JUDGMENT OF THE COURT (Second Chamber)

29 June 2006 *

In Case C-308/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice lodged on 19 July 2004,

SGL Carbon AG, established in Wiesbaden (Germany), represented by M. Klusmann and K. Beckmann, Rechtsanwälte,

appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by A. Bouquet, M. Schneider and H. Gading, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

Tokai Carbon Co. Ltd, established in Tokyo (Japan),

Nippon Carbon Co. Ltd, established in Tokyo,

Showa Denko KK, established in Tokyo,

GrafTech International Ltd, formerly UCAR International Inc., established in Wilmington (United States),

SEC Corp., established in Amagasaki (Japan),

The Carbide/Graphite Group Inc., established in Pittsburgh (United States),

applicants at first instance,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), P. Kūris, G. Arestis and J. Klučka, Judges,

Advocate General: L.A. Geelhoed,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 15 September 2005,

after hearing the Opinion of the Advocate General at the sitting on 19 January 2006,

gives the following

Judgment

1 By its appeal, SGL Carbon AG ('SGL Carbon') applies for the judgment of the Court of First Instance of the European Communities in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181 ('the judgment under appeal') to be set aside in part, in so far as it dismissed the action brought against Articles 3 and 4 of Commission Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement — Case COMP/E-1/36.490 — Graphite electrodes (OJ 2002 L 100, p. 1) ('the contested decision').

Legal context

Regulation No 17

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

'1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently:

...

(b) they supply incorrect information in response to a request made pursuant to Article 11(3) or (5), ...

...

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each

of the undertakings participating in the infringement where, either intentionally or negligently:

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

...

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

...'

The Guidelines

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

'The principles outlined ... should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst upholding the discretion which the Commission is granted under the

relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

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

The Leniency Notice

4 In its Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the Leniency Notice'), the Commission set out the conditions under which undertakings cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them.

5 Section A, paragraph 5, of the Leniency Notice provides:

'Cooperation by an [undertaking] is only one of several factors which the Commission takes into account when fixing the amount of a fine. ...'

European Convention for the Protection of Human Rights and Fundamental Freedoms

6 Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, provides as follows:

'Right not to be tried or punished twice

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

No derogation from this Article shall be made under Article 15 of the Convention.'

Facts and background to the adoption of the contested decision

7 In the judgment under appeal, the Court of First Instance summarised the facts of the action before it as follows:

'1 By Decision 2002/271/EC ... the Commission found that various undertakings had participated in a series of agreements and concerted practices within the meaning of Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994, L 1, p. 3) ("the EEA Agreement")] in the graphite electrodes sector.

2 Graphite electrodes are used primarily in the production of steel in electric arc furnaces. Electric arc furnace steelmaking is essentially a recycling process whereby scrap steel is converted into new steel, as opposed to the "traditional" blast furnace/oxygen process of production from iron ore. Nine electrodes, joined in columns of three, are used in the electric arc furnace to melt scrap steel. Because of the intensity of the melting process, one electrode is consumed approximately every eight hours. The processing time for an electrode is approximately two months. There are no product substitutes for graphite electrodes in this production process.

3 The demand for graphite electrodes is directly linked to the production of steel in electric arc furnaces. The customers are principally steel producers, which account for approximately 85% of demand. In 1998, world crude steel

production was 800 million tonnes, of which 280 million tonnes was produced in electric arc furnaces ...

...

5 During the 1980s, technological improvements led to a substantial decline in the specific consumption of electrodes per tonne of steel produced. The steel industry was also undergoing major restructuring in that period. The fall in demand for electrodes led to the restructuring of the world electrodes industry, with a number of factories being closed.

6 In 2001, nine Western producers supplied the European market with graphite electrodes: ...

7 On 5 June 1997, acting under Article 14(3) of Council Regulation No 17 ..., Commission officials carried out simultaneous and unannounced investigations at the premises of [certain graphite electrode producers].

8 On the same date, Federal Bureau of Investigation (FBI) agents executed judicial search warrants at the premises of a number of producers. These investigations led to criminal proceedings for conspiracy being brought against SGL ... . All

the accused pleaded guilty to the charges and agreed to pay fines, which were set at United States dollars (USD) 135 million for SGL ...

...

10 Civil proceedings were filed in the United States on behalf of a class of purchasers claiming triple damages against ..., SGL ... .

11 In Canada, ... in July 2000, SGL pleaded guilty and agreed to pay a fine of CAD 12.5 million for [an] offence [against the Canadian Competition Act]. Civil proceedings were instituted by purchasers of steel in Canada in June 1998 against ... SGL ... for conspiracy.

12 On 24 January 2000, the Commission sent a statement of objections to the undertakings concerned. The administrative procedure culminated in the adoption, on 18 July 2001, of the [contested] [d]ecision, in which the applicant undertakings ... are found to have been involved, on a worldwide scale, in price fixing and also in sharing the national and regional markets in the product in question according to the "home producer" principle: ... SGL [was responsible for part of] Europe; ...

13 Still according to the [contested] [d]ecision, the basic principles of the cartel were as follows:

— prices for graphite electrodes should be set on a global basis;

— decisions on each company's pricing had to be taken by the Chairman/ General Manager only;

— the "home producer" was to establish the market price in its home area and the other producers would "follow" it;

— for "non-home" markets, i.e. markets where there was no "home" producer, prices would be decided by consensus;

— non-home producers should not compete aggressively and would withdraw from the other producers' home markets;

— there was to be no expansion of capacity (the Japanese were supposed to reduce their capacity);

— there should be no transfer of technology outside the circle of producers participating in the cartel.

14 The [contested] [d]ecision goes on to state that those basic principles were implemented by meetings of the cartel, held at a number of levels: "Top Guy" meetings, "Working Level" meetings, "European group" meetings (without the Japanese undertakings), national or regional meetings dedicated to specific markets and bilateral contacts between undertakings.

...

16 On the basis of the findings of fact and the legal assessments made in the [contested] [d]ecision, the Commission imposed on the undertakings concerned fines set according to the methodology described in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ... and the Notice on the non-imposition or reduction of fines in cartel cases ...

17 Article 3 of the operative part of the [contested] [d]ecision imposes the following fines:

SGL: EUR 80.2 million;

...

18 In Article 4 of the operative part, the undertakings concerned are ordered to pay the fines within three months of the date of notification of the [contested] [d]ecision, failing which interest of 8.04% will be payable.'

Proceedings before the Court of First Instance and the judgment under appeal

8 SGL Carbon and other undertakings to which the contested decision was addressed brought actions for annulment of that decision before the Court of First Instance.

9 By the judgment under appeal, the Court of First Instance held, inter alia, as follows:

'...

2. In Case T-239/01, *SGL Carbon* v *Commission* [the Court]:

— sets the amount of the fine imposed on the applicant by Article 3 of Decision 2002/271 at EUR 69 114 000;

— dismisses the remainder of the application;

...'

Forms of order sought before the Court

10 SGL claims that the Court should:

— set aside in part the judgment under appeal in Case T-239/01 to the extent to which it dismisses the action brought against Articles 3 and 4 of the contested decision;

— in the alternative, reduce the fine imposed on the appellant in Article 3 of that decision and the default interest fixed in Article 4 therein in conjunction with the letter of 23 July 2001 from the Commission;

— also in the alternative, refer the dispute back to the Court of First Instance for a fresh judgment taking into account the Court of Justice's view of the law;

— order the Commission to pay the costs.

11 The Commission contends that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

The application for the reopening of the oral procedure

12 By letter received at the Court of Justice on 24 February 2006, SGL Carbon requested the reopening of the oral procedure, pursuant to Article 61 of the Rules of Procedure of the Court of Justice.

13 In support of that request, SGL Carbon asserts that the Advocate General's Opinion in the present appeal does not always correctly reproduce the parties' statements of facts and the Court of First Instance's findings. It also contains arguments and suppositions which have not hitherto been put forward by the parties in their pleadings or discussed at the hearing. That Opinion cannot therefore constitute sufficient groundwork for the judgment, but calls, exceptionally, for additional observations before the Court decides the case definitively.

14 On that point, it is appropriate to recall, first, that the Statute of the Court of Justice and its Rules of Procedure make no provision for the parties to submit observations in response to the Advocate General's Opinion (see, in particular, the order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 2).

15 As regards SGL Carbon's argument, it is noteworthy 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, in particular, Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 19, and Case C-30/02 *Recheio — Cash & Carry* [2004] ECR I-6051, paragraph 12).

16 In the present case, the Court finds that it has all the information necessary to give judgment on this appeal.

17 Consequently, there is no need to order the reopening of the oral procedure.

The appeal

18 SGL Carbon puts forward seven pleas, namely that the Court of First Instance (i) failed to have regard to the obligation to take into consideration penalties imposed previously (principle of *non bis in idem*); (ii) set the basic amount incorrectly when determining the amount of the fine imposed on the appellant; (iii) wrongly upheld the increase in respect of the telephone warnings prior to the 1997 investigation; (iv) failed to have regard to the upper limit on fines of 10% of consolidated worldwide turnover in accordance with Article 15(2) of Regulation No 17; (v) restricted the rights of the defence of the appellant on the ground of insufficient access to the file; (vi) unlawfully failed to take into consideration the appellant's ability to pay; and (vii) set the interest rates unlawfully.

First plea: failure to have regard to the obligation to take into consideration penalties imposed previously by the authorities of non-member States: the principle of non bis in idem

Arguments of the parties

19 SGL Carbon asserts that the Court of First Instance incorrectly held that the principle of *non bis in idem* was not applicable in relations between the United States of America and Canada on the one hand and the Community on the other by relying on three erroneous arguments set out in paragraphs 134, 136, 137, 140, 142 and 143 of the judgment under appeal.

20 In support of its argument, the appellant relies in particular on Case 7/72 *Boehringer Mannheim* v *Commission* [1972] ECR 1281.

21 SGL Carbon states that, contrary to the assessment of the Court of First Instance, the legal right being protected is the same in this case. Moreover, it is immaterial whether a relevant convention exists as there is an obligation to take into account penalties already imposed.

22 In the appellant's view, even if the Court of First Instance were justified in rejecting the application of the principle of *non bis in idem* in cases involving non-member States, it should have taken into account penalties imposed previously in those countries, in accordance with the principles of proportionality and natural justice.

23 The Commission submits that the appellant was not justified in relying on the prohibition against concurrent proceedings. The principle of *non bis in idem* is not transposable to cases in which non-member States have also imposed penalties.

24 The Commission maintains that, in the area of competition law, the United States of America and the Community do not pursue the same objectives. Moreover, their relevant legislation does not protect competition on a worldwide basis. The American legislation relates to competition on the United States market, whereas the rules in force in the Community are aimed at preventing distortions of competition in the common market.

25 The Commission concludes from this that the Court of First Instance was correct to hold that the principle of *non bis in idem* was not applicable in the present case.

Findings of the Court

26 It should be noted, first of all, that the principle of *non bis in idem*, also enshrined in Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitutes a fundamental principle of Community law the observance of which is guaranteed by the judicature (see, inter alia, Joined Cases 18/65 and 35/65 *Gutmann* v *Commission of the EAEC* [1966] ECR 103, 119, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59).

27 With regard to examining the substance of the plea regarding infringement of that principle, it should also be noted, as the Court of First Instance rightly held in paragraph 140 of the judgment under appeal, that the Court of Justice has not yet decided the question whether the Commission is required to set off a penalty imposed by the authorities of a non-member State where the facts with which the Commission and those authorities charge an undertaking are the same, but it has made the identical nature of the facts alleged by the Commission and the authorities of a non-member State a precondition of doing so.

28 As regards the scope of application of the principle of *non bis in idem* in situations in which the authorities of a non-member State have taken action pursuant to their power to impose penalties in the field of competition law applicable in that State, it should be borne in mind that the context of the cartel at issue is an international one, characterised in particular by action of legal systems of non-member States within their respective territories.

29 In that regard, the exercise of powers by the authorities of those States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States. The elements forming the basis of other States' legal

systems in the field of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules.

30 On the other hand, the legal situation is completely different where an undertaking is caught exclusively — in competition matters — by the application of Community law and the law of one or more Member States on competition, that is to say, where a cartel is confined exclusively to the territorial scope of application of the legal system of the European Community.

31 It follows that, when the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard the free competition within the common market which constitutes a fundamental objective of the Community under Article 3(1)(g) EC. On account of the specific nature of the legal interests protected at Community level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those of authorities of non-member States.

32 Accordingly, the Court of First Instance was fully entitled to hold in paragraph 134 of the judgment under appeal that the principle of *non bis in idem* does not apply to situations in which the legal systems and competition authorities of non-member States intervene within their own jurisdiction.

33 Moreover, the Court of First Instance was also fully entitled to hold that there is no principle of law obliging the Commission to take account of proceedings and penalties to which the appellant has been subject in non-member States.

34 In that respect, it should be stated, as the Court of First Instance correctly observed in paragraph 136 of the judgment under appeal, that there is no principle of public international law that prevents the public authorities, including the courts, of different States from trying and convicting the same natural or legal person on the basis of the same facts as those for which that person has already been tried in another State. In addition, there is no public international law convention under which the Commission could be obliged, upon setting a fine under Article 15(2) of Regulation No 17, to take account of fines imposed by the authorities of non-member States pursuant to their competition law powers.

35 It should be added that the agreements between the European Communities and the Government of the United States of America of 23 September 1991 and 4 June 1998 on the application of positive comity principles in the enforcement of their competition laws (OJ 1995 L 95, p. 47, and OJ 1998 L 173, p. 28) are confined to practical procedural questions like the exchange of information and cooperation between competition authorities and are not in the least related to the offsetting or taking into account of penalties imposed by one of the parties to those agreements.

36 Finally, as regards failure by the Court of First Instance to have regard to the principles of proportionality and equity, pleaded in the alternative by the appellant, it should be observed that any consideration concerning the existence of fines imposed by the authorities of a non-member State can be taken into account only under the Commission's discretion in setting fines for infringements of Community competition law. Accordingly, although it cannot be ruled out that the Commission may take into account fines imposed previously by the authorities of non-member States, it cannot be required to do so.

37 The objective of deterrence which the Commission is entitled to pursue when setting the amount of a fine is to ensure compliance by undertakings with the competition rules laid down by the EC Treaty for the conduct of their activities

within the common market (see, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 173 to 176). Consequently, when assessing the deterrent nature of a fine to be imposed for infringement of those rules, the Commission is not required to take into account any penalties imposed on an undertaking for infringement of the competition rules of non-member States.

38 Accordingly, the Court of First Instance did not err in law by holding, in paragraphs 144 to 148 of the judgment under appeal, that the setting of the fine imposed was lawful.

39 In the light of all the foregoing considerations, the first plea must be rejected in its entirety.

Second plea: incorrect setting of the basic amount when determining the amount of the fine imposed on the appellant

Arguments of the parties

40 SGL Carbon submits that, when calculating the fine, the Court of First Instance erred in its application of the criteria for determining the basic amount, which constitutes either an infringement of the principle of equal treatment or an error of assessment.

41 The appellant explains that the reasoning followed by the Court of First Instance in this regard is mistaken in three respects. First, the calculation carried out by the Court of First Instance within a category of undertakings, by which the market shares and turnover of the various operators are added together in order to arrive at an average turnover or market share, is not justified. Second, the discrepancies between the market shares found by the Court of First Instance are so significant that it was not justified in treating the relevant undertakings in a uniform manner within the same category. Third, for the other undertakings to which the contested decision was addressed, the Court of First Instance regarded as an 'overriding reason' much smaller differences in market shares justifying the imposition of a more gradual and proportionate fine but did not apply those considerations to the appellant.

42 SGL Carbon concludes that it was specifically disadvantaged by the assessments of the Court of First Instance when the principles governing the calculation of fines were applied mathematically. Consequently, because of those calculating errors, the fine confirmed by the Court of First Instance should be reduced by a further EUR 5.1 million to EUR 12.2 million, depending on the calculation method used.

43 The Commission recalls that, in accordance with settled case-law, when setting the amount of the fine, it has a discretionary power which precludes the application of a precise mathematical formula. If, as in the present case, an infringement has been committed by several undertakings, it is necessary to assess the relative importance of each undertaking's participation in the cartel.

44 The Commission submits that the Court of First Instance exercised its power of review correctly in this regard, inter alia to the appellant's advantage. The Court of First Instance established that when dividing the members of a cartel into categories the Commission is not required to rely exclusively and mathematically on the turnover of each undertaking. In particular, the division of the members of the cartel

into several categories, which led to the adoption of a fixed rate for the basic amount for undertakings belonging to the same category, was deemed lawful by the Court of First Instance.

45 Finally, the Commission observes that the principle of equal treatment has not been infringed by the findings of the Court of First Instance concerning the method used for calculating the fines.

Findings of the Court

46 It has been consistently held (see, in particular, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 240 to 243, and the case-law cited) that the Commission enjoys a wide discretion as regards the method used for calculating fines and that it can, in this respect, take account of numerous factors, whilst complying with the ceiling on turnover laid down in Article 15(2) of Regulation No 17.

47 The Court of Justice has also stated that the calculation method set out in the Guidelines contains various flexible elements, enabling the Commission to exercise its discretion in accordance with Article 15 of Regulation No 17, as interpreted by the Court of Justice (see *Dansk Rørindustri and Others* v *Commission*, paragraph 267).

48 It is none the less for the Court of Justice to verify whether the Court of First Instance has correctly assessed the Commission's exercise of that discretion.

49 In this respect, it should be observed that the Court of First Instance considered in detail whether the quantitative thresholds separating the three categories of undertakings for the purpose of setting the basic amounts of the fines had been determined in a coherent and objective manner.

50 As explained by the Court of First Instance in paragraphs 217 to 219 of the judgment under appeal, in dividing the undertakings which participated in the cartel into three categories, and in setting different basic amounts, the Commission relied on the turnover and market shares which the members of the cartel achieved through sales of the relevant product on the world market during the period referred to by the contested decision.

51 The Court of First Instance concluded, in paragraphs 224 to 226 of the judgment under appeal, that the choice of the basic amounts, resulting in an amount of EUR 40 million for undertakings belonging to the first category, in which SGL Carbon had been placed, was not arbitrary and did not exceed the discretion which the Commission enjoys in this area.

52 On that point, it should be noted that, by its argument, the appellant seeks to contest the classification system used by the Commission and upheld by the Court of First Instance since, in its view, each difference between the undertakings concerned in terms of turnover or market share should translate into a discrete category for each undertaking participating in the cartel and, consequently, into a different basic amount.

53 That argument cannot be accepted.

54 As follows from the abovementioned considerations of the Court of First Instance, the Court ascertained whether the Commission had applied its method for classifying undertakings and had set quantitative thresholds for each category in a consistent and coherent manner. The Court of First Instance also examined whether the grouping of undertakings within the same category was sufficiently coherent and objective in comparison with the other categories.

55 The fact that other members of the cartel had been placed, depending on the circumstances specific to each of them, in other categories cannot cast doubt on the validity of the findings of the Court of First Instance with respect to the appellant's classification.

56 It follows that the division into categories carried out by the Commission and upheld by the Court of First Instance is also consistent with the principle of equal treatment.

57 In those circumstances, the judgment under appeal is free from any errors of law on that point.

58 The second plea cannot therefore be upheld.

Third plea: increase of 25% in the basic amount

Arguments of the parties

59 SGL Carbon takes the view that the specific increase, upheld by the Court of First Instance, in the basic amount of 25%, namely EUR 15.5 million, on account of the

warnings which it gave to other undertakings of a forthcoming Commission inspection was not justified. The assessments of the Court of First Instance on that point are vitiated by errors, since the appellant was accused of certain facts which had not been established and of which it had never previously been accused, either in the statement of objections or in the contested decision.

60 SGL Carbon complains that the Court of First Instance wrongly assessed its telephone warnings, for three reasons. First, the Court of First Instance ignored the fact that the appellant's conduct was not prohibited and that it should not therefore have been penalised, on account of the principle of *nulla poena sine lege*. Second, the Court of First Instance violated the principle of *in dubio pro reo* by presupposing the existence of facts which were not substantiated either by the findings of the Commission or by its own findings. Third, the Court of First Instance infringed the principle of equal treatment.

61 The Commission asserts that the appellant's first and third arguments, namely the infringement of the principle of *nulla poena sine lege* and the infringement of the principle of equal treatment, are inadmissible, since those allegations had already been raised at first instance and that SGL Carbon merely repeats the same arguments in the appeal. In any event, the allegations put forward are without foundation.

62 The Commission observes that the appellant's argument that the Court of First Instance assumed the existence of motives unfavourable to SGL Carbon is irrelevant. When setting fines, the Commission has a wide discretion without being bound by a precise mathematical formula.

63 The Commission submits that, in its review of the exercise of that power, the Court of First Instance was right to confirm that the warnings given by the appellant had constituted a serious impediment to the investigation and that, in that context, it was not necessary to inquire into the specific motives of the member of the cartel which issued those warnings.

Findings of the Court

64 The Court of First Instance held, in paragraph 312 of the judgment under appeal, that the fact that the appellant warned other undertakings of the forthcoming Commission investigations may be characterised as an aggravating circumstance and that, contrary to the appellant's assertion, that conduct did not constitute a specific and autonomous infringement of the Community competition rules, but conduct which added to the gravity of the initial infringement. The Court of First Instance also found, in the same paragraph of the judgment under appeal that, by thus warning other undertakings, SGL Carbon sought to conceal the existence of the cartel and to keep it in operation, an aim which was successfully achieved until March 1998.

65 In paragraph 313 of the judgment under appeal, the Court of First Instance stated that the appellant's reference to Article 15(1)(c) of Regulation No 17 was irrelevant, since that provision is aimed at obstructions *qua* autonomous infringements, independent of the existence of a cartel, whereas the warnings given in the present case by SGL Carbon sought to ensure the continuation of a cartel which is accepted as having constituted a flagrant breach of Community competition law.

66 Lastly, the Court of First Instance noted in paragraph 315 of the judgment under appeal that, as the warnings were issued to other undertakings, they went beyond the purely internal sphere of SGL Carbon and sought to frustrate the Commission's entire investigation in order to ensure that the cartel could continue.

67 It should be observed that, in those findings, the Court of First Instance has made a certain number of factual assessments in relation to the appellant's conduct.

68 In this respect, it must be recalled that, in accordance with settled case-law, the Court of First Instance has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in those findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice in an appeal (see, inter alia, Case C-470/00 P *Parliament* v *Ripa di Meana and Others* [2004] ECR I-4167, paragraph 40, and the case-law cited).

69 As regards the appellant's argument relating to an alleged infringement of the principles of proportionality and equal treatment, it should be recalled that, in paragraphs 309 and 310 of the judgment under appeal, the Court of First Instance held that the increase in the fine imposed on SGL Carbon for warning other undertakings did not appear disproportionate or discriminatory. It upheld the Commission's classification of those warnings as obstructive conduct by SGL Carbon by which it sought to conceal the existence of the cartel and as an aggravating circumstance justifying an increase in that fine.

70 Those findings of the Court of First Instance are not vitiated by an error of law.

71 It follows from the case-law (see, in particular, *Dansk Rørindustri and Others* v *Commission*, paragraphs 240 to 242) that, whereas the basic amount of the fine is set according to the infringement, its gravity is determined by reference to numerous other factors, in respect of which the Commission has a wide discretion. To take

into account aggravating circumstances when setting the fine is consistent with the Commission's task of ensuring compliance with the competition rules.

72 The third plea must therefore be rejected in its entirety.

Fourth plea: failure to take into account the upper limit on fines as set out in Article 15(2) of Regulation No 17

Arguments of the parties

73 SGL Carbon observes that the Court of First Instance ignored the fact that the fine set by the Commission exceeds the upper limit provided for in Article 15(2) of Regulation No 17. The reasoning of the Court of First Instance in this regard is also vitiated by a failure to state reasons.

74 First, SGL Carbon pleads that the Court of First Instance made an error of assessment as regards the turnover figure which it took into consideration for calculating the fines. The Court of First Instance left open the question whether the Commission should have relied on the turnover figures for 1999 or those for 2000.

75 Second, SGL Carbon complains that the Court of First Instance violated Article 15(2) of Regulation No 17 and the principle of *nulla poena sine lege*. The Court of First Instance did not take into account the fact that, as a provision which prescribes a penalty, Article 15(2) of Regulation No 17 is subject to the principle of legality. That principle applies both to interim amounts and to the final amount of the penalty imposed.

76 Third, the appellant submits that the Court of First Instance infringed the principle of equal treatment. In this regard, the Court of First Instance found that the Commission could take into account many factors in order to determine the final amount of the fine. However, where the Commission chooses a given method of calculation, it should apply that method in a coherent and non-discriminatory manner.

77 Finally, SGL Carbon pleads infringement of the requirement to state reasons laid down in Article 253 EC. The Court of First Instance failed to have regard to the Commission's obligation to state reasons for not reducing the fine for the appellant, which was in a situation comparable to that of another undertaking. Contrary to the assessment of the Court of First Instance, the statement of reasons relating to the reduction in the fine granted to the other undertaking should have appeared in the contested decision.

78 In response to all the arguments set out in this plea, the Commission asserts that the Court of First Instance was right to reject those arguments, which, moreover, had already been put forward at first instance. Neither the final amount of the fine imposed by the Commission nor the final amount as reduced by the Court of First Instance exceeds 10% of the appellant's overall turnover.

79 The Commission submits that the Court of First Instance was right to confirm that the turnover achieved with the products which were the subject of the cartel must be taken into account. It states that that figure had been used, amongst other factual criteria, in order to determine the appellant's capacity to influence the graphite electrodes market through the infringement committed.

80 As regards the nature of the ceiling provided for in Article 15(2) of Regulation No 17, the Commission notes that, since the turnover of large multinational undertakings is nowadays considerable, only a flexible ceiling, which takes into account the size of the undertaking, ensures that fines imposed for an infringement of the Community competition rules have a deterrent effect. Furthermore, that provision is sufficiently precise in this respect to ensure that those to whom it applies can easily ascertain the amount of the fine which they can expect to receive.

Findings of the Court

81 In accordance with settled case-law (see, inter alia, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 117 to 119, and *Dansk Rørindustri and Others* v *Commission*, paragraph 257), the maximum limit of 10% referred to in Article 15(2) of Regulation No 17 relates to the overall turnover of the undertaking concerned, which alone gives an indication of that undertaking's size and influence on the market.

82 Furthermore, it follows from the case-law (see, inter alia, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraphs 592 and 593, and *Dansk Rørindustri and Others* v *Commission*, paragraph 278) that it is only the final amount of the fine imposed which must comply with that 10% limit. Consequently,

Article 15(2) of Regulation No 17 does not prohibit the Commission from arriving, during the various stages of calculation, at an intermediate amount higher than that limit, provided that the final amount of the fine imposed does not exceed it.

83 With respect to this case, it must be held that, as follows from paragraph 367 of the judgment under appeal, the amount of the fine imposed by the Commission remained within that maximum limit of 10%.

84 As regards the appellant's argument that the Court of First of Instance infringed the principle of equal treatment and its obligation to state reasons concerning the amount of the fine, it is sufficient to recall that, as the Court of First Instance correctly observed in paragraphs 367 to 370 of the judgment under appeal, the Commission is entitled to determine that amount by reference to numerous factors, in particular by taking into account the gravity and duration of the infringements committed and the characteristics of each undertaking belonging to a cartel.

85 It follows that, when exercising its discretion on the method used for calculating fines, the Commission is required to carry out individual assessments in order to apply that method to different undertakings.

86 It therefore follows from all the above considerations that the Court of First Instance was right to hold that, for the purpose of setting the amount of the fine in question, the appellant's position was not analogous to those of other undertakings and that, therefore, the Commission had applied the method used for calculating the disputed fine in a coherent and non-discriminatory manner.

87 The fourth plea must therefore be rejected.

Fifth plea: breach of the rights of the defence

Arguments of the parties

88 SGL Carbon submits that the Court of First Instance erred in law in finding that the Commission had granted sufficient access to the file.

89 The appellant states that the findings of the Court of First Instance in this respect are contradictory in that, first, that Court found that the Commission had established that the documents relating to cooperation by the undertakings did not form part of the internal file but appeared in the investigation file to which the undertakings had access and, second, the Court of First Instance explained that the internal documents contained information which was relevant for the defence of the appellant, since they related to collaboration by the undertakings and that those documents did in fact have an impact on the determination of the fine.

90 According to SGL Carbon, the Court of First Instance was also incorrect to find that the Hearing Officer was required to communicate to the College of Commissioners only the objections relevant to the assessment of the lawfulness of the conduct of the administrative procedure, that is to say the well-founded objections.

91 The Commission asserts that the argument that the appellant did not have sufficient access to the file is inadmissible, since it does not relate to a point of law, but to the factual findings of the Court of First Instance. The Court of Justice is not competent

to review such findings, or to review the evidence that the Court of First Instance used in support of those findings of fact. In any event, the plea put forward is without foundation.

92 The Commission observes that the appellant itself acknowledged, having participated in the graphite electrodes cartel, that the Court of First Instance found that SGL Carbon had been one of the members of the cartel and that that undertaking had admitted the infringement. Not only did the appellant fail to call in question the Commission's findings in this connection in the contested decision, but it also benefited from the rules of the Leniency Notice.

93 Finally, the Commission notes that the appellant's argument relating to the Hearing Officer's report must be rejected as inadmissible in the absence of any new evidence in this respect.

Findings of the Court

94 It should be recalled that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings (see, inter alia, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 30).

95 As regards the appellant's arguments relating to access to the file, it is sufficient to observe that the appellant does not raise a point of law, but relies on findings of fact. The Court of First Instance established, at paragraphs 39 to 41 of the judgment under appeal, that the request for access in question did not have as its object a list

or a non-confidential summary of documents. Moreover, the assessments of the Court of First Instance in those paragraphs of the judgment under appeal, relating to the treatment of a number of documents during the administrative procedure, are not contradictory.

96 As regards the appellant's argument relating to the final report of the Hearing Officer, it is sufficient to note that at the material time the latter was not required to ascertain whether the classification of internal documents was correct or not and whether the Commission was obliged to grant access to its internal file or to supply a list or summary of confidential documents.

97 It follows from settled case-law that the mere failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned is able to show, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document (see, inter alia, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 24 to 30, and Case 322/81 *Michelin* v *Commission*, paragraphs 7 to 9).

98 The Court of Justice has also stated in this respect that it is for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (see 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 73).

99 It follows from all the above considerations that the assessments of the Court of First Instance with regard to the report of the Hearing Officer, set out in paragraphs 50 to 54 of the judgment under appeal, do not contain any error of law.

100 The fifth plea must therefore be rejected.

Sixth plea: failure to take into consideration the appellant's ability to pay

Arguments of the parties

101 SGL Carbon states that in paragraphs 370 to 372 of the judgment under appeal, the Court of First Instance failed to take account of the fact that the appellant's ability to pay was significantly reduced by the heavy fines imposed by other competition authorities and the high level of damages which it had to pay in non-member States. Consequently, the imposition of a further heavy fine would push the undertaking to the verge of bankruptcy.

102 According to the appellant, by upholding the Commission's approach in this regard, the Court of First Instance infringed the principle of proportionality and the protection of the rights of undertakings deriving from economic freedom and property ownership. Contrary to the assessment of the Court of First Instance, the Commission was required to examine and take into consideration the appellant's ability to pay.

103 The Commission submits that it exercised its discretion in a lawful manner in determining the amount of the fine and that there was no reason to reduce the amount of the fine imposed.

104 The Commission adds that the Court of First Instance did not err in law in finding that it was not required to take into account the financial situation of the undertaking concerned and its ability to pay when determining the amount of the fine.

Findings of the Court

105 According to settled case-law, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions (see Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraphs 54 and 55, and *Dansk Rørindustri and Others* v *Commission*, paragraph 327).

106 That case-law is in no way called in question by Section 5(b) of the Guidelines, which states that an undertaking's real ability to pay must be taken into consideration. That ability can be relevant only in a 'specific social context', namely the consequences which payment of a fine could have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned.

107 As it is, the appellant has submitted no evidence that such a context exists.

108 So far as the appellant's argument relating to the freedom to conduct business and the right to property is concerned, it is sufficient to note that those principles are subject to public-interest restrictions and that they cannot be relevant in the context of setting a fine for an infringement of Community competition law.

109 In those circumstances, the Court of First Instance was right to hold that the Commission did not err in law in rejecting the plea alleging that the appellant's financial situation was precarious.

110 This sixth plea must therefore be rejected.

Seventh plea: unlawfulness of the rate of default interest

Arguments of the parties

111 SGL Carbon submits that the Court of First Instance did not examine its argument concerning the setting of the default interest rate. The judgment under appeal is therefore incomplete and does not provide proper grounds for rejecting the plea put forward in this connection.

112 The Commission observes that the Court of First Instance was right to uphold the decision in relation to default interest and that it gave detailed reasons for its assessments in this connection. In particular, the Court of First Instance referred to the settled case-law concerning the Commission's power to set such interest.

Findings of the Court

113 It should be borne in mind that the Court of First Instance, replying to the plea raised, referred, in paragraphs 475 and 478 of the judgment under appeal, to settled case-law that the powers conferred on the Commission under Article 15(2) of Regulation No 17 include the power to determine the date on which the fines are payable and that on which default interest begins to accrue, and the power to set the rate of such interest and to determine the detailed arrangements for implementing its decision.

114 If the Commission did not have such a power, undertakings might be able to take advantage of late payments, thereby weakening the effect of penalties.

115 Accordingly, the Court of First Instance was right to hold that the Commission was entitled to adopt a point of reference higher than the applicable market rate offered to the average borrower, to an extent necessary to discourage dilatory behaviour in relation to payment of the fine.

116 Finally, the Court of First Instance concluded that the Commission did not exceed its discretion when setting the disputed interest rate.

117 Those assessments of the Court of First Instance contain no errors of law.

118 The seventh plea must therefore be rejected.

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

Costs

120 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against SGL Carbon and SGL Carbon has been unsuccessful, it must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders SGL Carbon AG to pay the costs.

[Signatures]