated infringement» means that the Commission or a national competition authority (NCA) had found earlier that the undertaking in question infringed Article 81 or 82 EC (now Articles 101 and 102 TFEU).[33] In the *Lafarge* judgment the ECJ has expressly confirmed that the Commission's (or, under the 2006 Guidelines – that of the NCAs) ***decision establishing the previous infringement does not have to be definitive***, i.e. the judicial review of the Commission's decision does not preclude the Commission from taking it as a basis for finding the existence of a repeated infringement. The ECJ has thus managed to strike a balance between the need for an expedient antitrust enforcement and prevention of dilatory tactics on one hand, and procedural rights of the undertakings on the other. The latter have to rely on the self-correction mechanism under Article 266 TFEU. The balanced approach taken by the ECJ seems to be ***supported by the litiga-***

tion statistics: during the period of 1998-2009 the fines were appealed in 52 out of the 56 cartel cases (or 93%) by one or more firms; out of the 32 decided appeals only 3 of the Commission's decisions were annulled for legal reasons.[34] This data demonstrates that while the likelihood of an appeal is very high, the chances that the Court will annul the Commission's finding of an infringement, at least in cartel cases, are very low. The fact that in many cases the Court has reduced the fines initially imposed by the Commission would have no relevance for establishing the existence of a repeated infringement.

The *Lafarge* judgment also reflects the Court's general approach towards the Commission's determination of fines, i.e. taking into account various attenuating and aggravating circumstances that can lead to a reduction or an increase of the basic amount. The appellant had raised the issue of the period of ***limitation*** for considering previous infringements of EC competition law. It argued *inter alia* that the absence of any limitation period for considering previous infringements would be contrary to the principle of legal certainty and that Regulation 17 did not empower the Commission to increase fines for repeated infringements. The same argument could be used in relation to Regulation 1/2003,[35] which was the basis for adopting the 2006 Guidelines. Both Regulations mandate the Commission to take into account the gravity and duration of an infringement. In its preceding case law cited in the *Lafarge* case the ECJ stated that repeated infringement is among the factors to be taken into consideration in the analysis of the gravity of the infringement in question.[36] Because it is not entirely clear how the recidivism as an aggravating factor follows from the obligation of the Commission to consider the «gravity» and «duration» of the infringement, it was argued that the Regulations do not provide the necessary clear and unambiguous legal basis for considering repeated infringements.[37] Nevertheless, the ECJ confirmed that Regulation 17 (and consequently Regulation 1/2003) constitutes the relevant legal basis for taking repeated infringement into consideration when calculating the fine.[38]

After reaffirming that the Commission is empowered to consider repeated infringements when determining the amount of the fine, the ECJ upheld its ruling in *Danone* and emphasized that neither Regulation 17 nor the 1998 Guidelines prescribe any ***maximum period*** outside which repeated infringement cannot be taken into account.[39] That should have been expected, however, since neither of the Regulations contains any references to the repeated infringement they could not be a source from which the period of limitation could be extracted. Both the 1998 and 2006 Guidelines which specify the consideration of repeated infringements do not contain any limitation periods. As a result, the Commission's discretion in considering past infringements would be ***limited only by the general principle of proportionality***, whereby in each individual case the Commission would have to take into consideration the indicia that confirm the offender's tendency to infringe competition rules, including the time that has elapsed between the infringements in question.[40] The ECJ held that the Commission's guidelines should ensure ***legal certainty*** by defining «the methods which the Commission imposed on itself in order to set the amount of fines».[41] The Commission's guidelines, however, do not impose any periods of limitation or any criteria other than the maximum percentage for increase of the basic amount on the ground of a repeated infringement.[42] While the ***Commission's practice*** might provide some guidance on the relevance of time periods elapsed between the infringements, one should note the GC's statement in *Michelin*: «the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in [the Regulation] and in the Guidelines».[43] The main signal that the Commission intended to communicate with the adoption of the 2006 Guidelines was its increased focus on the economic significance of the infringement and on deterrence. In order to achieve these objectives, the 2006 Guidelines justify the increase of the fine for each prior infringement, which reaffirmed the Commission's ***rejection of any limitation periods***. The *Lafarge* judgment indicates full support of the Court in relation to the Commission's policy on setting the fines based on a ***wide discretion*** of the latter in considering various aggravating and attenuating factors. Therefore, offenders with the past history of competition law infringements should expect that each of their prior infringements might trigger a 100% increase of the basic amount, without much regard to the timing of the prior infringements. The only fixed limitation that the Commission is expected to respect is the cap of 10% of the offender's total annual turnover established in Article 23(2) of Regulation 1/2003. This reinforces the Commission's message regarding its stricter fining policy: «Don't break the anti-trust rules; if you do, stop it as quickly as possible, and once you've stopped, don't do it again».[44]

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1 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, Societe Lafarge SA and Gyproc Benelux NV (Case No. COMP/E-1/37.152 *Plasterboard*), OJ 2005 L 166, p. 8.

2 The Commission has previously adopted a decision imposing fines on Lafarge for participation in a cartel in the cement sector. Since Lafarge continued to participate in the *Plasterboard* cartel even after notification of the above decision the Commission concluded that sanctions imposed in the first case did not lead Lafarge to modify its conduct and therefore constituted aggravating circumstances. See Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 - *Cement*), OJ 1994 L 343.

3 GC of 8 July 2008, T-54/03 *Lafarge ./. Commission* (the judgment is available in full text in French only on the website of the Court of Justice).

4 ECJ [2001] ECR I-1611 *Conolly ./. Commission*, para. 121; ECJ [2003] ECR I-8461 *Belgium ./. Commission*, para. 22.

5 Opinion of Advocate General *Mazak* of 11 February 2010, C-413/08 P *Lafarge SA ./. Commission*, paras. 52-55.

6 ECJ [2004] ECR I-123 *Aalborg Portland and Others ./. Commission*, para 91: «Objective factors such as the content and duration of the anti-competitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements».

7 Paras. 721 and 722 of the GC Judgment.

8 ECJ [2007] ECR I-1331 *Groupe Danone ./. Commission*.

9 *Id*., para. 39. See also Opinion of Advocate General Poiares *Maduro* of 16 November 2006, C-3/06 P *Groupe Danone ./. Commission*, para. 30.

10 *Id*., para. 38.

11 GC [2000] ECR II-491 *Cimenteries CBR and Others ./. Commission*.

12 Para. 734 of the GC Judgment.

13 *Id*., para. 737.

14 Opinion of Advocate General *Mazak* of 11 February 2010, C-413/08P *Lafarge SA ./. Commission*, para. 96.

15 *Id*., para. 91.

16 *Id*., paras. 99 and 100.

17 Judgment, para. 39.

18 *Id*., para. 40, with reference to ECJ [2006] ECR I-403 *IATA & ELFAA ./. Department for Transport*, para. 95.

19 *Id*., para. 40.

20 ECJ *Danone*, *supra* [Fn. 8], para. 37.

21 Judgment, para. 72.

22 *Id*., para. 81, with reference to ECJ [1994] ECR I-2555 *Commission ./. BASF and Others*, para. 48.

23 *Id*., para. 85.

24 *Id*., para. 88.

25 *Id*., para. 89.

26 *Id*., para. 90, with reference to ECJ [2000] ECR I-5843 *Salzgitter ./. Commission*, para. 58.

27 See also ECJ of 1 July 2010, C-407/08 P *Knauf Gips ./. Commission*.

28 EEC Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.02.1962, p. 204.

29 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 (1998 Guidelines).

30 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, Article 23.

31 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (2006 Guidelines).

32 Para. 2 of the 1998 Guidelines.

33 Para. 28 of the 2006 Guidelines.

34 See *Veljanovski*, European Cartel Prosecutions and Fines, 1998-2009 – A Statistical Analysis of Fines under the 1998 Penalty Guidelines (March 3, 2009). Available at SSRN: http://ssrn.com/abstract=1016014.

35 Article 23 of the Regulation 1/2003.

36 ECJ *Aalborg Portland*, *supra* [Fn. 6], para. 91; ECJ *Danone*, *supra* [Fn. 8], para. 26.

37 See *Nordlander*, The Commission's Policy on Recidivism: legal certainty for repeat offenders?, CompLRev 1(1) [2005] 55, available at http://www.clasf.org/CompLRev/Issues/Vol2Issue1Article3.pdf

38 Judgment, para. 64.

39 *Id*., para. 66.

40 ECJ *Danone*, *supra* [Fn. 8], para. 39.

41 Judgment, para. 93; ECJ [2008] ECR I-81* *Evonik Degussa ./. Commission and Council*, para. 53.

42 The Commission's practice under the 1998 Guidelines was to increase a fine by 50% where the undertaking was found to have been previously involved in one or more similar infringements. Under the 2006 Guidelines the increase may be up to 100%.

43 GC [2003] ECR II-4071 *Michelin ./. Commission*, para. 254.

44 Press release IP/06/857 of 28 June 2006, Competition: Commission revises Guidelines for setting fines in antitrust cases.

IV.

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Verträge über die betriebliche Altersvorsorge von Beschäftigten in Kommunen und kommunalen Betrieben sind ausschreibungspflichtig!

(Kommission ./. Bundesrepublik Deutschland, EuGH (Grosse Kammer), Urteil vom 15. Juli 2010, C-271/08)

Die Kommission leitete gegen die Bundesrepublik Deutschland ein Vertragsverletzungsverfahren betreffend die betriebliche Altersvorsorge durch Entgeltumwandlung nach dem Gesetz über die Verbesserung der betrieblichen Altersvorsorge (BetrAVG) ein. Der EuGH (Gerichtshof) hatte sich in erster Linie mit der Frage zu befassen, ob und inwieweit in einem Tarifvertrag[1] die Vertragspartner der kommunalen Mitarbeiter für die betriebliche Altersvorsorge (Zusatzversorgungseinrichtungen) benannt werden dürfen, ohne diese zuvor in einem wettbewerblichen Vergabeverfahren ermit-