Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

22 November 2012*

(Appeals — Action for annulment of a Commission decision relating to a fine for breach of seal — Burden of proof — Distortion of the evidence — Obligation to state reasons — Amount of the fine — Unlimited jurisdiction — Principle of proportionality)

In Case C-89/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 February 2011,

E.ON Energie AG, established in Munich (Germany), represented by A. Röhling, F. Dietrich and R. Pfromm, Rechtsanwälte,

appellant,

the other party to the proceedings being:

European Commission, represented by A. Bouquet, V. Bottka and R. Sauer, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as President of the Third Chamber, K. Lenaerts (Rapporteur), G. Arestis, J. Malenovský, and D. Šváby, Judges,

Advocate General: Y. Bot,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 19 April 2012,

after hearing the Opinion of the Advocate General at the sitting on 21 June 2012,

gives the following

* Language of the case: German.

Judgment

1 By its appeal, E.ON Energie AG ('E.ON Energie') seeks to have set aside the judgment of the General Court of 15 December 2010 in Case T-141/08 *E.On Energie* v *Commission* [2010] ECR II-5761 ('the judgment under appeal') in which the General Court dismissed its action for annulment of Commission Decision C (2008) 377 final of 30 January 2008 relating to a fine pursuant to Article 23(1)(e) of Council Regulation (EC) No 1/2003 for breach of a seal (Case COMP/B 1/39.326 – E.ON Energie AG), a summary version of which was published in the *Official Journal of the European Union* (OJ 2008 C 240, p. 6), 'the contested decision').

Legal context

2 Article 20(2)(d) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81 EC] and [82 EC] (OJ 2003 L 1, p. 1) provides that '[t]he officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered … to seal any business premises and books or records for the period and to the extent necessary for the inspection'.

3 Under Article 23(1)(e) of Regulation No 1/2003, '[t]he Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently … seals affixed in accordance with Article 20(2)(d) by officials or other accompanying persons authorised by the Commission have been broken'.

4 Under Article 23(2) of that regulation the Commission may by decision impose fines on undertakings and associations of undertakings, in particular where, either intentionally or negligently they infringe Article 81 EC or Article 82 EC: for each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

Background to the dispute

5 By decision of 24 May 2006, in accordance with Article 20 of Regulation No 1/2003, the Commission ordered an inspection at the premises of E.ON AG and the undertakings controlled by it, in order to ascertain the validity of suspicions as regards their participation in anti-competitive agreements. The inspection of the appellant, E.ON Energie AG, commenced in the afternoon of 29 May 2006 at its business premises in Munich (Germany). On learning of the inspection decision, E.ON Energie declared that it had no objection to it.

6 The inspection was carried out by four representatives of the Commission and six representatives of the Bundeskartellamt (the German competition authority). The documents selected during the inspection on 29 May 2006 for more detailed examination by those representatives were stored in room G.505, which was made available to the Commission by E.ON Energie. Since the inspection could not be completed on the same day, the leader of the inspection team locked the door of that room, consisting of painted sound insulating door leaf panels and of a door frame made of anodised aluminium, and affixed to it an official seal measuring 90 mm by 60 mm ('the seal at issue'). The latter was affixed with up to approximately two thirds of its surface area on the door leaf and the remainder on the door frame. A record of sealing was drawn up and signed by representatives of the Commission, of the Bundeskartellamt and of E.ON Energie. The inspectors then left E.ON Energie's premises, taking with them the key to the door of room G.505 which had been handed over to them. In reply to a request for information, E.ON Energie indicated, according to recital 19 to the contested decision, that in addition to that key handed over to the Commission, 20 other 'master keys' giving access to room G.505 were also in circulation.

7 The seal at issue was a blue adhesive label with yellow lines on the upper and lower edges and the yellow stars of the European flag. The lower yellow area contained a notice to the effect that the Commission may impose a fine in the event of a breach of the seal. The security label used to make the seal at issue ('the security label') had been manufactured by 3M Europe SA ('3M') in December 2002.

8 When a plastic seal, such as the seal at issue, is broken, the white adhesive by means of which the seal is fixed to the substrate remains on the latter in the form of 'VOID' messages about 12 Didot points (approximately 5 mm) high, distributed over the whole surface of the adhesive label. The removed seal becomes transparent at those points, so that the 'VOID' messages are also visible on the seal.

9 On its return, at around 08.45 hrs on 30 May 2006, the inspection team found that the condition of the seal at issue, which was still adhering to the door of room G.505, had changed.

10 At around 09.15 hrs, the leader of the inspection team opened the door of room G.505. The opening of the door caused the detachment of the part of the seal at issue which was stuck to the door leaf, whereas the other part remained stuck to the door frame.

11 A breach of seal report was drawn up, which states inter alia the following:

'…

— The entire seal [at issue] was displaced by about 2 mm upwards and sideways so that traces of adhesive were visible at the lower and right-hand edges of the seal [at issue].

— The "VOID" message was clearly visible over the entire surface of the seal [at issue], which was nevertheless still affixed crosswise from the door frame to the surface of the door and was not torn.

— After the door was opened by the Commission [official] (Mr K.), the seal remained intact, that is, it did not tear, and on the rear of the seal [at issue] (the adhesive side) white traces of the "VOID" message were evident.

— When the seal is removed, the white "VOID" message normally remains on the substrate, and that was largely the case here, too, the message being in fact on the door surface.

— Numerous white traces were, however, also visible on the adhesive surface of the seal [at issue], not on, but beside the corresponding transparent sections of the "VOID" message on the rear of the seal [at issue].'

12 The breach of seal report was signed by a representative of the Commission and by a representative of the Bundeskartellamt. E.ON Energie refused to sign it.

13 During the afternoon of 30 May 2006, some digital photographs of the seal at issue were taken with a mobile telephone.

14 On 31 May 2006, E.ON Energie made a 'supplementary statement … to the record of sealing of 30 May 2006', which reads as follows:

'1. When the door was opened, no change in the documents stored in the room was ascertained.

2. On removal of the seal [at issue] on the evening of 30 May prior to resealing, the "VOID" message on the door frame was completely intact.

3. Mr K. was present when the seal [at issue] was affixed on the previous evening and had the impression that the process was unusually protracted.'

15 On 9 August 2006, the Commission sent a request for information to E.ON Energie, in accordance with Article 18 of Regulation No 1/2003. E.ON Energie replied by letter of 23 August 2006. Other requests for information were sent, respectively, on 29 August 2006 to 3M, on 31 August 2006 to the cleaning company working on E.ON Energie's premises at the date of the events in question ('the cleaning company') and on 1 September 2006 to E.ON Energie's security service.

16 The 10 members of the inspection team completed questionnaires relating to their observations on the affixing of the seal at issue and on its condition on the morning of 30 May 2006.

17 On 2 October 2006, the Commission sent a statement of objections to E.ON Energie. On the basis of the available information, it concluded inter alia that the seal at issue had been broken and that, because of E.ON Energie's organisational power in the building in question, E.ON Energie had to be held responsible for that breach of seal.

18 On 13 November 2006, E.ON Energie submitted its comments on the statement of objections.

19 On 6 December 2006, at E.ON Energie's request, an oral hearing took place, held by the Hearing Officer, which 3M also attended.

20 On 21 December 2006, at the Commission's request, 3M confirmed in writing certain statements made during the oral hearing.

21 During the administrative procedure, E.ON Energie forwarded to the Commission three expert opinions from an institute of natural sciences and medicine ('the institute').

22 On 21 March 2007, the institute produced a first expert opinion which analysed the reaction of the seal at issue to shearing and peeling stresses.

23 On 11 April 2007, the Commission asked Mr Kr., a sworn expert in adhesives technology and the material behaviour of plastics, to draw up a report on certain aspects of the performance and handling of the seal at issue. His first report was drawn up on 8 May 2007.

24 On 15 May 2007, the institute produced a second expert opinion, which analysed the reaction of the seal at issue to pulling-shearing and compression stresses and to peeling stresses following the use of the cleaning product Synto ('Synto') which, according to E.ON Energie, was used by the cleaning company on the door where the seal at issue was affixed.

25 By letter of 6 June 2007, the Commission informed E.ON Energie of the new facts ascertained since the statement of objections, based on 3M's statements and on Mr Kr.'s first report, and gave to it the opportunity to comment on them in writing.

26 On 6 July 2007, E.ON Energie sent the Commission written comments and requested a further hearing. That request was refused.

27 On 1 October 2007, E.ON Energie sent the Commission the institute's third expert opinion, dated 27 September 2007, which analysed the reaction of the seal at issue to peeling stresses following ageing, the use of Synto and air humidity.

28 The Commission then asked Mr Kr. to comment on the arguments and remarks contained in E.ON Energie's letter of 6 July 2007 and in the institute's second and third expert opinions. Mr Kr. drew up his second report on 20 November 2007.

29 By letter of 23 November 2007, the Commission informed E.ON Energie of the additional facts identified since its letter of 6 June 2007. At the same time, it granted E.ON Energie access to the relevant documents, and in particular Mr Kr.'s second report.

30 On 10 December 2007, E.ON Energie commented on the documents sent on 23 November 2007.

31 On 15 January 2008, the Commission received another letter from E.ON Energie, to which were attached affidavits from 20 persons who, according to E.ON Energie, were in possession of a key to room G.505 on the evening of 29 May 2006 ('the keyholders'). According to recital 42 to the contested decision, those persons declared in those affidavits that, during the period in question, namely between 19.00 hrs on 29 May 2006 and 09.30 hrs on 30 May 2006, they had either not been in building G or had not opened the door of the room in question.

32 On 30 January 2008, the Commission adopted the contested decision.

33 The operative part of that decision states:

'Article 1

E.ON Energie … broke [the seal at issue] affixed by representatives of the Commission pursuant to Article 20(2)(d) of Regulation No 1/2003 and at least negligently infringed Article 23(1)(e) of Regulation No 1/2003.

Article 2

A fine of EUR 38 000 000 is hereby imposed on E.ON Energie … for the infringement referred to in Article 1.

…'

The procedure before the General Court and the judgment under appeal

34 By application lodged at the Registry of the Court on 15 April 2008, E.ON Energie brought an action for annulment of the contested decision and, in the alternative, for an appropriate reduction in the amount of the fine imposed. It raised nine pleas in support of its application.

35 All those pleas in law were rejected by the General Court.

36 The General Court considered, in paragraphs 48 to 64 of the judgment under appeal, the first plea, alleging failure to have regard to the burden of proof. The General Court observed, in accordance with the case-law, that a court cannot conclude that the Commission has proved the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point, in particular in proceedings for the annulment of a decision imposing a fine, this being in accordance with the principle of the presumption of innocence resulting from Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and Article 47 of the Charter of Fundamental Rights of the European Union. The General Court rejected E.ON Energie's argument that there was an analogy with the case-law on concerted practices, according to which it is sufficient if an undertaking puts forward an argument which shows in a different light the facts established by the Commission which led it to conclude there had been an infringement. The General Court observed that this did not apply because the Commission relied on direct evidence. Except in cases where proof to the contrary could not be produced by the undertaking on account of the conduct of the Commission itself, it was for the undertaking to prove

to the requisite legal standard, on the one hand, the existence of the circumstance relied on by it and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission.

37 Accordingly, in the present case, the General Court dismissed E.ON Energie's argument that the Commission should prove, beyond any reasonable doubt, that the change in the condition of the seal found on 30 May 2006 was attributable to E.ON Energie. After observing that, contrary to the Commission's argument, the plea raised by E.ON Energie was not hypothetical, the General Court observed, however, that the Commission had not disregarded the principles governing the burden of proof. First, recital 44 to the contested decision expressly stated that 'it is the Commission's duty to submit the facts necessary to prove the breach of the seal'. Second, the Commission based its finding of a breach of seal, in recitals 75 and 76 to the contested decision, on the condition of the seal on the morning of 30 May 2006, which, according to the Commission, had the 'VOID' messages all over its surface and traces of adhesive on the back, as was clear from the statements of the Commission inspectors and those of the Bundeskartellamt inspectors and from the findings in the breach of seal report. Finally, the Court rejected E.ON Energie's arguments based on alternative explanations concerning the condition of the seal. The General Court considered that the allegation that the seal was outdated and the fact that there were no photographs showing the condition of the seal prior to the opening of the door had not added to the burden of proof on the Commission.

38 The General Court dismissed, at paragraphs 74 to 90 of the judgment under appeal, the second plea, alleging infringement of the 'principle of inquisitorial procedure' in that the Commission did not examine all the relevant aspects of the individual case. In the first place, the General Court observed that the Commission did not allow uncertainties to subsist relating to the composition of Synto used during the night of 29 to 30 May 2006 since, in particular, it had obtained from the cleaning company itself exactly the same detergent that the cleaning company had used on that night and used that cleaning product to carry out tests. In the second place, the General Court ruled that E.ON Energie's claim of the possibility that the keyholders gave access to the room in question to third parties or that someone entered that room in another way, is irrelevant in the present case because although, under Article 23(1)(e) of Regulation No 1/2003, the onus is on the Commission to prove the breach of seal, intentionally or negligently, it is not its responsibility to demonstrate that someone had actually entered the room which had been sealed. In the third place, the General Court dismissed the argument to the effect that question No 6 of the questionnaire addressed to the inspectors was tendentiously formulated, pointing out that the question sought to ask the members of the inspection team about indicia which pointed to a finding of breach of seal, in the light of the findings recorded in the breach of seal report. Moreover, each of the inspectors did in fact indicate the elements which they had individually remembered.

39 The General Court examined, at paragraphs 99 to 124 of the judgment under appeal, the third plea, alleging an erroneous assumption that the seal was affixed properly, and concluded that it could not succeed. In the first place, the General Court pointed out that the elements on which the Commission relied to establish that the seal at issue was affixed properly, namely the record of that sealing and the replies of the inspectors present when it was affixed to question No 3 of the questionnaire addressed to them, supported the finding that the seal at issue had been affixed properly on 29 May 2006, that it therefore adhered to the door and door frame of room G.505 and that it was intact, inasmuch as it was not showing 'VOID' messages at the time when the inspection team left E.ON Energie's premises.

40 In the second place, the General Court examined whether the circumstances alleged by E.ON Energie were such as to call in question the probative value of the abovementioned evidence. It dismissed the argument that the door was not subject to particular cleaning before the seal at issue was affixed, stating, in particular, that the inspectors checked that the substrate was clean and that, according to the technical bulletin, the consequence of affixing a seal on a contaminated surface would be that the 'VOID' messages could fail to appear in the event of a breach of seal due to the insufficient adhesive force of the seal. Moreover, E.ON Energie did not established that the surface in question was covered

with contaminants other than dust normally found in an office. Regarding the fact, referred to by E.ON Energie, that the surface in question was made of anodised aluminium, a material not mentioned in the technical bulletin of the seal at issue, the General Court held that, according to the seal's manufacturer, 3M, such a seal would function properly on aluminium and painted aluminium doors, pointing out that the result of use on an unsuitable substrate would be that the seal would not adhere sufficiently, which could prevent the 'VOID' messages appearing in the case of the seal being displaced. Lastly, the General Court dismissed as unfounded the allegation that the seal at issue was not detached from its protective liner in a manner complying with the manufacturer's instructions.

41 The General Court dismissed, at paragraphs 134 to 156 of the judgment under appeal, the fourth plea, alleging an erroneous assumption of the 'obvious condition' of the seal at issue on the day following the inspection. In the first place, the General Court noted that the elements on which the Commission relied to establish that a breach of seal occurred, namely the breach of seal report, according to which the entire seal at issue was displaced by about 2 mm upwards and sideways and the 'VOID' messages were clearly visible over the entire surface of that seal, as well as the witness statements of the inspectors who were present at the time of the finding of the breach of seal, supported the finding that the seal at issue had been broken during the night of 29 to 30 May 2006 and that the door of the room in question could therefore have been opened during that period.

42 In the second place, the General Court examined whether the circumstances alleged by E.ON Energie were such as to call in question the probative value of the abovementioned evidence. The General Court rejected E.ON Energie's argument that the 'VOID' messages were only very faintly visible and only on one part of the seal at issue. The General Court held, in particular, that the appearance of the 'VOID' messages was sufficient to establish that the seal at issue had been displaced and that the altered state of that seal had been confirmed by the eight inspectors present. As regards the comparison that the inspectors carried out between the condition of the seal at issue and the condition of the seals affixed in other parts of the building, the General Court ruled that, since that breach of seal was the first, it was reasonable that the inspectors checked by carrying out such a comparison. Accordingly, it cannot be inferred that doubts existed concerning the condition of the seal. Regarding the argument alleging that the photographs on which the Commission relied were taken after the door was opened, the General Court observed that it was not such as to call in question the probative value of the abovementioned evidence.

43 The General Court then went on to examine, at paragraphs 166 to 171 of the judgment under appeal, the fifth plea, alleging an erroneous assumption of the suitability of the security label for official sealing by the Commission, as that label had been designed to prove that a 'secured container or product' has not been opened. The Court held, in the first place, that even though the technical bulletin of the seal at issue does not explicitly mention the use made of it by the Commission, according to that bulletin the security label has to indicate tampering by self-destructing when an attempt is made to remove the label, which corresponds exactly to the Commission's use. In so far as the manufacturer recommends the use of additional methods of security in cases where tampering 'could have severe consequences such as significant monetary loss', it is apparent from the technical bulletin that that recommendation reflects the possibility of a false negative reaction.

44 In the second place, the General Court found that the sealing, in accordance with Article 20(2)(d) of Regulation No 1/2003 had been recognised by representatives of E.ON Energie and it may be assumed that E.ON Energie would have immediately raised doubts, where appropriate, as regards the suitability of the security label when it was affixed. In the third place, the General Court decided to consider, in its examination of the sixth plea, E.ON Energie's arguments relating to 'alternative scenarios' which might have affected the condition of the seal at issue.

45 The General Court dismissed, at paragraphs 199 to 234 of the judgment under appeal, the sixth plea, alleging disregard by the Commission of 'alternative scenarios' which may have been the cause of the condition of the seal at issue. After holding that, in principle, it is for the undertaking, which alleges

there is an alternative explanation of the facts established by the Commission to prove, on the one hand, the existence of the circumstance which it alleges and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission, the General Court observed that it had already held, when dismissing the fourth plea, that the Commission was justified in finding that the seal at issue had been broken during the night of 29 to 30 May 2006. It was therefore necessary to consider whether E.ON Energie had produced evidence to the contrary.

46 In the first place, the General Court held that E.ON Energie had not established the existence of 'external influences' which were the cause of the 'VOID' messages on the seal at issue. In particular, it observed that E.ON Energie did not adduce proof of a causal link between the alleged exceeding of the shelf life of the seal at issue and the appearance of the 'VOID' messages, taking into account, inter alia, the fact that the other seals used, originating from the same batch, had not shown a positive reaction. The General Court also found that E.ON Energie had not proved that the use of a detergent, Synto, by the cleaning company's employee to clean the door which had been sealed had led to a risk of 'false positive reaction' in the seal at issue. The General Court added that, in any event, it was E.ON Energie's responsibility to inform the cleaning company about the significance of the seal and to make sure that the seal at issue was not broken by the cleaning company's employee.

47 The General Court also found that E.ON Energie did not adduce proof that alteration of the condition of that seal during the night of 29 to 30 May 2006 had been caused by the air humidity in Munich during the night in question; by any vibrations and any shaking, linked to any occupancy of room G.506, situated beside room G.505 which had been sealed, and even the combined effect of those two factors; by the obsolescence of the seal at issue or by the effect of Synto on that seal. As regards the argument based on the fact that room G.505 had not been opened during the night in question, the General Court recalled, as stated at paragraph 38 above, that it was not for the Commission to establish the contrary.

48 In the second place, the General Court observed that the expert opinions produced by E.ON Energie did not establish that the circumstances alleged by E.ON Energie caused the alteration of the condition of the seal at issue and that they contained, in any event, a number of shortcomings resulting, inter alia, from the small size of the samples tested, from the quantity of cleaning agent used, and from E.ON Energie's refusal to use original seals and to allow a Commission official to be present at the tests. In the third place, the General Court dismissed as irrelevant or not established the various criticisms put forward by E.ON Energie with regards to the reports carried out by Mr Kr. at the request of the Commission. In the fourth place, after taking account of the fact that E.ON Energie had not adduced proof capable of calling in question the probative value of the evidence furnished by the Commission, the General Court held that there was no need for it to rule on the alleged 'possibility of false positive reactions' which was put forward in recitals 7, 74 and 75 to the contested decision.

49 The General Court examined, at paragraphs 238 to 247 of the judgment under appeal, the seventh plea, alleging breach of the principle of the presumption of innocence. Having noted, in accordance with the case-law, that that principle must be applied to the procedures relating to infringements of the competition rules, the General Court dismissed E.ON Energie's arguments based on the alleged 'leading' nature of the questionnaire addressed to the expert, Mr Kr., by letter of 16 October 2007.

50 The questionnaire asked Mr Kr. inter alia to state the reasons for which the expert opinions produced by E.ON Energie 'do not challenge' his own expert opinion of 8 May 2007 and to 'confirm' that the combination of the factors put forward by E.ON Energie 'cannot have led' to a false positive reaction. The General Court found, in particular, that the burden of proof, in this regard, lay with E.ON Energie and that the questionnaire sought to establish whether the conclusions of Mr Kr.'s first report were called in question by the expert opinion produced by E.ON Energie, although Mr Kr. had already

made some comments orally on the findings contained in the those expert opinions. Finally, the General Court observed that, in his second report, before answering, Mr Kr. reformulated in an 'open' way the questions asked. For all those reasons, the General Court dismissed the seventh plea.

51 The General Court dismissed, at paragraphs 254 to 263 of the judgment under appeal, the eighth plea, alleging infringement of Article 23(1) of Regulation No 1/2003, in that the Commission wrongly considered, at recital 101 to the contested decision, that actions of third parties were attributable to E.ON Energie and that there can be no question of negligence in this case, since the employee of the cleaning company was not in a position to know that she was carrying out the material act constituting the breach of seal. First of all, the General Court took the view that E.ON Energie's arguments that the keyholders did not open the door of the room in question were irrelevant as it was not for the Commission to prove that that room had actually been entered. Second, the General Court found that, according to the undisputed observations made at recitals 101 and 103 to the contested decision, only persons authorised by E.ON Energie were in the building at the time of the breach of seal and that the argument that only the keyholders were staff or authorised representatives of E.ON Energie could not be accepted. Third, the ignorance of the employee of the cleaning company as regards the consequences which could allegedly result from wiping the seal at issue with a cloth impregnated with a cleaning agent was irrelevant since it had not been proved that cleaning the door with Synto had actually affected the condition of the seal at issue. Fourth, as regards the arguments about the outdated nature of the seal at issue, the General Court recalled that it had rejected these arguments in the context of the examination of the sixth plea.

52 Finally, the General Court examined at paragraphs 276 to 297 of the judgment under appeal, the ninth plea, alleging infringement of Article 253 EC and of the principle of proportionality when the amount of the fine was set.

53 In the first place, the General Court recalled that, according to case-law, the statement of reasons must be assessed in relation to the circumstances of each case and in particular its context as well as the legal rules governing the matter in question and does not necessarily have to go into all the relevant facts and points of law. The General Court went on to point out that the Commission, when setting the amount of the fine imposed on E.ON Energie, had relied on the gravity of the infringement and the particular circumstances of the case and, in particular, on the existence of evidence pointing to infringements by E.ON Energie of the competition rules, on the fact that this was the first case to which Article 23(1)(e) of Regulation No 1/2003 had applied and on the necessity that the fine set would nevertheless be capable of ensuring the deterrent effect of that new provision.

54 The General Court observed, in that regard, that since the Commission had not adopted any guidelines regarding the setting of fines imposed pursuant to Article 23(1)(e) of Regulation No 1/2003, it was not required to express in figures, either in absolute terms or as a percentage, the basic amount of the fine and any aggravating or attenuating circumstances. The General Court therefore rejected the argument that the statement of reasons to the contested decision was inadequate, as well as the argument alleging, as a result, that there was an infringement of E.ON Energie's rights of defence.

55 In the second place, as regards the argument, alleging infringement of the principle of proportionality, after recalling that, according to the case-law, the fines must not be disproportionate to the aims pursued, the General Court observed that the Commission rightly set out the reasons, in recitals 105 to 108 to the contested decision, why breaking a seal was, as such, a particularly serious infringement: it took into account, in particular, the need to ensure the deterrent effect of the fine set in case of a breach of seal, so that undertakings should not be able to consider that it would be advantageous for them to break a seal in the course of an inspection. Accordingly, the Commission did not find that there were aggravating circumstances, but rather circumstances which justified the imposition of a sufficient dissuasive fine for any breach of seal.

56 In relation to the attenuating circumstances put forward by E.ON Energie, the General Court stated inter alia that the fact that a breach of seal was committed through negligence and not intentionally is not an attenuating circumstance and that the Commission had not started, in the present case, from the assumption that the infringement was necessarily intentional. The General Court also held that the Commission had no reason to inform E.ON Energie of an alleged 'particular sensitivity' of the security label and that it was also irrelevant that it was not possible to establish whether documents had been removed from room G.505. The extent of the efforts made by E.ON Energie in producing expert opinions and questioning all keyholders was also irrelevant, since those efforts formed part the exercise, by E.ON Energie, of its rights of defence and did not facilitate the Commission's investigation. The General Court found that the Commission fully took into consideration the fact that it was the first breach of seal case and concluded that, contrary to what E.ON Energie maintained, a fine of EUR 38 million, corresponding to approximately 0.14% of E.ON Energie's turnover, could not be considered disproportionate to the infringement.

57 For all those reasons, the General Court dismissed the ninth plea and, therefore, E.ON Energie's application in its entirety.

Procedure before the Court

Forms of order sought by the parties

58 E.ON Energie claims that the Court should:

— set aside the judgment under appeal and annul the contested decision;

— in the alternative, set aside the judgment under appeal and annul the contested decision in so far as a fine as well as costs were imposed on E.ON Energie, and grant the forms of order sought by E.ON Energie at first instance;

— in the further alternative, set aside the judgment under appeal and refer the case back to the General Court; and

— order the Commission to pay the costs.

59 The Commission contends that the Court of Justice should:

— dismiss the appeal in its entirety, and

— order E.ON Energie to pay the costs of the proceedings.

The reopening of the oral procedure

60 By letter dated 26 June 2012, the Commission requested that the oral procedure be reopened. In support of its application, the Commission indicated its disagreement with the position adopted by the Advocate General as regards the sixth ground of appeal and contends that certain questions that he raised in this respect were new, meaning that the principle of *audi alteram partem* was not observed in this case.

61 It must be pointed out that the Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order the reopening of the oral procedure under Article 61 of its Rules of Procedure if it considers that it lacks sufficient information or that the case must be dealt

with on the basis of an argument which has not been debated between the parties (see Case C-205/06 *Commission* v *Austria* [2009] ECR I-1301, paragraph 13 and Case C-262/10 *Döhler Neuenkirchen* [2012] ECR, paragraph 38).

62 It should be recalled that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. In this regard, the Court is not bound either by the conclusion reached by the Advocate General or by the reasoning which led to that conclusion (see Case C-229/09 *Hogan Lovells International* [2010] ECR I-11335, paragraph 26). Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he examines in his Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure.

63 Therefore, since the Court, having heard the Advocate General, considers that it has sufficient information to make a ruling and since the case does not have to be resolved on the basis of arguments which were not the subject of debate between the parties, the Commission's application for the reopening of the oral procedure must be rejected.

The appeal

64 It should be recalled, at the outset, that the General Court has exclusive jurisdiction to find and appraise the relevant facts and, in principle, to examine the evidence it accepts in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (Case C-535/06 P *Moser Baer India* v *Council* [2009] ECR I-7051, paragraph 32 and the case-law cited).

65 However, where the General Court has found or appraised the facts, the Court of Justice has jurisdiction to carry out a review, provided that the General Court has defined their legal nature and determined the legal consequences (Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49).

The first ground of appeal, alleging an error in law with regard to the distribution of the burden of proof and an infringement of the violation of the principle of the presumption of innocence and the maxim of European Union law in dubio pro reo

Arguments of the parties

66 According to E.ON Energie, the General Court, after finding, at paragraph 48 of the judgment under appeal, that it was for the Commission to prove the infringements found by it reversed the burden of proof in holding, at paragraph 55, that where the Commission relies on direct evidence it is for the undertakings concerned to demonstrate that the evidence relied on by the Commission is insufficient. According to E.ON Energie, the General Court, inter alia, failed to have regard to the fact that the evidence, consisting of the breach of a seal which had undisputedly exceeded its shelf life, does not constitute sufficiently precise proof, and therefore sufficient proof, for the purposes of establishing the existence of an infringement. E.ON Energie objects, in particular, to the application by analogy of the judgment in Case C-235/92 *P Montecatini* v *Commission* [1999] ECR I-4539, as it considers that,

unlike documentary evidence, the breaking of a seal is not direct and sufficient evidence, but equivocal evidence. As for the remainder, the evidence on which the General Court relied was only indirect evidence.

67 E.ON Energie, in addition, submits that the uncertainty regarding the fitness of the seal actually used in the present case was attributable to the Commission, since the Commission had used a seal which had exceeded its shelf life and it had not secured the evidence before the door of the room was opened. In its reply, E.ON Energie adds that therefore the seal at issue was wrongly affixed because, to be correctly affixed, it was necessary to comply with the manufacturer's instructions in the technical bulletin for the product. The fact that it was impossible to adduce evidence owing to the Commission's actions should not prejudice E.ON Energie. Therefore that event reverses the burden of proof, meaning that the General Court ought to have required the Commission to prove that the seal at issue had been correctly affixed and functioned normally, instead of requiring E.ON Energie to prove the contrary as the General Court did at paragraph 170 of the judgment under appeal. E.ON Energie argues that the first ground of appeal is admissible because the distribution of the burden of proof is a question of law and, without the error of law complained about in this ground, the General Court may have come to a different assessment of the facts at issue in the present case. Accordingly, E.ON Energie is not challenging as such the General Court's findings of fact before the Court of Justice.

68 According to the Commission, the question of whether it adduced proof of a breach of seal falls within the General Court's assessment of the evidence and its review by the Court of Justice must remain within strict limits. Since E.ON Energie has not claimed that there has been a distortion of the evidence, the first ground of appeal is inadmissible. Furthermore, the argument, introduced for the first time, and therefore at too late a stage, in E.ON Energie's reply that the seal at issue was wrongly affixed, due to it being outdated, cannot justify the reversal of the burden of proof that E.ON Energie seeks.

69 In addition, as the General Court observed in paragraphs 53 to 55 of the judgment under appeal, the standard of proof depends on the nature of the evidence adduced by the Commission to establish the infringement. The Commission observes that if, as regards concerted practices, it relies solely on observations of parallel conduct on the market and presumes, in this respect, that it cannot be explained other than by collusion between the undertakings concerned, it is sufficient for those undertakings to establish circumstances which cast the facts in a different light in order to exculpate themselves. By contrast, it is different if the Commission can rely on evidence showing that the observed behaviour is the result of concerted action, in which case it is not sufficient for the undertakings concerned to present an alternative explanation of the facts found by the Commission. In that case, the undertakings concerned must challenge the existence of those facts established on the basis of the documents produced by the Commission.

70 According to the Commission, the question of whether it has discharged its obligation to satisfy the initial burden of proof by means of direct evidence and whether the undertaking has adduced evidence to the contrary both pertain to an assessment of the evidence. In addition, taking into account the information provided by the manufacturer of the seal at issue, the present case was a normal situation where a functional seal was affixed, meaning that it was for E.ON Energie to adduce evidence to the contrary proving its claim that there was a false positive reaction. According to the Commission, E.ON Energie is seeking, by producing an argument relating to the standard of proof, to take the attention of the Court of Justice away from the fact that E.ON Energie has never succeeded in seriously calling in question the performance of the seal at issue, as described the manufacturer, as confirmed by the Commission's practice and as verified by the technical expert, Mr Kr.

Findings of the Court

71 It should be borne in mind, as the General Court rightly stated at paragraph 48 of the judgment under appeal, that, in the field of competition law, where there is a dispute as to the existence of an infringement, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58 and Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23, paragraph 62).

72 Moreover, where the Court still has a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement (see, to that effect, Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 265). Indeed, the presumption of innocence constitutes a general principle of European Union law, currently laid down in Article 48(1) of the Charter of Fundamental Rights of the European Union.

73 According to the Court's case-law, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150, and *Montecatini* v *Commission*, paragraphs 175 and 176).

74 Admittedly, if the Commission finds that there has been an infringement of the competition rules on the basis that the established facts cannot be explained other than by the existence of anti-competitive behaviour, the Courts of the European Union will find it necessary to annul the decision in question where those undertakings put forward arguments which cast the facts established by the Commission in a different light and thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement occurred. In such a case, it cannot be considered that the Commission has adduced proof of an infringement of competition law (see, to that effect, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 16 and Joined Cases C-89/95, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström and Others* v *Commission* [1993] ECR I-1307, paragraphs 126 and 127).

75 However, the Court has also held that, where the Commission has been able to establish that an undertaking had taken part in meetings between undertakings of a manifestly anti-competitive nature, the General Court was entitled to consider that it was for that undertaking to provide another explanation of the tenor of those meetings. In so doing, the General Court had neither unduly reversed the burden of proof nor set aside the presumption of innocence (*Montecatini* v *Commission*, paragraph 181).

76 Likewise, as the General Court rightly pointed out, at paragraph 56 of the judgment under appeal, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence so that the Commission bears the burden of proving that that circumstance was not capable of affecting the probative value of that evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance relied on by it and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission.

77 In the present case, E.ON Energie complains that in the judgment under appeal the General Court applied, by analogy, paragraph 181 of the judgment in *Montecatini* v *Commission* to a breach of seal.

78 In so far as E.ON Energie challenges that application by analogy, it must be held that the General Court did not err in law in this respect, either at paragraphs 55 and seq. or at paragraph 170 of the judgment under appeal. Indeed, since the Commission had determined that there had been a breach of seal on the basis of a body of evidence, including the breach of seal report, the General Court was entitled to conclude, by applying by analogy the judgment in *Montecatini* v *Commission*, that it was for E.ON Energie to adduce evidence challenging that finding, and, in so doing, the General Court did not unduly reverse the burden of proof or set aside the principle of the presumption of innocence.

79 In so far as E.ON Energie seeks to derive an argument, in the first ground of appeal, from the seal at issue having exceeded its shelf life, it is sufficient to note that E.ON Energie is contesting the factual assessments made by the General Court as regards the various pieces of evidence produced. In this respect, its argument is therefore inadmissible, in accordance with the case-law cited in paragraphs 64 and 65 above.

80 As regards the argument alleging uncertainty, attributable to the Commission, concerning the effectiveness of the seal at issue actually used in the present case, it must be recalled, as stated at paragraph 76 above, that the General Court did not err in law in finding that the burden of proof lay with E.ON Energie, except in so far as such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself. After asking itself the correct question in law, the General Court then found, on the basis of the evidence before it, at paragraphs 57 to 63, 99 to 124 and 134 to 156 of the judgment under appeal, that uncertainty attributable to the Commission had not been established, with the result that the burden of proof actually lay with E.ON Energie. In so far as E.ON Energie disputes that factual assessment by the General Court, its arguments are inadmissible, in accordance with the case-law cited in paragraphs 64 and 65 above.

81 Accordingly, the first ground of appeal must be rejected.

The second ground of appeal, alleging an infringement of the obligation to state reasons in applying the principles governing the burden of proof

Arguments of the parties

82 E.ON Energie complains that the General Court failed to comply with its obligation to state reasons, because it carried out an incorrect legal characterisation of facts. According to E.ON Energie, in the course of reversing of the burden of proof, the General Court failed to have regard to the criterion of 'questioning' the probative value of the seal at issue that it had itself referred to, at paragraph 56 of the judgment under appeal, by requiring, at paragraphs 202 and 203 of that judgment, proof of a direct 'causal link' between the exceeding of the shelf life of that seal and the appearance of a false positive reaction. According to E.ON Energie, the contradictory and insufficient nature of those grounds of judgment raises a question of law and the second ground of appeal is therefore admissible.

83 According to the Commission, this ground of appeal is inadmissible because E.ON Energie is not challenging the grounds of the judgment under appeal, which are clear, but only challenging the assessment of the evidence carried out by the General Court. In any event, in its view it is unfounded.

Findings of the Court

84 Contrary to what to Commission contends, the second ground of the appeal is admissible. Indeed, in so far as E.ON Energie complains of an alleged contradiction between the legal rule laid down at paragraph 56 of the judgment under appeal and the implementation of that rule at paragraph 202 of that judgment, thereby casting doubt on the reasoning followed by the General Court in its

application of European Union law on the burden of proof, E.ON Energie is raising a legal issue concerning the application of European Union law by the General Court (Case C-412/05 P *Alcon* v *OHIM* [2007] ECR I-3569, paragraph 89).

85 As regards the merits of this ground of appeal, it is sufficient to note that, as the Advocate General has observed at paragraph 37 of his Opinion, where the General Court lays down the principle, at paragraph 56 of the judgment under appeal, that the circumstance relied upon by E.ON Energie must call in question the probative force of the evidence relied on by the Commission, this obviously presupposes a causal connection between the one and the other.

86 Indeed, the circumstance relied on by E.ON Energie before the General Court, namely that the seal had exceeded its maximum shelf life, may call in question the probative value of the 'VOID' messages on the seal only if it is shown that there is a causal link between expiry of the shelf life of the seal and the appearance of those messages. It must therefore be concluded that, by looking for the existence of such a link at paragraphs 202 and 203 of the judgment under appeal, the General Court did not apply a different legal test to the one it set out at paragraph 56 of that judgment.

87 It follows that the second ground of appeal must be rejected.

The third ground of appeal, alleging distortion of evidence, breach of the principle of the rule of law and the right to sound administration, illogical and erroneous nature of the reasoning concerning the question whether the seal at issue was properly affixed

Arguments of the parties

88 The third ground of appeal concerns the General Court's appraisal at paragraphs 102 to 115 of the judgment under appeal of the question whether the seal at issue was properly affixed.

89 Regarding, first of all, distortion of evidence, E.ON Energie points out that the intactness of a seal comprises both an internal aspect and an external aspect and that only the state of the latter can be established by reference to the record of sealing. Accordingly the General Court failed to take account of the internal intactness of that seal, which could not have been apparent from the exterior during the short period between the application of the seal and the moment when the inspection team left the premises. By neglecting that aspect, the General Court therefore disregarded the principle of the rule of law and the right to sound administration because it was not in a position to determine with the naked eye whether the Commission had acted properly.

90 Moreover, the General Court is alleged to have misrepresented the evidence of the record of sealing of the seal at issue and attributed to it a declaratory nature that it does not have, by assuming, at paragraph 104 of the judgment under appeal, that it constitutes adequate proof that the seal at issue was properly affixed. Furthermore, in holding, at paragraph 115 of the judgment under appeal, that the seal 'adhered to the door and door frame of room G.505 and that it was intact, inasmuch as it was not showing 'VOID' messages at the time when the inspection team left [E.ON Energie]'s premises', the General Court accepted criteria which are irrelevant as regards the internal fitness of the seal at issue to fulfil its function. In doing so, the General Court breached the laws of logic.

91 Second, E.ON Energie complains that the General Court based its analysis on the statements of the Commission and Bundeskartellamt inspectors concerning the affixing of the seal at issue. Those statements are irrelevant as the inspectors were unable to assess the internal intactness of the seal at issue.

92 Third, E.ON Energie asserts that it had no opportunity to see that the security label was especially sensitive and likewise no means or opportunity to verify its specific properties. In that context, the General Court allegedly made an error of reasoning when it indicated, at paragraph 105 of the judgment under appeal, referring to recital 51 of the contested decision, that E.ON Energie was deemed to be 'perfectly aware of the significance of such signs', namely the 'VOID' messages. According to E.ON Energie, it cannot be excluded that a hidden defect or prior damage of the seal at issue could appear only later or that, due to ignorance as to the functioning of that seal, nobody paid sufficient attention to its external intactness.

93 The Commission considers that, by the third ground of appeal, E.ON Energie seeks in fact to call into question the Court's factual findings, and thus that ground of appeal is inadmissible.

Findings of the Court

94 As concerns the arguments relating to distortion of evidence, it is necessary to distinguish, as the Advocate General has observed at paragraph 50 of his Opinion, between the part concerning the General Court's assessment of the intactness of the seal and the part concerning the assessment of the probative value of the record of sealing of that seal.

95 To the extent that E.ON Energie calls in question the General Court's assessment of the intactness of the seal at issue, it should be observed that E.ON Energie puts forward its own definition of the absence of any alteration of a seal, in respect of which it requests the Court of Justice to review the assessment of the evidence carried out by the General Court.

96 However, the question of whether the seal at issue could be considered as being altered is not a question of distortion of evidence, but a question of fact. E.ON Energie is therefore contesting, in reality, the factual assessment which the General Court made as regards the intactness of the seal at issue on the basis of the evidence presented to it. It follows that, in accordance with the case-law cited in paragraph 64 above, those claims are inadmissible in this appeal.

97 Moreover, E.ON Energie does not explain how the General Court infringed the principles of the rule of law and sound administration, as a result of the factual assessment that it carried out. Therefore, these arguments must also be rejected.

98 As regards the alleged distortion of the record of sealing of the seal at issue, it should be noted, as the Advocate General has observed at paragraph 56 of his Opinion, that that evidence is authentic, until proved to the contrary, as regards to whether that seal was properly affixed, as well as the fact that that seal adhered to the door of room G.505, as witnessed by the representatives of the Commission and the Bundeskartellamt on the evening of 29 May 2006. The submissions put forward by E.ON Energie do not reveal any material inaccuracy in the General Court's reading of the report and neither do they mention anything showing that the report contains inaccurate statements.

99 Therefore, the claims relating to the distortion of the record of the sealing of the seal at issue must be rejected as unfounded.

100 As regards the complaint that E.ON Energie made to the General Court, criticising the relevance of the statements of the inspectors, since they were allegedly not in a position to evaluate the internal functioning of the seal at issue, it should be noted, as was pointed out in paragraph 95 above, that, in so doing, E.ON Energie sought to have adopted its own definition of the absence of any alteration of a seal. However, as the Court has held at paragraph 96 above, the question of whether the seal at issue could be considered as being altered is a question of fact falling exclusively within the jurisdiction of the General Court.

101 Moreover, in accordance with the case-law cited in paragraph 64 above, provided that the evidence has been properly obtained and the general principles of law and rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it (see also, to that effect, Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 41 and the case-law cited). However, in its submissions relating to the relevance of the statements of the inspectors, E.ON Energie seeks to the challenge the value given to that evidence by the General Court. Consequently, its argument must be dismissed as inadmissible.

102 Finally, E.ON Energie's argument alleging an error of reasoning is ineffective, since it relates to a ground which is superfluous to the reasoning of the General Court. Indeed, the finding of the General Court, at paragraph 105 of the judgment under appeal, that E.ON Energie 'was perfectly aware of the significance' of the 'VOID' signs, which is the subject of this argument, forms part of a line of reasoning based on the absence of objections from E.ON Energie as regards the affixing of the seal at issue before the appearance of those signs, and that reasoning only serves to corroborate the conclusions drawn by the General Court from other evidence.

103 It follows from the above that the third ground of appeal must be rejected in its entirety.

The fourth ground of appeal, alleging an illogical statement of reasons concerning the appraisal of the argument that the maximum shelf life of the seal at issue had been exceeded.

Arguments of the parties

104 E.ON Energie alleges a failure to state reasons linked to an alleged violation the laws of logic. In E.ON Energie's view, at paragraph 203 of the judgment under appeal, from the fact that the other seals affixed in E.ON Energie's building functioned properly, the General Court draws the logically inexplicable conclusion that the seal at issue should have also functioned properly. However, it is precisely a characteristic of mass production that a particular defect causes flaws only in isolated products. The Commission did not show that all the seals which came from the same batch were free from defects. In addition, in the present case it is common ground that the other seals were not affixed to doors consisting of soundproof panels and an anodised aluminium frame but to three filing cabinets E.ON Energie states that it disputes the inherent logic in the findings made by the General Court and not the factual assessment carried out by it.

105 According to the Commission, the fourth ground of appeal is inadmissible, as E.ON Energie contests only the findings of fact made by the General Court, and, in any event, its arguments are unfounded.

Findings of the Court

106 In so far as that the General Court relies, at the paragraph 203 of the judgment under appeal, on the fact that the all the seals in question come from the same lot, it is a finding of fact that E.ON Energie cannot challenge before the Court of Justice in the absence of a distortion of the facts, in accordance with the case-law cited in paragraph 64 and 65 above.

107 As regards the argument in which E.ON Energie relies on the alleged differences between the substrate on which the seals were affixed, it should be noted that E.ON Energie does not challenge the explicit finding, made at paragraph 122 of the judgment under appeal, that, according to the information provided by the manufacturer, which was corroborated by the tests of the Commission's expert, the type of seal used is 'adapted to practically all substrates'. In those circumstances, this argument is ineffective since E.ON Energie disregards a key element underpinning the reasoning of the General Court and cannot therefore call into question that reasoning.

108 Finally, it must be added that the Commission rightly points out that if an undertaking could challenge the probative value of a seal by alleging the simple possibility that it might have been defective, the Commission would be completely deprived of the possibility of using seals. Therefore, such an argument, unsupported by any evidence establishing a defect in the seal at issue, cannot be accepted.

The fifth ground of the appeal, alleging an irregularity in the administration of evidence, breach of the principle in dubio pro reo and inconsistencies in the assessment of the condition of the seal

Arguments of the parties

109 E.ON Energie criticises the Court for having infringed the rules on the administration of evidence and the laws of logic as well as the principle *in dubio pro reo*. In particular, the General Court, at paragraph 146 of the judgment under appeal, allegedly erred in law by dismissing as irrelevant the argument relating to state of the 'VOID' messages on the frame of the door. In so doing, the General Court contradicted its own findings as well as the uncontested account of the facts of the Commission. According to E.ON Energie, it follows from the Commission's own account of facts that each repositioning of the seal must result in damage to the letters, meaning that the presence of the intact 'VOID' messages prove that a detachment following a repositioning of the seal can be ruled out. If a false positive reaction on the part of the seal at issue which was affixed to the frame of the door cannot be ruled out, it should be found, *in dubio pro reo*, that such a reaction could occur in the same manner in relation to the part of the seal affixed to the door leaf, which would also contradict the finding that the appearance of the 'VOID' messages on the seal at issue or, at the very least, on part of it signifies, in all cases, that the seal had been broken and the adhesive label had been displaced.

110 In addition, it runs counter to the rules on the administration of evidence that the General Court failed to order a measure of inquiry in relation to that matter. E.ON Energie states, in this respect, that the question of whether specific evidence had been adduced in a proper manner while respecting the relevant principles, including the principle of *in dubio pro reo*, is a question of law.

111 The Commission contests those arguments and considers that, in particular, E.ON Energie seeks once again to dispute findings of fact. The fifth ground of appeal is therefore inadmissible.

Findings of the Court

112 It should be noted, at the outset, that an appeal is inadmissible where, without even including an argument specifically identifying the error of law allegedly vitiating the judgment of the General Court, it simply repeats or reproduces verbatim the pleas in law and arguments already put forward before that Court, including those which were based on facts expressly rejected by that Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake on appeal (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 51 and the case-law cited).

113 By contrast, where an appellant challenges the interpretation or the application of European Union law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 32 and the case-law cited).

114 In the present case, while E.ON Energie claims a breach of the principle *in dubio pro reo* as well as a contradiction in the reasoning, the only explanations that it puts forward in support of its arguments, in actual fact, consist of a challenge to the findings of fact that the General Court made on the basis of the evidence before it. Therefore, E.ON Energie does not explain the errors of law which are said to vitiate the General Court's assessment nor does it dispute the General Court's interpretation or application of European Union law.

115 As regards the failure by the General Court to order measures of inquiry, it should be borne in mind that, according to well-established case-law, the General Court is the sole judge of any need to supplement the information available to it concerning the cases before it. The question whether the procedural documents before it are convincing is a matter to be appraised by it alone, which, again according to well-established case-law, is not subject to review by the Court of Justice, unless the facts or evidence have been distorted (see Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 66; and Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 19).

116 Nothing in the present appeal would suggest that such is the case here. Indeed, as the Advocate General has observed at paragraph 84 of his Opinion, the General Court's finding at paragraph 146 of the judgment under appeal that the seal at issue must have been removed from the door of room G.505 during the night of 29 to 30 May 2006 is supported to the requisite legal standard by the General Court's assessment of the evidence before it, at paragraphs 136 to 145 of the judgment under appeal.

117 Therefore, the General Court cannot be criticised for not having granted E.ON Energie's request that further measures of inquiry be ordered.

118 In light of the above, the fifth ground of appeal must be dismissed.

The sixth ground of appeal, alleging errors of law and, in particular, a breach of the principle of proportionality, in the assessment of the seriousness of the infringement and the amount of the fine

Arguments of the parties

119 E.ON Energie claims that the General Court erred in law and, in particular, breached the principle of proportionality by failing to take account, in assessing the gravity of the infringement and the amount of the fine, of the fact that the Commission had adduced no evidence to show that the door of room G.505 had actually been opened or that documents had been removed. According to E.ON Energie, these are decisive matters in as far as the objective of sealing is to prevent any handling of the documents placed in the sealed room, as stated at paragraph 291 of the judgment under appeal. E.ON Energie adds that the General Court, in exercising its unlimited jurisdiction, ought to have reduced the fine accordingly. Moreover, E.ON Energie claims that the General Court erred in law as regards the rules on the administration of evidence by failing to order a measure of inquiry relating to the question of the opening of the door.

120 E.ON Energie also claim that the Commission's use of seals whose shelf life had expired led to a situation of uncertainty which the General Court ought to have taken into consideration when setting the amount of the fine. On that point, E.ON Energie refers, by analogy, to *Suiker Unie and Others* v *Commission* (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 [1975] ECR 1663, paragraphs 94 to 99) where the Court of Justice held, in essence, that an infringement resulting from a certain practice cannot be taken into consideration for the purpose of setting the amount of a fine because the possibility cannot be ruled out that the wording of a Commission communication could induce the belief that such a practice was accepted as compatible with European Union law.

121 Therefore, the General Court failed to take into account the attenuating circumstance resulting from the fact that the Commission itself created the unclear situation concerning the condition of the seal at issue, which was liable to mislead and impossible to clarify after the event. It is for the Court of Justice, as part of its review in the context of an appeal, to identify and take account of all the relevant factors needed to assess the gravity of a particular course of conduct.

122 The Commission disputes those submissions and proposes that the Court dismiss the sixth ground of appeal.

Findings of the Court

123 It should be borne in mind, from the outset, that, in accordance with Article 261 TFEU and with Article 31 of Regulation No 1/2003, the General Court has unlimited jurisdiction with regard to the fines imposed by the Commission.

124 The General Court is therefore empowered, in addition to carrying out a mere review of the lawfulness of those fines, to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 61 and the case-law cited).

125 By contrast, it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of European Union law (see, to that effect, Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 34; and Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 54).

126 Accordingly, only inasmuch as the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, would it have to find that the General Court erred in law, due to the inappropriateness of the amount of a fine.

127 As regards E.ON Energie's claims about the allegedly disproportionate nature of the fine imposed in the present case, the General Court, at paragraph 294 of the judgment under appeal, gave three reasons explaining its decision on the setting of the amount of the fine at EUR 38 million namely (i) the particularly serious nature of a breach of seal; (ii) the size of E.ON Energie; and (iii) the need to ensure that the fine has a sufficient deterrent effect.

128 As regards the first of those reasons, it should be borne in mind, as the Commission observes, that the General Court correctly explained, at paragraphs 85 and 218 of the judgment under appeal, that it does not matter, for the purposes of establishing the breach of seal, that someone entered the sealed room or not. Indeed, the objective of Articles 20(2)(d) and 23(1)(e) of Regulation No 1/2003 is to protect the inspections from the threat that comes from the simple fact that the seal has been broken, thereby giving rise to a doubt as regards the integrity of the evidence in the sealed room.

129 Accordingly, the General Court did not err in law by considering, at paragraph 294 of the judgment under appeal, that an infringement consisting of a breach of seal is particularly serious by its own nature, E.ON Energie's arguments – that alleged non-opening of the door of room G.505 ought to have changed the General Court's assessment – must therefore be dismissed.

130 As regards the second of those reasons, concerning E.ON Energie's size, it should be observed that the General Court, in order to assess the proportionality of the fine in relation to E.ON Energie's size, points, at paragraph 296 of the judgment under appeal, to the fact that the EUR 38 million fine imposed on that undertaking represents 0.14% of its annual turnover. In this regard, it is sufficient to

observe that that percentage, which was mentioned at recital 113 to the contested decision, was not contested by E.ON Energie either before the General Court or the Court of Justice, and therefore is an established fact in the context of the present appeal.

131 In those circumstances, it must be held that E.ON Energie has not put forward any argument demonstrating that the General Court's confirmation of the setting of such an amount of a fine was disproportionate in relation to the size of the undertaking as such.

132 Similarly, as regards the third reason concerning the need to ensure that the fine has a sufficient deterrent effect, it should be borne in mind that, in accordance with Article 23(2) of Regulation 1/2003, in the case of an infringement of the substantive rules laid down in Articles 81 and 82 EC, the Commission can impose a fine of up to 10% of the total turnover of the undertaking concerned in the preceding business year. Therefore, an undertaking which hinders the Commission's inspections, by breaking seals affixed by the Commission to preserve the integrity of documents during the period of time necessary for the inspection, could, by removing the evidence gathered by the Commission, escape such a penalty and must therefore be dissuaded, by the amount of the fine set in accordance with Article 23(1) of Regulation 1/2003, from engaging in such behaviour. Once a breach of seal is observed, it cannot be excluded that such behaviour occurred.

133 Accordingly, as regards the possible fine that could be imposed on E.ON Energie, pursuant to Article 23(2) of Regulation No 1/2003, in the event that the practices investigated are proved to have occurred, the fine of EUR 38 million, set down in the contested decision and confirmed by the General Court in the judgment under appeal and representing 0.14% of its annual turnover, could not be considered as excessive as regards the need to ensure its deterrent effect. It must be added, for the record, that by advancing, at paragraph 294 of the judgment under appeal, the three reasons mentioned at paragraph 127 above, the General Court gave sufficient reasons for its decision, adopted in the exercise of its unlimited jurisdiction, on the proportionality of the penalty imposed.

134 In light of the above, the Court rejects all E.ON Energie's arguments relating to an alleged infringement of the principle of proportionality in the assessment of the gravity of the infringement and the amount of the fine.

135 As regards E.ON Energie's arguments relating to the administration of evidence, in so far as E.ON Energie claims, in that context, that the General Court should have ordered a measure of inquiry to establish whether and, if necessary, in which manner, the door of room G.505 had been opened during the night of 29 to 30 May 2006, it should be borne in mind that, in accordance with the case-law cited at paragraph 115 above, the General Court is the sole judge of any need to supplement the information available to it in respect of the cases before it. That being so, it cannot be criticised, in the context of the sixth ground of appeal, for having decided, inter alia at paragraphs 84 to 86 of the judgment under appeal, not to supplement that information, and, in particular, not to take oral testimony from the keyholders, all the more so because those persons had already submitted affidavits during the administrative procedure.

136 As regards E.ON Energie's claim based on the fact that the Commission itself created the unclear situation that was liable to mislead and was impossible to clarify after the event, it must be observed that the judgment in *Suiker Unie*, to which it refers in this context, cannot be applied to the present case. Indeed, the Court of Justice has already dismissed all the grounds of appeal seeking to call into question the substantive assessments made by the General Court, and in particular the assessment that the performance of the seal at issue was not affected by the exceeding of its shelf life, made at paragraphs 63 and 199 to 203 of the judgment under appeal, and referred to in connection with the setting of the fine at paragraph 290 thereof. Therefore, E.ON Energie would have had no reason to object to the use of the seal at issue, even if it had been aware of that exceeding of the shelf life, and the absence of information in that regard at the moment when that seal was affixed could not be considered as an attenuating circumstance.

137 As to the remainder, it need merely be noted that, by its arguments put forward in the sixth ground of appeal, E.ON Energie seeks to obtain a fresh assessment of the facts or of the appropriateness of the amount of the fine. In accordance with the case-law cited in paragraph 64 and 125 above, such arguments must be dismissed as inadmissible.

138 It follows from the foregoing that the sixth ground of appeal must be dismissed and, consequently, the appeal must be rejected in its entirety

Costs

139 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and E.ON Energie has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby

1. Dismisses the appeal;

2. Orders E.ON Energie AG to pay the costs.

[Signatures]