JUDGMENT OF THE COURT (Second Chamber)

29 June 2006 *

In Case C-301/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice lodged on 14 July 2004,

Commission of the European Communities, represented by W. Mölls, W. Wils and H. Gading, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

SGL Carbon AG, established in Wiesbaden (Germany), represented by M. Klusmann, Rechtsanwalt,

applicant 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, the Commission of the European Communities applies for paragraph 2 of the operative part of the judgment of the Court of First Instance of the European Communities of 29 April 2004 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 so far as it reduced to the sum of EUR 69 114 000 the amount of the fine imposed on SGL Carbon AG ('SGL Carbon') by 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 11 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. In carrying out the duties assigned to it by Article [85] and by provisions adopted under Article [83] of the Treaty, the Commission may obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time-limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time-limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.'

3 Article 15 of Regulation No 17 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

4 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, while 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

5 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.

6 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. ...'

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 a 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 In the judgment under appeal, the Court of First Instance, in particular:

'...

2. In Case T-239/01 *SGL Carbon* v *Commission*:

— 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 action;

...'

10 As regards the method of setting the fines imposed, the Court of First Instance, in paragraphs 401 to 412 of the judgment under appeal, held as follows:

'401 Next, the essential reason why the Commission granted SGL a reduction of only 30% is set out in recital 174 of the [contested decision]: according to the Commission, an undertaking deserves a reduction in its fine only if its cooperation is "voluntary" and is outside the exercise of "any investigatory power": the Commission considered that "a substantial part of the information provided [by SGL] in fact constitute[d] SGL's reply to the Commission's formal

request for information [and that] SGL's statement [would] be regarded as a voluntary contribution within the meaning of the Leniency Notice only where the information provided went beyond that requested under Article 11". Furthermore, SGL sent its statement of 8 June 1999 only after it had received a reminder in which the Commission reserved the right to adopt a formal decision under Article 11(5) (recital 173 of the [contested] [d]ecision). Relying on the judgment of the Court of Justice in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraphs 27, 28 and 32 to 35, the Commission therefore did not make recompense for the information which it considered that SGL was required to provide in any event in reply to a request for information or to a decision ordering, under threat of penalties, communication of the information requested.

402 In that context, it is appropriate to observe that the absolute right to silence on which SGL relies in support of its contention that it was not required to respond to any request for information cannot be recognised. To acknowledge the existence of such a right would be to go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty to ensure that the rules on competition within the common market are observed. A right to silence can be recognised only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraphs 66 and 67).

403 In order to ensure the effectiveness of Article 11 of Regulation No 17, the Commission is therefore entitled to compel the undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, even if the latter may be used to establish the existence of anti-competitive conduct (see *Mannesmannröhren-Werke* v *Commission*, cited at paragraph 402 above, paragraph 65, and the case-law cited there).

404 This power of the Commission to obtain information, enshrined in *Orkem* v *Commission* and *Mannesmannröhren-Werke* v *Commission*, cited at paragraphs 401 and 402 above respectively, does not fall foul of either Article 6(1) and (2) of the ECHR [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950] (*Mannesmann-röhren-Werke* v *Commission*, cited above, paragraph 75) or the case-law of the European Court of Human Rights.

405 Although the Court of Justice has held ([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-8735; "*LVM*"], paragraph 274) that after the judgment in *Orkem* v *Commission*, cited at paragraph 401 above, the case-law of the European Court of Human Rights, of which the Community Courts must take account, has gone through new developments with the *Funke* judgment ... the *Saunders* v *United Kingdom* judgment of 17 December 1996 (*Reports of Judgments and Decisions* 1996-VI, p. 2044, §§ 69, 71 and 76), and the *J.B.* v *Switzerland* judgment of 3 May 2001 (*Reports of Judgments and Decisions* 2001-III, §§ 64 to 71), the Court of Justice did not reverse its previous case-law in *LVM*.

406 In any event, the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to fair legal process, which offer, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the Convention. There is nothing to prevent the addressee of a request for information from showing, whether later during the administrative procedure or in proceedings before the Community Courts, when exercising his rights of defence, that the facts set out in his replies or the documents produced by him have a different meaning from that ascribed to them by the Commission (*Mannesmannröhren-Werke* v *Commission*, cited at paragraph 402 above, paragraphs 77 and 78).

407 As regards, next, the extent to which SGL was required to reply, in accordance with the case-law referred to above, to the request for information of 31 March 1999, it must be observed that, in addition to the purely factual questions and the requests to produce documents already in existence, the Commission requested SGL to describe the object of and what occurred at a number of meetings in which SGL participated and also the results/conclusions of those meetings, when it was clear that the Commission suspected that the object of the meetings was to restrict competition. It follows that a request of that nature was of such a kind as to require SGL to admit its participation in an infringement of the Community competition rules.

408 The same applies to the requests for the protocols of those meetings, the working documents and the preparatory documents concerning them, the handwritten notes relating to them, the notes and the conclusions pertaining to the meetings, the planning and discussion documents and also the implementing projects concerning the price increases put into effect between 1992 and 1998.

409 As SGL was not required to answer questions of that type in the request for information of 31 March 1999, the fact that it none the less provided information on those points must be regarded as voluntary collaboration on the part of the undertaking apt to justify a reduction in the fine under the Leniency Notice.

410 That conclusion cannot be affected by the Commission's argument that the information in question was not provided voluntarily but in reply to a request for information. Section D, paragraph 2, first indent, of the Leniency Notice does not require a voluntary act taken solely on the initiative of the undertaking concerned, but merely requires information which contributes to establishing the existence of the infringement. Even Section C, moreover, which relates to a more substantial reduction in the fine than that referred to in Section D, makes it possible to reward cooperation provided "after the Commission has

undertaken an investigation ordered by decision on the premises of the parties to the cartel". Accordingly, the fact that a request for information was sent to SGL under Article 11(1) of Regulation No 17 cannot minimise the cooperation provided by that undertaking under Section D, paragraph 2, first indent, of the Leniency Notice, especially not as a request for information is a less coercive measure than an investigation ordered by decision.

411 It follows that the Commission failed to appreciate the importance of SGL's cooperation in that context.

412 In so far as the Commission criticises SGL for having given an incomplete answer to the question as to which undertakings SGL had informed of the forthcoming investigations by the Commission in June 1997, it is true that, by letter of 30 July 1997, SGL admitted only to having informed VAW and another undertaking and failed to state that it had also informed UCAR. However, the Commission itself stated that SGL's warning increased the gravity of the infringement, gave rise to a fine whose deterrent effect was greater than normal and justified being regarded as an aggravating circumstance, as SGL's conduct had created the conditions necessary to keep the cartel active and to prolong its injurious effects. Consequently, SGL was not required to inform the Commission that it had warned other undertakings. That information was likely to increase the penalty which the Commission would impose on SGL. On this point too, therefore, the Commission failed to appreciate SGL's conduct by criticising it for having provided an incomplete reply.'

Forms of order sought before the Court

11 The Commission claims that the Court should:

— set aside the judgment under appeal as regards paragraph 2 of its operative part;

— order SGL Carbon to pay the costs.

12 SGL Carbon contends that the Court should:

— dismiss the appeal;

— order the Commission to pay the costs.

The application for the reopening of the oral procedure

13 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.

14 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.

15 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).

16 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).

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

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

The appeal

19 The Commission maintains that paragraphs 401 to 412 of the judgment under appeal involve infringements of Community law, in particular of Article 15, in conjunction with Article 11, of Regulation No 17 and of the Leniency Notice. It

submits that the Court of First Instance made errors of law in its evaluation of the replies given by SGL Carbon to the Commission's requests for information as regards a possible reduction in the amount of the fine. In addition, the judgment under appeal, on those points, is vitiated by defects in its reasoning. The Commission divides this single ground of appeal into two parts.

20 SGL Carbon submits that, as the Court of First Instance found, the Commission's request for information of 30 June 1997, as well as questions 1 to 5 and the second subparagraph of question 7 in that of 31 March 1999, exceeded its investigatory powers. Those requests were contrary to the right not to incriminate oneself (*nemo tenetur se ipsum accusare*). Consequently, on the basis of the Leniency Notice, the fine should have been further reduced by at least 8%. In any event, the judgment under appeal is not, on that point, vitiated by any error of assessment.

First part: the request for information of 31 March 1999

Arguments of the parties

21 The Commission submits that the judgment under appeal is vitiated by several errors of law, in paragraphs 408 and 409, concerning the interpretation of Article 15, in conjunction with Article 11, of Regulation No 17 and of the Leniency Notice. It is always entitled to request the production of documents and such a request does not infringe the rights of the defence.

22 The Commission states that the points raised in the request for information of 31 March 1999 covered the 'production' of documents in SGL Carbon's possession and that there were no questions seeking to obtain a 'reply' from that party. In those circumstances, the Court of First Instance's conclusion that certain aspects of that request were of such a kind as to require SGL Carbon to admit its participation in an infringement cannot apply to requests for existing documents.

23 The Commission asserts that a request for existing documents can always be reconciled with the rights of the defence, even if they may be used to establish the existence of anti-competitive conduct, as the Court of First Instance expressly noted in paragraphs 403, 406 and 407 of the judgment under appeal. The Court of First Instance therefore failed to apply the Court of Justice's case-law and contradicted its own findings.

24 The Commission submits that the Court of First Instance should have established the extent to which SGL Carbon, by producing the documents requested, effectively complied with the various points of the request for information which the Court of First Instance specifically challenged. It is clear from SGL Carbon's reply of 8 June 1999 that that was not the case. On the contrary, it stated in that reply that it had no documents of the type requested.

25 The Commission concludes therefrom that the matters in question in the request for information of 31 March 1999 cannot give rise to a greater reduction in the fine than that already accorded. It took into account the fact that SGL Carbon, in spite of lacking the documents sought, made every effort to contribute to clarifying the facts. The only matters which it did not take into account in determining the reduction were those which constituted SGL Carbon's reply to the formal request for information. By contrast, it took into account the information which went beyond that requested under Article 11 of Regulation No 17 in reducing the amount of the fine imposed by 30%.

26 According to the Commission, the Court of First Instance none the less wrongly held, in paragraph 409 of the judgment under appeal, that SGL Carbon complied with the request for information covering those matters as such and that the Commission took no account of that contribution.

27 The Commission adds that the judgment under appeal is also affected by defects in its reasoning. Paragraphs 408 and 409 of that judgment are in clear contradiction to paragraphs 403, 406 and 407, in which the Court of First Instance reproduces the criteria set forth in the case-law of the Court of Justice. In addition, the Court of First Instance did not explain how, in view, first, of the wording of SGL Carbon's reply of 8 June 1999, and, second, of the contested decision, it could reach the conclusion that that undertaking had provided the Commission's investigation with a contribution of which the Commission took no account.

28 SGL Carbon states that the entirety of the matters in its memorandum of 8 June 1999 as well as its replies to the request for information of 30 June 1997 should have been regarded as contributions equivalent to cooperation, since no distinction can be drawn between express confession of an infringement or of facts and the production of documents proving the infringement.

29 SGL Carbon contends that questions 1 to 5 and the second subparagraph of question 7 in the request for information of 31 March 1999 were not only intended to extract a confession of an infringement, but also to induce it to disclose materials proving its own infringement. It could not, under the case-law of the Court of Justice and the European Court of Human Rights, be required to reply to those questions. In those circumstances, the fact that it voluntarily disclosed the information and materials requested should have been regarded as a contribution justifying a reduction in the fine.

30 In the alternative, that is to say, should the Court of Justice not recognise the existence of an unlimited right to silence, SGL Carbon submits that the judgment under appeal is not contrary to the case-law of the Court of Justice on the subject. An undertaking cannot be required to give replies consisting in a confession of infringement the proof of which must be adduced by the Commission. For the purposes of that case-law, the judgment under appeal is well founded, since the Court of First Instance regarded as a matter leading to a reduction in the fine — following the examination required under the substantive rules — the fact that SGL Carbon replied to the request for information of 31 March 1999 in terms exceeding what was required of it.

31 SGL Carbon submits that, if an undertaking being questioned produces, without being obliged to do so, probatory documents in the field concerned, that is, for the purposes of the Leniency Notice, an initiative which should be regarded as cooperation, as the Court of First Instance correctly held in paragraph 409 of the judgment under appeal. The Court of First Instance correctly pointed out that the evaluation of the cooperation consists in identifying whether any substantive 'added value' has been provided voluntarily.

32 SGL Carbon submits also that it matters little, in that context, whether there was a prior request for information. It is necessary to ask whether or not, and to what extent, the relevant material provided had to be revealed. To the extent that it did not, even a reply to a request for information could be voluntary and therefore relevant from the point of view of the undertaking's cooperation.

Findings of the Court

33 The first part of the ground of appeal raises, in essence, the question whether SGL Carbon was bound to provide all the documents sought by the Commission in its request for information of 31 March 1999 and, therefore, whether the Court of First Instance's findings on that question, in paragraphs 408 and 409 of the judgment under appeal, are correct in law.

34 Accordingly, it must be determined whether the reply given by SGL Carbon to the Commission's request constituted voluntary cooperation or the performance of an obligation.

35 As regards the content of the abovementioned request, it must be noted that the Commission had sought, among others, documents relating to the object of and events at meetings in which SGL Carbon had participated as well as written evidence concerning the results or conclusions of those meetings. Those documents were described by the Commission as copies of the convening notices, agendas, lists of participants, handwritten notes, working documents, preparatory documents and documents concerning the implementation of price increases.

36 The Court of First Instance held, in paragraph 408 of the judgment under appeal, that, as regards an undertaking's right to refuse to produce documents which might contain an admission of infringement, '[t]he same applies to the requests for the protocols of those meetings, the working documents and the preparatory documents concerning them, the notes and the conclusions pertaining to the meetings, the planning and discussion documents and also the implementing projects concerning the price increases put into effect between 1992 and 1998'.

37 The Court of First Instance, in paragraph 409 of the judgment under appeal, held in that regard that SGL Carbon was 'not required to answer questions of that type ...'. It therefore found that to the extent that the Commission could not require SGL Carbon to provide the documents sought, the reply which it gave had to be regarded as 'voluntary collaboration'.

38 Those findings of the Court of First Instance are vitiated by errors of law.

39 It must be recalled first that, under Article 11(1) of Regulation No 17, in carrying out the duties assigned to it in the matter, the Commission may obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings. As set out in Article 11(4) thereof, the owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution are to supply the information requested.

40 As regards the Commission's powers to make such requests, it is important to note that, in paragraph 27 of the judgment in *Orkem* v *Commission*, the Court pointed out that Regulation No 17 does not give an undertaking which is being investigated under that regulation any right to evade the investigation and that, on the contrary, the undertaking in question is subject to an obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject-matter of the investigation.

41 So far as concerns the question whether that obligation also applies to requests for information which could be used to establish, against the undertaking which provides the information, an infringement of the competition rules, the Court held, in paragraph 34 of that judgment that in order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17 the Commission is entitled to compel an undertaking, if necessary by adopting a decision, to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in that undertaking's possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct.

42 By contrast, the situation is completely different where the Commission seeks to obtain answers from an undertaking which is being investigated by which that undertaking would be led to admit an infringement which it is incumbent upon the Commission to prove (see *Orkem* v *Commission*, paragraph 35).

43 It must be added that the Court of Justice, in paragraphs 274 to 276 of the judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, observed that since the judgment in *Orkem* v *Commission* there have been further developments in the case-law of the European Court of Human Rights which the Community judicature must take into account when interpreting the fundamental rights. The Court of Justice stated however in that regard that those developments were not such as to put in question the statements of principle in *Orkem* v *Commission*.

44 It does not follow from that case-law that the Commission's powers of investigation have been limited as regards the production of documents in the possession of an undertaking which is subject to investigation. The undertaking concerned must therefore, if the Commission requests it, provide the Commission with documents which relate to the subject-matter of the investigation, even if those documents could be used by the Commission in order to establish the existence of an infringement.

45 It is important to point out also that the Court of First Instance itself, in paragraph 405 of the judgment under appeal, expressly referred to the principles stated in *Orkem* v *Commission* and to the fact that the Court of Justice has not reversed its previous case-law on the point.

46 The Court of First Instance found, however, in the course of its reasoning, that the Commission's request for information of 31 March 1999 was such as to require SGL Carbon to admit its participation in infringements of the Community competition rules.

47 That finding of the Court of First Instance misconstrues the scope of Article 11 of Regulation No 17, as interpreted by the Court of Justice, and therefore weakens the principle that undertakings subject to a Commission investigation must cooperate.

48 That obligation to cooperate means that the undertaking may not evade requests for production of documents on the ground that by complying with them it would be required to give evidence against itself.

49 In addition, as the Advocate General correctly observed in point 67 of his Opinion, while it is evident that the rights of the defence should be respected, the undertaking concerned is still able, either during the administrative procedure or in the proceedings before the Community Courts, to contend that the documents produced have a different meaning from that ascribed to them by the Commission.

50 Thus, the Court of First Instance made an error of law in holding that the conditions for a reduction in the fine by virtue of the Leniency Notice were fulfilled.

51 The first part of the ground of appeal is therefore well founded.

Second part: the request for information of 30 June 1997

Arguments of the parties

52 The Commission submits that paragraph 412 of the judgment under appeal is vitiated by several errors of law. The Court of First Instance attributed to the Commission a point of view which it did not hold and the Court did not examine the arguments which the Commission had developed in its observations, which constitutes a defect in its reasoning.

53 The Commission points out that it never claimed to have limited the reduction accorded to SGL Carbon under the Leniency Notice on the ground that it did not name all the undertakings which it had warned of the forthcoming investigations. The Commission, on the contrary, gave no greater reduction in the fine because it considered that the reply actually given by SGL Carbon did not go beyond its obligation to cooperate, in accordance with Article 11 of Regulation No 17.

54 The Commission maintains that the question which it asked did not exceed its powers of investigation and therefore that the reply given went no further than what was requested pursuant to Article 11 of Regulation No 17. There was, as a result, no reason to reduce the fine under the Leniency Notice. In addition, the fact that SGL Carbon's reply was incomplete and misleading was an additional reason not to give a reduction under the Leniency Notice.

55 Nor, in the Commission's view, did the Court of First Instance respond to the alternative argument that SGL Carbon had omitted, in its reply to the request for information of 30 June 1997, to deal with the most important elements that had led to an increase in the fine because of an aggravating circumstance. As the Court of First Instance itself recognised, only effective contributions to the Commission investigation could give rise to a reduction in the fine.

56 The Commission also points out that a reduction for an 'excusable failure to contribute', would, if the Court of First Instance had envisaged it, be, on any basis, incompatible with Article 15 of Regulation No 17 and the Leniency Notice. According to the principles governing the application of those provisions, a reduction is justified only if an undertaking's conduct enabled the Commission to establish an infringement with less difficulty and, where appropriate, to put an end to it.

57 The Commission maintains that, if the Court of First Instance took the view that the reply actually given by SGL Carbon, namely that it warned another undertaking of forthcoming investigations, should have led to a reduction in the fine, it thereby infringed Article 15, in conjunction with Article 11, of Regulation No 17 and the Leniency Notice. The Commission is not bound to accord a reduction in the fine solely because an undertaking has complied with a request for information, if that request is within the limits established by the case-law of the Court of Justice. That is the case here, since the request of 30 June 1997 was intended to obtain factual information and did not lead SGL Carbon to admit an infringement.

58 The Commission acknowledges that warning another undertaking does not constitute an infringement of Article 81 EC and states that the Court of First Instance itself found that those warnings did not infringe that provision. The Court of First Instance held, however, that the information in question could aggravate the penalty which the Commission was going to impose on SGL Carbon. It concluded therefrom, in paragraph 412 of the judgment under appeal, that SGL Carbon was not required to inform the Commission that it had warned other undertakings of a forthcoming investigation. In so doing, the Court of First Instance misconstrued the case-law on the point.

59 For the Commission, the decisive question is whether the reply requested, as such, anticipates the conclusion that there is an infringement, so that the undertaking would expose itself to a penalty by that reply alone. Warning another economic operator of a forthcoming investigation would not, by itself, expose the undertaking to an accusation of infringement or to sanctions. The fact, noted by the Court of First Instance, that the Commission considered that warning to be an aggravating factor changes nothing. To reach that conclusion, the Commission had first to establish proof of the infringement and the information relating to the warning is not such as to replace that proof.

60 The Commission maintains, in addition, that the fact that it found that there was an aggravating circumstance does not form part of its establishment of the facts constituting the infringement, but of the exercise of its discretionary power to determine the amount of the fine. In addition, the fact that the information provided could have contributed to the establishment of proof of the infringement as a matter of fact is irrelevant.

61 The Commission concludes that the Court of First Instance made an error of law in finding that the reply given by SGL Carbon that it had warned another undertaking of the forthcoming investigations should have led to a reduction in the fine. That interpretation is contrary to Article 15, in conjunction with Article 11, of Regulation No 17 and the Leniency Notice. Furthermore, the judgment under appeal is contradictory on that point, as it is concerning the production of documents already in existence. Basing itself on the case-law of the Court of Justice, the Court of First Instance recalled the relevant criteria in paragraphs 402 to 406 of the judgment under appeal, but did not apply them.

62 SGL Carbon submits that the Court of First Instance correctly held, in paragraph 412 of the judgment under appeal, that the Commission's request for information of 30 June 1997 was unlawful. SGL Carbon voluntarily admitted, in fact, that it had warned certain undertakings of forthcoming investigations and the Commission should have taken that admission into consideration in evaluating cooperation.

63 SGL Carbon contends that the Commission's argument should be rejected as inadmissible since neither the Commission nor the Court of First Instance found there to be any agreement to destroy documents. The Commission cannot, on an appeal, put forward new matters of fact.

64 SGL Carbon maintains that the request for information had no legal basis since the giving of warnings to other undertakings is not anti-competitive conduct prohibited by Article 81 EC. The rights which Article 11 of Regulation No 17 confers on the

Commission do not empower it to ask questions on matters of fact not covered by that provision. However, supposing that those warnings could constitute aggravating circumstances, the fact that they were admitted should have been regarded as an 'element of cooperation'.

65 SGL Carbon submits that, on any basis, the Court of First Instance correctly found that it was not bound to reveal to the Commission that it had warned other undertakings of forthcoming investigations.

Findings of the Court

66 It should be recalled at the outset, that, in its request for information of 30 June 1997, the Commission had requested SGL Carbon to inform it, among other things, of the names of the undertakings in the graphite electrodes industry which it had warned of the possibility of being made subject to Commission investigations.

67 It must be noted that the Court of First Instance observed, in paragraph 412 of the judgment under appeal, that SGL Carbon was not required to inform the Commission, as a consequence of that request, that it had warned other undertakings and that the Commission could not force SGL Carbon to reply to it. The Court of First Instance concluded, in the same paragraph of the judgment under appeal, that the Commission had failed to appreciate SGL Carbon's conduct by criticising it for having provided an incomplete reply.

68 In order to assess the soundness of that reasoning of the Court of First Instance, it must be pointed out that it is clear from the Court of Justice's recent case-law that a reduction under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be

considered to demonstrate a genuine spirit of cooperation on its part (see 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 388 to 403, particularly paragraph 395).

69 As the Advocate General pointed out in point 78 of his Opinion, although SGL Carbon was not obliged to answer the question asked by the Commission, it did answer it, but in an incomplete and misleading way. Therefore, that conduct of SGL Carbon cannot be considered to reflect a spirit of cooperation within the meaning of the judgment in *Dansk Rørindustri and Others* v *Commission.*

70 The Court of First Instance therefore made an error of law in holding that SGL Carbon fulfilled, on account of its conduct, the requirements for a reduction in the fine pursuant to the Leniency Notice. Paragraph 412 of the judgment under appeal is therefore also vitiated by an error of law. It follows that the second part of the ground of appeal is well founded.

Consequences of the setting-aside of the judgment under appeal

71 Under Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to set aside the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

72 The Court of Justice considers that, in this case, the conditions are fulfilled for it to be able to give final judgment.

73 It should be recalled that the Court of First Instance awarded SGL Carbon an extra reduction of 10% under Section D, paragraph 2, of the Leniency Notice, but subsequently reduced it to 8% because of its conduct. That reduction of 8% was intended to reward SGL Carbon for its answers to the question put by the Commission — which was held to have exceeded the Commission's powers — and which were classified by the Court of First Instance as conduct falling within the scope of the Leniency Notice.

74 As the Advocate General pointed out in points 69 and 82 of his Opinion, only a minor element of the questions put by the Commission, namely that relating to the purpose and result of SGL Carbon's meetings with other undertakings, went beyond what the Commission could have compelled SGL Carbon to answer.

75 The Court observes that that element is equivalent to a fifth of the information sought by the Commission.

76 In those circumstances, the Court considers that a total additional reduction of 4% in addition to the 30% accorded by the Commission is justified.

77 The fine must therefore be set at EUR 75.7 million.

Costs

78 Under the first paragraph of Article 122 of the Rules of Procedure, where an appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under the first subparagraph of Article 69(2) of the same rules, which is applicable to appeal proceedings pursuant to 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. As the Commission has asked for costs to be awarded against SGL Carbon and the latter has been for the most part unsuccessful in its pleas in law on the appeal, it must be ordered to pay the costs of the present proceedings.

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

1. **Sets aside the first indent of paragraph 2 of the operative part of the judgment of the Court of First Instance of the European Communities of 29 April 2004 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*;**

2. **Sets at EUR 75.7 million the amount of the fine imposed on SGL Carbon AG by Article 3 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;**

3. **Orders SGL Carbon AG to pay the costs.**

[Signatures]