

OPINION OF ADVOCATE GENERAL

MENGGOZZI

delivered on 11 January 2007¹

1. By judgment of 21 April 2005² ('the contested judgment'), the Court of First Instance dismissed an application brought by Holcim (Deutschland) AG against the Commission in which it sought reimbursement of bank guarantee charges incurred to enable it to defer payment of fines that were imposed for infringement of Article 85 of the EC Treaty (now Article 81 EC) by a decision that was subsequently annulled by the Court of First Instance

Facts

3. By Commission decision of 30 November 1994 ('the Cement decision'),³ the companies Alsen Breitenburg Zement und Kalkwerke GmbH ('ABZK') and Nordcement AG were ordered to pay fines of EUR 3.841 million and EUR 1.85 million respectively for infringing Article 85 of the EC Treaty.

2. In this appeal, the appellant asks the Court of Justice to set aside the contested judgment and to order the Commission to reimburse those costs and to pay default interest.

4. ABZK and Nordcement challenged that decision before the Court of First Instance and, exercising an option offered by the Commission, they both decided to make arrangements for a bank guarantee to be

¹ — Original language: Italian

² — Case T-28/03 *Holcim (Deutschland) v Commission* [2005] ECR II-1357.

³ — Commission Decision 94/815/EC relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1).

provided to the Commission, thus avoiding the need to pay the fines immediately.

2003, the applicant claimed that the Commission should be ordered to pay the sum indicated in the foregoing point, plus default interest at the rate of 5.75% per annum from 15 April 2000, and also the costs of the proceedings.

5. By judgment of 15 March 2000 ('the *Cement* judgment'),⁴ the Court of First Instance, among other things, annulled the Cement decision to the extent to which it related to Alsen AG, with which ABZK and Nordciment had in the meantime merged, the resultant company being Holcim (Deutschland) AG ('the appellant').

8. In the contested judgment, the Court of First Instance dismissed the application and ordered the applicant to pay the costs.

6. The appellant then asked the Commission to reimburse the costs incurred by it in setting up the abovementioned bank guarantees, in the total sum of EUR 139 002.21. The Commission declined to do so.

9. As a preliminary point, the Court of First Instance considered that the application was inadmissible to the extent to which it was based on Article 233 EC⁵ and dismissed as inadmissible the claim made by the applicant in the alternative that the action, in so far as it was based on Article 233 EC, should be interpreted as an action for annulment or for failure to act⁶.

Procedure before the Court of First Instance and the contested judgment

7. By application lodged at the Registry of the Court of First Instance on 31 January

10. The Court of First Instance also found that the application contained a claim for damages under Articles 235 EC and the second paragraph of Article 288 EC.⁷ It took the view, however, that that claim was inadmissible in that it was time-barred under Article 46 of the Statute of the Court of Justice, in so far as it was concerned with

4 — 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 ('Cement')* [2000] ECR II-491.

5 — Contested judgment, paragraphs 27 to 40 and paragraph 1 of the operative part.

6 — *Ibid.*, paragraphs 41 to 46 and paragraph 2 of the operative part.

7 — *Ibid.*, paragraphs 41 and 46.

bank guarantee charges incurred by the applicant more than five years earlier than the date on which the action was brought.⁸

11. In that connection, the Court of First Instance observed that, according to the case-law, the limitation period for proceedings against the Community for non-contractual liability cannot begin to run before all the requirements governing the obligation to make good the damage are satisfied. According to the Court of First Instance, the damage alleged in this case occurred when the bank guarantees were provided (namely 3 May 1995 for ABZK's guarantee and 18 April 1995 for Nordcement's guarantee) and from that time the appellant was in a position to bring proceedings to establish the Community's non-contractual liability, relying on the existence of future but certain and quantifiable damage, since the harm was foreseeable with sufficient certainty. The Court also observed that the alleged damage was ongoing, since the expenses in respect of those guarantees were calculated in proportion to the number of days for which they remained in force. The Court therefore observed that the limitation period applied, by reference to the date of the event that interrupted the limitation period, to the period preceding that date by more than five years, without affecting rights which arose during subsequent periods, and that the limitation period had been interrupted only by the bringing of the action.⁹

12. On the other hand, when considering the substance the Court of First Instance held, with regard to the claims for compensation that were not yet time-barred, that the application was unfounded because two preconditions for the non-contractual liability of the Community to be incurred were not satisfied.

13. First, the Court held that the infringement of Community law found in the *Cement* judgment as regards ABZK and Nordcement was not a sufficiently serious breach within the meaning of the Community case-law. In that regard, the Court of First Instance found that in the circumstances of the case the Commission's discretion was indeed 'reduced', but that the subject-matter of the *Cement* decision and the *Cement* judgment was particularly complex and that the Commission was therefore faced with a situation that was very difficult to regulate, inter alia because of the difficulties of applying the provisions of the EC Treaty in matters relating to cartels, which were all the greater because the factual elements of the case were numerous.¹⁰

14. Also, the Court of First Instance held that the causal link between the conduct attributed to the defendant and the alleged damage could not be classified as sufficiently direct within the meaning of the Community case-law. According to the Court,¹¹ the bank guarantee charges incurred by the applicant

8 — Ibid., paragraph 74, and paragraph 3 of the operative part.

9 — Ibid., paragraphs 59, 60, 63, 68 to 70 and 74.

10 — Ibid., paragraphs 100, 102, 114 and 115.

11 — Ibid., paragraphs 123 and 124.

resulted from the free choice made by it not to discharge its obligation to pay the fines within the time-limit laid down in the Cement decision and, by setting up a bank guarantee, to derogate from the EC Treaty rules which, on the one hand, make Commission decisions enforceable instruments which entail pecuniary obligations on persons other than States¹² and, on the other, do not attribute suspensory effect to actions brought before the Community judicature.¹³

- order the Commission to pay it the sum of EUR 139 002.21, plus default interest at the rate of 5.75% per annum as from 15 April 2000, or, in the alternative, refer the case to the Court of First Instance for it to deliver a further judgment;

- order the Commission to pay the costs.

Proceedings before the Court of Justice and forms of order sought

15. By application lodged at the Registry of the Court of Justice on 13 July 2005, the appellant appealed against the abovementioned judgment.

17. The Commission contends that the Court of Justice should:

16. The appellant claims that the Court of Justice should:

- dismiss the appeal;

- annul the contested judgment;

12 — First paragraph of Article 192 of the EC Treaty (now first paragraph of Article 256 EC).

13 — First sentence of Article 185 of the EC Treaty (now the first sentence of Article 242 EC).

- order the appellant to pay the costs.

Legal analysis

from an illegal decision imposing fines could not have a successful outcome without a prior judgment upholding an action for the annulment of that decision.

The first ground of appeal, concerning partial time-barring of the right to compensation

Arguments of the parties

18. The appellant claims that the Court of First Instance misinterpreted the rules on limitation in Article 46 of the Statute of the Court of Justice. It states that, according to the case-law of the Court of Justice, the limitation period for actions to establish liability of the Community cannot start running until all the preconditions for the obligation to pay compensation are fulfilled.¹⁴ Because, in the appellant's opinion, the Cement decision had to be annulled before the Commission's liability to reimburse it for bank guarantee charges could arise, the limitation period applicable to the right to compensation started to run only when the *Cement* judgment was delivered. The appellant submits that an action to recover compensation for damage resulting

19. According to the appellant, the Court of First Instance wrongly considered the claim for compensation to be independent from the claim for annulment in rejecting the appellant's argument concerning the starting date of the limitation period. The appellant points out in that connection that, in this case, it cannot be said that the two types of action are wholly independent of each other in so far as the damage suffered was directly linked to the bringing of the action for annulment. It was necessary to provide bank guarantees specifically in order to bring that action against the Cement decision.

20. Moreover, the Court of First Instance failed to consider that, when the bank guarantees were set up, the damage had not yet occurred. At that time, contrary to the finding of the Court of First Instance, the damage was, in the appellant's opinion, neither determined nor determinable, given that its quantum depended on the duration of the action for annulment before the Community Court.

¹⁴ — Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer v Council and Commission* [1982] ECR 85, paragraph 10.

21. The appellant also maintains that the Court of First Instance erred in law in considering that the damage was ongoing. On the contrary, there was a single instance of damage, consisting in the provision, under a sole contract, of the bank guarantee and the fact that in consequence the banks charged commission. The fact that the extent of that damage depends on the duration of the annulment proceedings does not mean that that damage arose repeatedly and gradually. Furthermore, the Court of First Instance contradicted itself by saying, in paragraph 63 of the contested judgment, that it was a case of future damage whilst concluding, on the other hand, at paragraph 69 of the same judgment, that the damage increased progressively.

bank guarantees were provided, the damage was determined or at least determinable, it being possible to calculate the amount of the commissions payable by the appellant to the banks on the basis of the rates laid down for that purpose in the guarantee contracts; the Court of First Instance did not therefore err in law by concluding that the alleged damage had sufficiently materialised at that same time. The appellant's argument that the alleged damage was not ongoing merely confirms that the damage arose when the bank guarantees were set up and not when the *Cement* judgment was delivered. Finally, the argument put forward by the appellant in the alternative is also unfounded, in that it is clear from the wording of Article 46 of the Statute of the Court of Justice that the limitation period is interrupted by the bringing of an action for damages but not by the bringing of an action for annulment.

22. In the alternative, the appellant criticises the Court of First Instance for failing to recognise at least that the limitation period applicable to the right to reimbursement of the bank guarantee charges had already been interrupted before the action for damages was brought, namely when proceedings were instituted for annulment of the *Cement* decision.

Analysis

23. The Commission observes that the appellant's main argument ultimately boils down to perceiving the origin of the alleged non-contractual liability as the *Cement* judgment, which is absurd. The fact is that the origin of the liability should be seen as the *Cement* decision or the provision of the bank guarantees. It also states that, when the

24. Under Article 46 of the Statute of the Court of Justice, '[p]roceedings against the Communities in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto'.

25. As the Court has had occasion to observe, the purpose of limitation periods is to reconcile the rights of individuals with the principle of legal certainty.¹⁵ By virtue of settled case-law, the limitation period for actions to establish non-contractual liability against the Community cannot start to run before all the requirements governing an obligation to pay compensation for damage are satisfied and, in particular, not before the damage to be made good has materialised.¹⁶

26. The appellant considers that, in this case, one of the preconditions for the Community's non-contractual liability to arise was the annulment of the Cement decision.

27. I consider that view to be without foundation.

28. It will be remembered that non-contractual liability of the Community and the right to compensation for harm suffered depend on a number of conditions concerning the existence of an unlawful measure adopted by

the Community institutions, actual damage and a causal relationship between them.¹⁷

29. However, first, there is nothing in the Community case-law to suggest that the condition regarding wrongful conduct on the part of the institution concerned is satisfied only when that wrongful act is ascertained in legal proceedings. A judicial finding concerning that act is obviously a necessary precondition for a judicial finding as to the non-contractual liability of the Community, but it does not in fact affect the creation of that liability or the running of the limitation period for an action for compensation.

30. To argue otherwise would ultimately put a claimant itself in the position of being able to cause time to run or not run for the purposes of the limitation period. Indeed, that period would not run until the claimant had brought an action (for annulment or to establish liability, or both) *and* secured a finding that the institution's conduct was unlawful.

31. It seems clear to me that the time bar rules place the onus on the applicant himself,

15 — Order in Case C-136/01 P *Autosalone Ispra dei Fratelli Rossi v Commission* [2002] ECR I-6565, paragraph 28.

16 — *Birra Wührer and Others v Council and Commission*, paragraph 10, and the Order in *Autosalone Ispra dei Fratelli Rossi v Commission*, paragraph 30.

17 — *Birra Wührer and Others v Council and Commission*, paragraph 9, Case C-104/97 P *Atlanta v European Community* [1999] ECR I-6983, paragraph 65; and the Order in *Autosalone Ispra dei Fratelli Rossi v Commission*, paragraph 29.

possibly aided by legal advisers, to appraise the legality of the institution's conduct. That is the view correctly taken by the Court of First Instance in paragraph 65 of the contested judgment, where it observes that, as soon as the Cement decision was adopted, the applicant was entitled to allege an infringement of Community law. Moreover, the same Court had earlier made it clear, in its judgments in *Hartmann v Council and Commission*¹⁸ and *Bühning v Council and Commission*,¹⁹ that the running of the limitation period is triggered by the victim's awareness of the event giving rise to the damage, not the illegality thereof.

32. Second, contrary to the appellant's assertion, it was likewise not necessary for the Cement decision to have been annulled before it could be concluded, in this case, that the damage to be made good had materialised.

33. In that connection, the Court of First Instance observed in the contested judgment that, when the bank guarantees were provided, the damage complained of by the applicant was future damage, but certain and quantifiable damage, in so far as it was sufficiently foreseeable. For that reason, the Court of First Instance took the view that the applicant was in a position to establish the Community's non-contractual liability from

that very moment and that, in the circumstances, the limitation period had begun to run.²⁰

34. By that reasoning, the Court of First Instance appears to consider that the limitation period for actions to establish Community non-contractual liability necessarily runs from the time when it becomes possible to exercise that right of action. Moreover, a view to that effect has already been clearly expressed by Advocate General Capotorti,²¹ who observed in that regard that 'all periods of limitation for legal actions start to run on the date from which the right of action accrues' and that, 'in so far as it is considered that proceedings under Articles 215 and 178 of the EEC Treaty [now Articles 288 EC and 235 EC] may be instituted even in respect of future damage ... the date on which the period of limitation starts to run is the date from which the right of action accrues'.

35. I am not however persuaded by that approach, which does not seem to be consonant with the inferences to be drawn from the case-law of the Court of Justice. It seems to me, as it does to the appellant, that such an approach wrongly confuses the question of the limitation period with that of the admissibility of an action for compensation.

18 — Case T-20/94 [1997] ECR II-595, paragraph 112.

19 — Case T-246/93 [1998] ECR II-171, paragraph 68.

20 — Contested judgment, paragraphs 60 to 63 and 68.

21 — Opinions delivered on 13 October 1981 in *Birra Wührer and Others v Council and Commission*, and in Case 51/81 *De Franceschi v Council and Commission* [1982] ECR 108, point 4.

36. It is clear, on the one hand, from the case-law of the Court of Justice that Article 288 EC does not preclude applications to the Community judicature for a declaration as to the Community's liability for imminent damage which is foreseeable with some degree of certainty, even if the extent of the damage is not yet precisely quantifiable. According to the Court of Justice, it may be necessary, in order to avoid greater damage, to start proceedings as soon as the cause of the harm is certain.²²

37. On the other hand, it is apparent from the case-law of the Court of Justice that the limitation period for actions to establish Community liability cannot begin to run before the damage to be compensated for has materialised, that is to say before the harmful effects of the Community's unlawful act have occurred.²³

38. It follows, as I see it, that it is quite possible to bring an action for compensation under Article 235 EC even though the damage has not yet materialised (provided, however, that it is imminent and foreseeable with some degree of certainty) but, in any

event, the limitation period will not start running before the damage has materialised.

39. Essentially, the case-law referred to in point 36 above tends towards allowing an action to establish liability to be brought, even though it might otherwise be considered premature, as a way of ensuring advance protection in such a way as to contain the extent of the harmful consequences of the Community's unlawful act. The possibility of such anticipatory protection does not however have any impact on the starting date of the limitation period, in so far as it is protective of the Community interest as well. It may in fact lead to a limitation on the amount of compensation that the Community might be required to pay in the event of the conditions for its non-contractual liability being found to be satisfied.

40. Thus, whilst it is true that the limitation period cannot start running for so long as it is not possible to commence proceedings for compensation, it is not necessarily true that the period starts to run at the same moment as such a right of action becomes exercisable.

22 — Joined Cases 56/74 to 60/74 *Kampffmeyer and Others v Commission and Council* [1976] ECR 711, paragraph 6, and Case 281/84 *Zuckerfabrik Bedburg v Council and Commission* [1987] ECR 49, paragraph 14.

23 — *Birra Wührer and Others v Council and Commission*, paragraphs 10 and 11, and Case 51/81 *De Franceschi v Council and Commission* [1982] ECR 117, paragraphs 10 and 11.

41. Now, in this case, the time lag between the moment when the damage became *foreseeable with some degree of certainty* and the time when it *materialised* is minimal. The first moment coincides with the

provision of the bank guarantees, as correctly observed by the Court of First Instance. The second moment, which is the time from which the limitation period runs, is identifiable as the following day, since, as the Court of First Instance found,²⁴ the bank guarantee charges were accumulating from day to day.

42. In any event, the fact remains that the appellant does not maintain that the limitation period started to run on the day following the provision of the bank guarantees. On the other hand, it criticises the Court of First Instance for not taking the view that the damage materialised only when the *Cement* decision was annulled. However, that criticism is clearly without foundation, given that the bank guarantee charges, which embody the damage complained of, started to accrue, as I have just pointed out, on the day following the provision of the bank guarantees, and therefore long before the *Cement* judgment was delivered.

43. That judgment certainly removed the appellant's obligation to pay the fines imposed on ABZK and Nordciment in the *Cement* decision and therefore brought to an end the accrual of bank guarantee charges incurred by the appellant. At that moment, the final amount of those charges, and thus of the damage complained of, became fully quantifiable.

44. That is no reason, however, for concluding that the limitation period did not run before that time. The case-law on the running of limitation periods requires that the damage has materialised, not that it has also run its full course. In addition, there is nothing in the case-law to indicate that actions for damages under Article 235 EC can be brought only if the alleged damage is precisely quantifiable *in its entirety* when the action is brought.

45. I take the view therefore that the Court of First Instance did in fact err in law by taking the view that the limitation period in this case started to run on the day (the date of provision of the bank guarantees) on which, the damage having become sufficiently foreseeable, an action to establish liability became available, rather than from the day on which the damage had actually materialised. I consider, however, that the appellant's complaint in that respect must nevertheless be rejected, albeit on different grounds, because, contrary to the appellant's contention, the materialisation of the damage was marked not by the *Cement* judgment but by the accrual of the first bank guarantee charges on the day following the provision of those guarantees.

46. As regards the appellant's further criticisms regarding the immediate and non-gradual materialisation of the damage and

24 — Contested judgment, paragraph 61.

the interruption of the limitation period by the bringing of the action for annulment of the Cement decision, I consider that they clearly do not deserve to be upheld.

The second ground of appeal, concerning the condition of illegality of the Community's conduct

Arguments of the parties

47. The argument concerning the instantaneous materialisation of the damage is of no possible benefit to the appellant since, even if it were well founded, the barring of the action to establish non-contractual liability would affect the alleged damage in its entirety and not, as found in the contested judgment, only a part of it.

48. The argument, put forward in the alternative, regarding interruption of the limitation period, collides with the clear wording of Article 46 of the Statute of the Court of Justice, which identifies exhaustively the events which interrupt the limitation period provided for therein. In addition, an action for annulment is, by its very nature, incapable of giving rise to an interruption of the limitation period for an action for compensation since the fact of seeking annulment does not in itself indicate a wish to exercise the right to seek compensation for the damage caused by the measure against which that action is brought.

50. Primarily, the appellant maintains that the Court of First Instance erred in law in taking the view that non-contractual liability on the part of the Community presupposes, in this case too, the existence of a sufficiently serious breach of Community law. In its opinion, that condition is laid down by the case-law only for non-contractual liability of the Community deriving from legislative measures and not for liability deriving from decisions imposing fines for infringements of competition law, the illegality of such decisions being sufficient to cause such liability to arise.

51. In the alternative, the appellant claims that in this case the Commission in any event committed a sufficiently serious breach and that the Court of First Instance wrongly took the opposite view.

49. I am therefore of the opinion that the first ground of appeal should be rejected.

52. In that regard, the appellant criticises the Court of First Instance, first, for not confin-

ing itself, when considering whether the breach of Community law committed by the Commission was sufficiently serious, to noting that the Cement decision did not allow the institution any discretion. Taking into account, as an additional criterion of assessment, the complexity of the facts and the difficulty of applying the Community legislation relating to cartels, the Court of First Instance wrongly departed from the case-law according to which the extent of the discretion available to the institution concerned is the decisive criterion for the purpose of determining whether there is a sufficiently serious breach.

53. Second, the appellant considers that, in any event, the actions imputed to ABZK and Nordcement in the Cement decision and the legal assessment thereof were not so complex as to justify ruling out the liability of the Community alleged by the appellant. In fact, all the Commission had to do was to verify whether the participation of those companies in the information exchanges concerning the export markets carried out within the European Cement Export Committee ('the ECEC') could amount to an infringement of Community cartel law. The Court of First Instance, in disagreeing with the appellant and deciding that the facts and legal questions covered by the Cement decision were complex, wrongly placed emphasis on circumstances unconnected with ABZK and Nordcement and on the difficulties deriving from the Commission's decision to deal within a single procedure and a single decision with the actions taken by and the

position of those undertakings and other undertakings.

54. The Commission is of the opinion that the Court of First Instance did not err in law in holding that the finding against ABZK and Nordcement in the Cement decision did not constitute a seriously serious breach and in considering, for that reason, that there was no possibility of non-contractual liability on the part of the Community.

55. It contests the relevance of the distinction drawn by the appellant between legislative acts and individual decisions, which, on the basis of the most recent case-law, is not decisive for the purpose of identifying the limits of the power of appraisal available to the institution concerned. It also considers that the Court of First Instance was right also to take account of the complexity of the facts which the Commission was required to assess. Finally, the appellant's argument that the facts were not complex is not admissible in the context of an appeal and is in any event unfounded, given that it was necessary to take account, as the Court of First Instance did, not only of the situation of ABZK and Nordcement but also of the overall situation of the cement sector at the material time, which the *Cement* judgment itself classified as rather complex.

Analysis

56. In the contested judgment, the Court of First Instance, after pointing out that the non-contractual liability of the Community depends on the fulfilment of a number of conditions, including the illegality of the conduct alleged against the institution,²⁵ correctly stated, with regard to that condition, that the case-law of the Court of Justice requires that a sufficiently serious breach of a legal rule designed to confer rights on individuals be established.²⁶

57. Contrary to the appellant's contention, which is based on case-law dating back a considerable time,²⁷ the requirement of the existence of a sufficiently serious breach is not limited to cases in which the unlawful conduct alleged against the institution concerned consists in the adoption of a legislative measure. The case-law of the Court of Justice cited by the Court of First Instance,

and also later case-law,²⁸ does not in fact impose such a limit on the operation of that requirement, which, on the other hand, is of a general nature.²⁹

58. Therefore, the Court of First Instance was not guilty of any error in law in concluding that a precondition for non-contractual liability on the part of the Community for damage allegedly suffered by the appellant through the adoption of the Cement decision was a finding of a sufficiently serious breach of a legal rule designed to confer rights on individuals.

59. As regards, next, the argument put forward by the appellant in the alternative, I would point out above all that the appellant is wrong to criticise the Court of First Instance for failing to conclude, after accepting that the Commission's discretion in this case was 'reduced', that such a breach existed for that very reason.

²⁵ — Contested judgment, paragraph 86.

²⁶ — *Ibid.*, paragraph 87. The Court of First Instance refers in that connection to the judgments in Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraphs 40 and 42 to 44; Case C-312/00 P *Commission v Camar and Tico* [2002] ECR I-11355, paragraphs 52 to 55; and Case C-472/00 P *Commission v Fresh Marine* [2003] ECR I-7541, paragraphs 24 to 26.

²⁷ — Case 5/71 *Aktien-Zuckerfabrik Schoeppenstedt v Council* [1971] ECR 975, paragraph 11, which made non-contractual liability of the Community for damage deriving from a legislative act involving economic policy choices conditional upon the existence of a serious breach of a superior rule of law designed for the protection of individuals.

²⁸ — Case C-234/02 P *Ombudsman v Lamberts* [2004] ECR I-2803, paragraph 49, and Case C-198/03 P *Commission v CEVA and Pfizer* [2005] ECR I-6357, paragraph 63.

²⁹ — The appellant is also wrong in asserting that all the judgments of the Court of Justice to which the Court of First Instance refers in paragraph 87 of the contested judgment related to liability deriving from legislative measures. In fact, the judgment in *Commission v Camar and Tico*, concerns non-contractual liability deriving from a Commission decision rejecting a request for transitional measures within the meaning of Article 30 of Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1).

60. It is true, as the appellant points out, that, according to the case-law of the Court of Justice, the decisive criterion for considering a breach of Community law to be sufficiently serious is that it must involve a manifest and serious failure, by the Community institution concerned, to remain within the limits imposed on its discretion and that the decisive criterion in determining whether there has been a breach of that kind is the degree of latitude which was available to the institution in question.³⁰

61. However, it is also apparent from the same case-law that the rules laid down by the Court of Justice in accordance with the second paragraph of Article 288 EC take account in particular of the complexity of the situations to be regulated, the difficulties of applying or interpreting the legislation and, in particular, the degree of latitude available to the author of the contested measure.³¹

62. The Court of First Instance was not therefore guilty of any error in law in also placing emphasis, for the purpose of assessing whether in this case there has been a sufficiently serious breach, on the complexity of the situations on which the Commission was required to give a decision and the difficulties of applying the relevant provisions of the EC Treaty.

63. As regards, next, the criticism concerning the view taken by the Court of First Instance concerning the complexity both of the situations on which the Commission was to give a decision and their legal classification, I consider it to be admissible only to the extent to which the Court of First Instance is accused of having attached importance, in making that appraisal, to facts unconnected with the companies ABZK and Nordciment.

64. I am of the opinion that the appraisal of the complexity of the facts and the appraisal of the complexity of their legal classification are not questions of law but rather are matters to be analysed on the basis of an appraisal of the facts, which, of course, is not subject to review by the Court of Justice in an appeal from a judgment of the Court of First Instance, except where evidence produced to the latter has been distorted;³² but no such distortion has been alleged in this case.

65. Conversely, a point of law that can be examined in such proceedings is the question whether, in the context of such appraisals, carried out to establish whether the infringement of Community law detrimental to an undertaking is sufficiently serious, it is or is not permissible to take account also of

30 — *Bergaderm and Goupil v Commission*, paragraphs 43 and 46; *Commission v Camar and Tico*, paragraphs 54 and 55; *Commission v Fresh Marine*, paragraphs 26 and 27; and *Commission v CEVA and Pfizer*, paragraphs 64 and 66.

31 — *Bergaderm and Goupil v Commission*, paragraph 40; *Commission v Camar and Tico*, paragraph 52; *Commission v Fresh Marine*, paragraph 24; and *Commission v CEVA and Pfizer*, paragraph 62.

32 — See, amongst many, judgments in Case C-390/95 P *Antillean Rice Mills and Others v Commission* [1999] ECR I-769, paragraph 29, and Case C-122/01 P *T. Port v Commission* [2003] ECR I-4261, paragraph 27.

the position of other undertakings and of the facts relating to them.

66. In that regard, I would observe by way of preliminary that, since this case is concerned with the application of Article 85(1) of the EC Treaty in relation to alleged agreements and concerted practices, that is to say infringements which by definition involve the participation of two or more undertakings, it is patently obvious that the Commission could not establish whether that provision had been infringed by a given undertaking if it confined itself to establishing and appraising facts relating solely to that undertaking. Contrary to the appellant's contention, therefore, the Commission could not have adopted a separate decision relating only to ABZK and/or Nordcement.³³

67. The appellant's criticism focuses essentially on the fact that in its view the Court of First Instance treated the length of the *Cement* judgment as evidence of the complexity of the facts of the case relating to ABZK or Nordcement, whereas, in the appellant's view, the length of the judgment is simply a consequence of the choice made by the Commission, first, and then by the Court of First Instance to deal with several *related cases* within a single decision.³⁴

68. However, it is not in fact apparent from the contested judgment that the Court of First Instance drew any inference as to the complexity of the facts or their legal classification from the length of the *Cement* judgment.

69. It is true, however, that in an early part of its reasoning,³⁵ the Court of First Instance appears to be assessing not the complexity of the specific actions which the Commission imputed to ABZK and Nordcement and the other undertakings held responsible for the two infringements of which they stood accused but rather the complexity of the entire case covered by the *Cement* decision ('the *Cement* case').

70. It should be borne in mind in that connection that, in the *Cement* decision, the Commission identified a large number of infringements of Article 85(1) of the EC Treaty.³⁶ However, only two of those infringements were found against ABZK and Nordcement: the one referred to in Article 1 of the *Cement* decision, namely 'an agreement designed to ensure non-transshipment to home markets and to regulate cement transfers from one country to another' and the one referred to in Article 5 of that decision, namely the exchange of information within the ECEC on 'the supply

33 — See the final part of paragraph 52 of the appeal.

34 — *Ibid.*

35 — Contested judgment, paragraphs 103 to 106.

36 — *Cement* decision, Articles 1 to 7.

and demand situation in the importing third countries, the export prices chargeable, the import situation in the member countries and the supply and demand situation on the home markets and designed to prevent incursions by competitors on respective national markets in the Community’.

71. Because, in the contested judgment, the Court of First Instance was called on to assess the complexity of the situations to be regulated in order to verify not whether the duration of the administrative procedure was reasonable³⁷ but whether the breach of Community law committed by the Commission to the detriment of ABZK and Nordcement was sufficiently serious, I am of the opinion that the Court of First Instance should not — *without giving further clarifications* which, however, are lacking in the contested judgment — have referred to the Cement case as such, but rather should have referred only to the infringements imputed to those companies.

72. I would nevertheless point out, on the one hand, that, in referring to the Cement case as such, the Court of First Instance essentially made it clear that it involved a large number of undertakings and in particular almost all the European cement industry.³⁸ It is clear from a simple reading of the operative part of the Cement decision

that every one of the other undertakings held responsible for infringements of Article 85(1) of the EC Treaty participated, together with ABZK and Nordcement, in the infringement found in Article 1 of that decision. It is thus clear that the number of undertakings involved in that alleged infringement coincides exactly with the number of undertakings involved in the Cement case and that the difficulties relating to the large number of undertakings involved, to which the Court of First Instance referred, therefore existed also for at least one of the two infringements alleged against those companies.

73. On the other hand, in the later part of its reasoning, the Court of First Instance observed that the complexity of the situations to be regulated was apparent in particular from:

- the fact that the undertakings concerned by the Commission’s investigations were members of Cembureau (European Cement Association) — either direct *or merely indirect* members — (in other words, represented by their respective associations) and the latter case applied to ABZK and Nordcement;³⁹

37 — In paragraphs 104 and 105 of the contested judgment, the Court of First Instance referred to certain findings concerning the complexity of the case covered by the Cement decision which had been made in the *Cement* judgment, albeit in the context of examining the reasonableness of the duration of the administrative procedure.

38 — Contested judgment, paragraphs 103 and 105 and, more particularly, paragraph 114.

39 — *Ibid.*, paragraph 107.

- the fact that, as regards the part of the Cement decision which specifically concerns those two companies, the Commission found itself obliged to deal with a range of probative documents whose interpretation was unclear⁴⁰ and had to analyse a great number of documents;⁴¹

situations which the Commission was called on to regulate were extremely difficult.

- the fact, in particular, that, although the Court of First Instance had annulled the Cement decision as regards those companies, it had nevertheless established that the Commission was in possession of certain information tending to support its view — which the Court of First Instance then held to be not sufficiently substantiated — that the purpose and effect of the cooperation within the ECEC were to reinforce the rule of respecting national markets.⁴²

75. In such circumstances, even if it were accepted that the Court of First Instance had erred in referring, in the first part of its reasoning relating to the complexity of the situations to be regulated, to the *Cement* case as a whole rather than to the specific infringements imputed to ABZK and Nordcement, that error did not, in my opinion, have any impact on the conclusion drawn by the Court of First Instance to which I refer in the foregoing point.

74. The appellant does not mention or in any way dispute the latter findings of the Court of First Instance which, as is clear from paragraph 114 of the contested judgment, were, together with the great number of undertakings involved, those on which it ultimately relied in concluding that the

76. As regards, next, the difficulties in applying the relevant legislative texts, there is nothing in the contested judgment to show that the Court of First Instance did not assess them with regard to the infringements specifically alleged against ABZK and Nordcement. On the contrary, it is expressly indicated in paragraph 115 of the contested judgment that the difficulties in applying the EC Treaty provisions on cartels, inherent in the provisions themselves, 'were all the greater because the factual elements of the case in question, *including in the part of the decision concerning [ABZK and Nordcement]*, were numerous'.⁴³

40 — Ibid., paragraph 108.

41 — Ibid., paragraph 114.

42 — Ibid., paragraph 113.

43 — Emphasis added.

77. The criticism being considered here therefore also seems to me to lack any merit.

would be unnecessary to examine the third ground, concerning the existence of a causal link between the unlawful conduct and the damage complained of.

78. I would point out, finally — emphasising that it is lawful to take overall account of the discretion available to the Commission, the complexity of the facts and the difficulty of applying the legal provisions — that the appeal does not contain any specific criticism regarding the way in which the Court of First Instance weighed up those factors and reached the conclusion that the breach of Community law committed by the Commission was not sufficiently serious. The Court of Justice is not therefore called on to give a decision on that point.

81. In fact, by virtue of settled case-law, given that the three conditions on which the non-contractual liability of the Community depends, namely the illegality of the conduct imputed to the Community institutions, the existence of damage and the existence of a causal link between the institutions' conduct and the damage complained of must be satisfied cumulatively, the fact that any of those conditions has not been satisfied is a sufficient basis on which to dismiss a claim for damages.⁴⁴

79. In the light of the considerations so far set out, I consider that the second ground of appeal must also be rejected.

The third ground of appeal: the existence of a causal link between the unlawful conduct and the damage complained of

82. Because the appellant has not proved the existence of errors of law such as to render invalid the Court of First Instance's finding concerning the absence in this case of any sufficiently serious breach of Community law and because that finding alone justifies rejection of the claim for compensation made by the appellant, examination of the third ground of appeal is superfluous in that,

80. If, as I suggest it should, the Court of Justice rejects the second ground of appeal, it

⁴⁴ — See, among many, Case 253/84 *GAEC de la Ségaude v Council and Commission* [1987] ECR 123, paragraphs 9 and 21; Case C-257/98 *P Lucaccioni v Commission* [1999] ECR I-5251, paragraph 14; and *Atlanta and Others v European Community*, paragraph 65.

in the circumstances described, a finding that it was well founded could not vitiate the operative part of the contested judgment.⁴⁵

83. Accordingly, if I now analyse the third ground of appeal as well, I only do so in case the Court should uphold the second ground of appeal or decide to examine the third ground of appeal before the second.

Arguments of the parties

84. The appellant considers that the Court of First Instance in this case misapplied the case-law of the Court of Justice to the effect that the Community can be liable only for damage deriving sufficiently directly from the unlawful conduct of the institution concerned.⁴⁶

⁴⁵ — In other words, the third ground of appeal is directed against a matter included for the sake of completeness in the grounds of the judgment of the Court of First Instance and must therefore be rejected as irrelevant because the operative part of the judgment is based on another part of the grounds of the judgment *which stands up to the appellant's criticisms*.

⁴⁶ — Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others v Council* [1979] ECR 3091, paragraph 21.

85. In the first place, the appellant maintains that the damage complained of derives sufficiently directly from the Cement decision since, if the Commission had not adopted that decision against it, the appellant would not have found it necessary to bring an action for annulment and to furnish the bank guarantees.

86. Secondly, it states that the decision to provide those guarantees, rather than immediately paying the fine imposed, is not such as to break the causal link, given that the operative part of the Cement decision and the lack of suspensory effect of the action for annulment compelled the penalised undertakings to meet the Commission's need to ensure that the fine was paid. From that viewpoint, it is not permissible to apply different treatment, as regards legal consequences, to the two forms of guarantee which could be offered to the Commission, that is to say either the provision of bank guarantees or the immediate payment of the fine.

87. Thirdly, the appellant states that the provision of the bank guarantees was consistent with its obligation as a victim of an unlawful measure to reduce the damage and it had the effect of mitigating the damage for which the Commission would otherwise have had to pay compensation. It points out that, if it had had to borrow funds from banks to pay the fine, the interest which it

would have had to pay, and which the Commission would have had to reimburse to it as compensation for damage, would have been greater, even after deduction of the positive interest that would have accrued to the Commission on the amount of the fine, than the commission payable in respect of the bank guarantees. The Court of First Instance thus wrongly considered that the damage complained of was not eligible for compensation since otherwise the Commission would have been penalised by having to repay sums which it had never had in its possession. The appellant emphasises that the purpose of the obligation to compensate for damage under the second paragraph of Article 288 EC is specifically to make the institutions answerable for the damage they cause to third parties by adopting illegal decisions.

Analysis

89. With regard to non-contractual liability under the second paragraph of Article 288 EC, the Community judicature has consistently held that the Community can be held responsible only for damage deriving in a sufficiently direct manner from the unlawful conduct of the institution concerned⁴⁷ or, in other words, that such liability presupposes the existence of a direct⁴⁸ (or immediate)⁴⁹ link between the wrongful act and the damage.⁵⁰

90. The appellant does not make any criticism of that case-law, to which the contested

88. The Commission, on the other hand, states that there is no direct causal link between its conduct and the damage complained of, which resulted from the choice freely made by the appellant to provide bank guarantees rather than to pay the fine on a provisional basis. It also observes that the bank guarantee charges would have arisen even if the Court had not upheld the appellant's claim against the Cement decision.

47 — *Dumortier and Others v Council*, paragraph 21; Case T-175/94 *International Procurement Service v Commission* [1996] ECR II-729, paragraph 55; Case T-7/96 *Perillo v Commission* [1997] ECR II-1061, paragraph 41; and Case T-13/96 *TEAM v Commission* [1998] ECR II-4073, paragraph 68.

48 — Joined Cases C-363/88 and C-364/88 *Finsider and Others v Commission* [1992] ECR I-359, paragraphs 28 and 50 (albeit relating to non-contractual liability of the ECSC) and *Bergaderm and Goupil v Commission*, paragraphs 41 and 42, and the Order of 12 April 2005 in Case C-80/04 P *DLD Trading v Council*, not published in ECR, paragraph 45; Case T-168/94 *Blackspur and Others v Council and Commission* [1995] ECR II-2627, paragraph 40, and Case T-226/01 *CAS Succhi di Frutta v Commission* [2006] ECR II-2763, paragraph 37.

49 — *Finsider and Others v Commission*, paragraph 25.

50 — The existence of a direct causal link is also required by the Community case-law for the purposes of establishing non-contractual liability of a Member State for damage deriving from an infringement by it of Community law. See Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraphs 51 and 65; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraphs 25 and 32, and Case C-140/97 *Reichberger and Others* [1999] ECR I-3499, paragraph 72.

judgment refers and on which the appellant expressly relies. On the other hand, it criticises the Court of First Instance for misapplying it to the present case.

Member States, is not accepted by the Community case-law on the second paragraph of Article 288 EC. The latter, as pointed out in point 89 above, limits the liability of the Community to damage which derives directly, or even *sufficiently* directly, from the unlawful conduct of the institution concerned, so that such liability cannot extend to damage that is only a remote consequence of such conduct.⁵¹

91. However, because the appellant, in the first part of the present ground of appeal (see point 85 above), considers that in this case the requisite causal link exists on account of the fact that, if the Commission had not adopted the Cement decision against ABZK and Nordcement, the latter would not have found it necessary to provide the bank guarantees, it seems to me that the appellant is in reality taking a view of what constitutes a causal link that differs from that which can be inferred from the Community case-law. Such an argument — which is admissible in so far as it raises a point of law — seems indeed to be based on the view that it is *sufficient*, for such a link to exist, that the unlawful conduct constituted a necessary condition (a *sine qua non*) for the damage to arise, in the sense that it would not have arisen in the absence of such conduct.

93. The first part of the present ground of appeal must therefore, in my opinion, be rejected.

94. As part of the same ground of appeal, however, the appellant also puts forward other arguments (see points 86 and 87 above) which do not necessarily presuppose a definition of a causal link based only on the idea of a condition *sine qua non* and do not appear to conflict logically with a more restrictive definition of what constitutes a causal link. Those arguments seek to demonstrate that the appellant's decision to provide the bank guarantees did not break the (direct) causal link between the Cement

92. However, it is quite clear that such a broad definition of the causal link, which finds some support in the law on non-contractual liability of a limited number of

⁵¹ — See *Dumortier and Others v Council*, paragraph 21.

decision and the damage associated with the provision of those guarantees.

95. I would point out that the Court of First Instance held in this case that no such link exists, essentially because the option of providing a bank guarantee rather than paying the fine immediately was 'left entirely to the discretion of the undertakings' and was 'therefore not mandatory in nature as a consequence of the Cement decision'.⁵²

96. That statement appears to be based on the view that, where action taken after the institution's adoption of the unlawful measure by the person complaining of damage is seen as a contributory cause of such damage, it breaks the causal link between that conduct and the damage where the action concerned is not a *necessary* consequence of the conduct of the institution but the result of a free choice — in the sense that there was no compulsion — made by the person who suffered the damage. Such a choice is interposed between the conduct of the institution and the damage, so that the damage is a merely indirect and remote consequence of that conduct.

97. In the second and third parts of the present ground of appeal, the appellant

claims, above all, that in this case the decision to provide bank guarantees was not in fact a free choice, as held by the Court of First Instance, but was an obligation. It states that the provision of the bank guarantees reflected, on the one hand, the obligation to satisfy the Commission's requirement to ensure payment of the fine and, on the other, a supposed 'obligation to reduce the damage' incumbent on the victim of the illegal conduct.

98. In that connection, it is necessary first to consider whether those arguments can be examined in an appeal or whether they are inadmissible in that they seek to call in question findings of fact or the appraisal of the facts contained in the contested judgment.

99. I would point out that, on the basis of the same arguments, the appellant does not appear to dispute the correctness of the interpretative approach taken by the Court of First Instance — which appears to me to be rather restrictive — whereby damage derives in a sufficiently direct manner from the conduct of the institution only where it is the necessary consequence thereof. The appellant, without actually putting forward a different view of what constitutes a causal link, appears only to challenge the fact that the Court of First Instance classified the decision to provide a bank guarantee as a

52 — Contested judgment, paragraphs 123 and 124.

free choice rather than as an obligation of the undertaking ordered to pay the fine.

Instance. The provision of a bank guarantee on the other hand is merely an option offered by the Commission to the penalised undertaking to enable it temporarily, that is to say for the duration of the judicial review of the decision imposing the fine, to defer fulfilment of that obligation.

100. Must it be concluded that that classification is the result of an *appraisal of the facts* made by the Court of First Instance, thus falling outside the purview of the Court of Justice, or rather that it is a *legal classification of the facts*, which is open to challenge before the Court of Justice?

101. I tend to think that, although it facilitates verification of the actual existence of the causal link, what is involved is nevertheless a legal classification of the facts, which implies that the appellant's above-mentioned arguments are admissible. However, it seems to me that, substantively, those arguments do not deserve to be upheld.

103. Payment of the fine and the provision of a bank guarantee cannot therefore, for the purposes relevant here, be placed on the same level in the context — this must be made clear — of an interpretative approach of the kind I have described in point 96 above, which the appellant's arguments under consideration here do not call in question and whose correctness, therefore, it is not appropriate to examine in these proceedings.

102. On the one hand, the provision of bank guarantees cannot, as I see it, be regarded as an alternative obligation attaching to the penalised undertaking. As correctly observed by the Court of First Instance, an undertaking ordered by a Commission decision to pay a fine is legally obliged to pay the fine within the time-limit set by the decision, unless the effects of that decision are suspended by order of the Court of First

104. On the other hand, whilst it is true that, by virtue of a general principle common to the laws of the Member States, the injured party, in order to avoid having to bear the damage, must show that he has acted with reasonable diligence in order to limit its extent,⁵³ it is in my view excessive to say that an undertaking unlawfully ordered to pay a fine is under an obligation to provide a bank guarantee where it is apparent, from the outset, that it will give rise to expenses that

53 — Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECR I-3061, paragraph 33; *Brasserie du pêcheur and Factortame*, paragraph 85; and Case C-284/98 P *Parliament v Bieber* [2000] ECR I-1527, paragraph 57.

amount to less than the damage for which the Commission might have to make reparation.

prohibition of undue enrichment in order to secure repayment of the bank guarantee charges. That argument is set out in paragraph 130 of the contested judgment in the following terms:

105. I therefore suggest that the Court of Justice reject the arguments put forward by the appellant to show that, contrary to the findings of the Court of First Instance in the contested judgment, the decision to provide bank guarantees in this case was a matter of compulsion and *as such* incapable of breaking the causal link between the Cement decision and the damage complained of.

106. In the third part of the present ground of appeal (see point 87 above) there is, however, a further criticism, which is concerned not with the supposed 'obligation to reduce the damage' attaching to the victim of the unlawful conduct, but with mitigation of the harmful consequences of the Cement decision by the provision of bank guarantees.⁵⁴

107. It must be borne in mind that the purpose of that criticism is to refute the argument by which the Court of First Instance, in the part of the contested judgment relating to the existence of the causal link, ruled that the appellant could not successfully invoke the principle of the

'... it must be held that ... the Commission's failure to assume responsibility for the charges incurred in providing a bank guarantee does not entail any undue enrichment of the Community, since the bank guarantee charges are paid not to the Community but to a third party. Observance of the general principle prohibiting undue enrichment does not justify such reimbursement in any circumstances. Quite to the contrary, if the Commission were to assume responsibility for the charges incurred in providing a bank guarantee, that would allow the undertaking concerned to be placed in the situation in which it was before the contested decision was adopted, but the Commission, on the other hand, would be penalised, since it would be required to reimburse to the undertaking sums of which it did not have the benefit.'⁵⁵

55 — The appellant, in paragraph 20 of the application to the Court of First Instance, expressly referred to the principle of the prohibition of undue enrichment and the way in which it had been applied by the Court of First Instance in its judgment in Case T-171/99 *Corus UK v Commission* [2001] ECR II-2967, to the effect that the Commission is under an obligation to pay default interest on a fine imposed and received illegally.

54 — Appeal, final part of paragraph 63.

108. It must be emphasised that the prohibition of undue enrichment, which is a general principle of Community law that applies to the Community as well,⁵⁶ does not come into play in these proceedings as a separate basis for the appellant's claim that the Commission should be ordered to reimburse the bank guarantee charges. That claim, as observed in the contested judgment and as is clearly apparent from the terms of the appeal, is a claim for damages based on the non-contractual liability of the Community under the second paragraph of Article 288 EC. The general principle of the prohibition of undue enrichment comes into play in this case, on the other hand, as a yardstick for interpreting the condition concerning a causal link which is relevant for the purposes of establishing such liability. It was in the context of its examination of that condition that, as I have observed above, the Court of First Instance set out the considerations mentioned in the foregoing point, which the appellant challenges before the Court of Justice as part of the third ground of appeal, which also relates to the fulfilment of that condition.

109. In essence, the appellant's present criticism, which focuses on the analysis whereby the Court of First Instance ruled that it could not avail itself of the general principle of unjust enrichment, must, in my opinion, be construed as seeking a finding that, regardless of whether it was made freely

or as a result of compulsion, the decision to provide the bank guarantees, *to the extent to which it attenuated the extent of the damage* caused by the Commission's wrongful act, cannot, without conflicting with the above-mentioned general principle, be regarded as capable of breaking the direct causal link between the unlawful act and the damage, regardless of whether a free choice was made or an obligation satisfied.

110. That criticism, which likewise raises a point of law and is therefore admissible in an appeal, seems to me to merit serious consideration.

111. The appellant asserts, in particular, that ABZK and Nordcement, by providing bank guarantees instead of paying the fine, avoided obtaining a bank loan to secure the funds needed for that payment. If on the other hand they had obtained a loan, the Commission would have been required to refund to the appellant, by way of compensation under the second paragraph of Article 288 EC, the debit interest which would have accrued on that loan, net of any credit interest received by that institution on the sums paid over in respect of the fine. According to the appellant, that difference would have in any event been greater than the bank guarantee charges actually incurred.

⁵⁶ — Case C-259/87 *Greece v Commission* [1990] ECR I-2845, summary publication, paragraph 26. See also the judgments of the Court of First Instance in *Corus UK v Commission*, paragraph 25, and Case T-166/98 *Cantina sociale di Dolianova and Others v Commission* [2004] ECR II-3991, paragraph 160.

112. I too, like the appellant, consider that the Court of First Instance was wrong to exclude any possibility of undue enrichment of the Community on the ground that those expenses were paid not to the Community but to third parties (the banks) and to say that if the Commission refunded those expenses it would be improperly penalised by having to repay sums of which it had not had the benefit.

113. By that reasoning, the Court of First Instance lost sight of the fact that 'enrichment' may occur not only when the person concerned enjoys an increase of assets but also where it benefits from a decrease of its liabilities (debts). The Court of First Instance wrongly focused on the fact that the Commission had not received any payment, when, in my view, it should have attached importance to the debit position (as a result of paying compensation) in which the Community would have found itself if the illegally imposed fine had been paid.

114. In my opinion, if it were demonstrated, on the one hand, that the situation in the financial markets and the position of the penalised undertakings were such that the provision of bank guarantees avoided damage (not covered by a mere payment, which would be required of the Commission,

of default interest on the amount of the fine)⁵⁷ exceeding the amount of the bank guarantee charges incurred, and, on the other, that the Community would have been liable for that damage by virtue of its responsibility for unlawful conduct under the second paragraph of Article 288 EC, the appellant would be entitled, by virtue of that provision, to a refund of such expenses by the Community.

115. Although negligent conduct on the part of the victim of the unlawful conduct which contributed to the damage suffered by it may, in certain circumstances, break the causal link between the unlawful conduct and the damage, it must be concluded that the same does not apply to action taken by the same person which, in contrast, is indicative of diligence and which, by affecting the causal chain brought into being by the unlawful conduct, resulted in damage different from and lesser than the recover-

⁵⁷ — That payment, together with repayment of the principal amount of the fine unduly paid, is required of the Commission by Article 233 EC to ensure compliance with a judgment annulling or reducing a fine imposed for infringement of Treaty competition rules. See, to that effect, Case T-48/00 *Corus UK v Commission* [2004] ECR II-2325, paragraph 223, and the Order of 4 May 2005 in Case T-86/03 *Holcim (France) v Commission* [2005] ECR II-1539, paragraph 30.

able damage which otherwise would have derived from the unlawful conduct.⁵⁸

unlawful conduct when making a diligent attempt to avert the damage would arise — at least within the limits of the amount of the recoverable damage avoided — even if it proved to be equal to or greater than that amount.

116. To frame the question in other terms, it may be stated that, where a victim of unlawful conduct has acted diligently so as to prevent the damage or limit its extent, any examination of the Community's liability (arising from an unlawful act) for expenses or other losses suffered by that victim in taking that course of action will include consideration of the question whether there is a direct causal link not between the unlawful act and those expenses or losses but between the unlawful act and the recoverable damage that was averted.

118. The criticism made by the appellant of the Court of First Instance's reasoning referred to in point 107 above therefore appears to me to be well founded.

119. If the Court of Justice should, contrary to my suggestion, uphold the second ground of appeal, then the third ground of appeal should in my opinion also be upheld within the limits set out above.

117. I should also add that a right to recover expenses or losses suffered by the victim of

⁵⁸ — I think it is important in that connection to point out that in two of the best known recent attempts at codification, by experts in the field, of the principles of European law on civil liability (endeavours based on a comparative examination of the national systems and designed to prompt reflection and prepare the terrain for possible future harmonisation or unification of such laws) — that of the European Group on Tort Law ('EGTL') of Vienna (see <http://www egtl.org>) and that of the Study Group on a European Civil Code ('SGECC') of Osnabrück (<http://www sgecc.net>) — there is an article which provides for the availability of compensation for expenses reasonably incurred to prevent anticipated damage or to limit its seriousness. See Article 2:104 of the 'Principles of European tort law' produced by the EGTL (May 2005 version) and Article 6-302 of the Principles of European tort law produced by the SGECC (December 2005 version).

The merits of the claim for damages

120. In the terms of Article 61 of the Statute of the Court of Justice, '[i]f the appeal is well

founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment’.

121. In view of the conclusion I have reached in examining the second ground of appeal, which would be a sufficient basis for rejecting the appellant’s claims, I shall confine myself, as regards the possible application of that provision by the Court of Justice in the event of its upholding the second and third grounds of appeal, to one straightforward observation.

122. The appellant, although asking the Court of Justice to give a final decision on the substance by ordering the Commission to repay the bank guarantee charges, together with default interest, has failed, before both the Court of First Instance and the Court of Justice, to provide any proof that payment of the fine rather than the provision of bank guarantees would have given rise to recoverable damage that would not have been covered by payment by the Commission of default interest on the amount of the fine. In particular, it failed to provide detailed information and evidence regarding the necessity for ABZK and Nordcement to obtain loans to pay the fine

imposed or regarding the rates of interest that would have been payable on such loans.

123. This observation, which does not seem to me to provide any basis for changing the grounds of the contested judgment in such a way as to exclude its annulment on the basis of the third ground of appeal,⁵⁹ in my opinion means that, if it does annul the judgment, the Court of Justice should give final judgment in the case, rejecting the appellant’s claim for damages.

Costs

124. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded the Court is to make a decision on costs. Pursuant to Article 69(2) of the same rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.

⁵⁹ — It will be remembered that, according to Community case-law, errors of law committed by the Court of First Instance are not liable to invalidate the contested judgment if its operative part appears to be based on other grounds of law (see, to that effect, Case C-367/95 P *Commission v Sytraval and Brink’s France* [1998] ECR I-1719, paragraph 47; *Commission v Camar and Tico*, cited above, paragraph 57, and Case C-93/02 P *Bierret International v Council* [2003] ECR I-10497, paragraph 60). My observation in the text applies, however, with regard to ascertainment of the facts and appraisal of the evidence relating thereto and not to the legal classification of the facts as found by the Court of First Instance.

125. Since I suggest that the Court dismiss the appeal and, since the Commission has asked for costs, I consider that the appellant should be ordered to pay them.

Conclusion

126. In the light of the foregoing considerations, I propose that the Court of Justice:

- dismiss the appeal;
- order the appellant to pay the costs.