JUDGMENT OF THE COURT (Fourth Chamber)

10 May 2007 *

In Case C-328/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 30 August 2005,

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

appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by F. Castillo de la Torre, M. Schneider and W. Mölls, and also by H. Gading, acting as Agents,

defendant at first instance,

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, R. Silva de Lapuerta (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Mazák,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 26 October 2006,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2007

gives the following

Judgment

1 By its appeal, SGL Carbon AG ('SGL Carbon') seeks, primarily, to have set aside in part the judgment of the Court of First Instance of the European Communities of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR ('the judgment under appeal'), whereby the Court of First Instance dismissed its action against Commission

Decision C(2002) 5083 final relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/37.667 — Specialty Graphites ('the decision in issue') and, in the alternative, a reduction in the fine imposed on it by that decision.

Legal framework

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 1959-62, 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 introductory paragraphs:

'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.'

4 According to Section 1 of the Guidelines, '[that] basic amount of the fine will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17'. Under Section 2 of the Guidelines, the basic amount will be increased where there are aggravating circumstances such as, for example, repeated infringement of the same type by the same undertaking or undertakings. According to Section 3 of the Guidelines, the basic amount will be reduced where there are specific 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 sets out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines, or may be granted a reduction in the fine which would otherwise have been imposed upon them.

6 According to Section A, point 5, of the Leniency Notice:

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

7 Section C of the Leniency Notice, entitled 'Substantial reduction in a fine', provides:

'[Undertakings] which both satisfy the conditions set out in Section B, points (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50% to 75% of the fine.'

8 The conditions set out in Section B of the Leniency Notice, to which Section C refers, are that the undertaking in question:

'(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the [undertakings] involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

(b) is the first to adduce decisive evidence of the cartel's existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;

(e) has not compelled another [undertaking] to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity'.

9 Section D of the Leniency Notice, entitled 'Significant reduction in a fine', is worded as follows:

'1. Where an [undertaking] cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

— before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which contribute to establishing the infringement;

— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

10 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.

...'

The facts of the dispute and the decision in issue

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

'1 By [the decision in issue] 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 (EEA) in the specialty graphite sector in the period from July 1993 to February 1998.

2 For the purposes of [the decision in issue], "specialty graphite" describes a group of graphite products, namely isostatic graphite, extruded graphite and moulded graphite used in diverse applications. It does not include steel-making graphite electrodes.

3 The mechanical characteristics of isostatic graphite are superior to those of extruded and moulded graphite and the price of each graphite category varies

according to its mechanical characteristics. Isostatic graphite is used, inter alia, in the manufacture, by electrical-discharge machining, of metal moulds for the automobile and electronics industries. It is also used to make dies for the continuous casting of non-ferrous metals such as copper and copper alloys.

4 The production cost differential between isostatic graphite and extruded or moulded graphite is at least 20%. In general, extruded graphite is the cheapest and is therefore chosen if it meets the user's requirements. Extruded products are used in a wide range of industrial applications, mainly in the iron and steel, aluminium and chemical industries and in metallurgy.

5 Moulded graphite is generally used only in large-scale applications, because it is typically inferior to extruded graphite.

6 In general, speciality graphite products are supplied to customers either directly from the manufacturing plants as finished machined products or through intermediary machine shops. These machine shops buy unmachined graphite (in blocks or rods), machine it (i.e. customise the product according to the customer's needs) and sell the machined products to the end-user.

7 The [decision in issue] concerns two separate cartels, one relating to the market for isostatic specialty graphite and the other to that for extruded specialty graphite. There was no evidence of an infringement in respect of moulded graphite. Those cartels covered very specific products, namely graphite in the form of standard and cut blocks, but not machined products, that are made to order for the customer.

8 The major producers of specialty graphite in the western world are multinational corporations. Worldwide speciality graphite sales in 2000 were about EUR 900 million. Of this figure, isostatic graphite accounted for around EUR 500 million and extruded graphite for EUR 300 million. At Community/EEA level, sales in 2000 were EUR 100 to 120 million for isostatic graphite and EUR 60 to 70 million for extruded graphite. Unmachined products accounted for about EUR 35 to 50 million in the isostatic market and about EUR 30 million in the extruded market.

9 When the [decision in issue] was adopted, the largest producers of isostatic specialty graphite in the Community/EEA were [inter alia] the German company SGL Carbon ...

...

12 In June 1997 the Commission commenced an investigation into the graphite electrodes market. The investigation led to the decision 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). ...

...

14 In the US, criminal proceedings were brought in March 2000 and in February 2001 against a subsidiary of [Le Carbone-Lorraine SA] and a subsidiary of [the Japanese company Toyo Tanso Co. Ltd]. The companies pleaded guilty and agreed to pay fines. ...

15 On 17 May 2002 the Commission sent a statement of objections to the addressees of [the decision in issue]. ... None of them substantially contested the facts.

...

17 The administrative procedure concluded on 17 December 2002 with the adoption of [the decision in issue]. ...

...

19 [The decision in issue] states that collusive agreements were implemented on the isostatic graphite market by regular multilateral meetings at four levels:

— "top level meetings", attended by the top executives of the companies, at which the main principles of cooperation were established;

— "international working level meetings" concerning the classification of graphite blocks into different categories and the fixing of minimum prices for each category;

— "regional" (European) meetings;

— "local" (national) meetings concerning the Italian, German, French, British and Spanish markets.

...

22 On the basis of the findings of fact and legal assessment in [the decision in issue], the Commission imposed on the companies in question fines calculated in accordance with the method set out in the Guidelines ... and the Leniency Notice.

23 Under the first paragraph of Article 1 of the operative part of [the decision in issue], the following undertakings infringed Article 81(1) EC and Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices affecting the Community and EEA markets for isostatic specialty graphite:

...

(b) SGL [Carbon], from July 1993 to February 1998;

...

24 Under the second paragraph of the same provision, the following undertakings infringed Article 81(1) EC and Article 53(1) of the EEA Agreement by participating for the periods indicated in a complex of agreements and concerted practices affecting the Community and EEA markets for extruded specialty graphite:

— SGL [Carbon], from February 1993 to November 1996;

...

25 Article 3 of the operative part imposes the following fines:

...

(b) SGL [Carbon]:

— Isostatic specialty graphite: EUR 18 940 000,

— Extruded specialty graphite: EUR 8 810 000;

...

26 Article 3 further orders that the fines are to be paid within three months of the date of notification of [the decision in issue] with default interest at the rate of 6.75%.

27 [The decision in issue] was sent to the applicants with a covering letter of 20 December 2002. It stated that after expiry of the period for payment specified in [that decision] the Commission would take steps to recover the sums in question; however, if proceedings were commenced before the Court of First Instance the Commission would not take steps to enforce the judgment provided that interest at the rate of 4.75% was paid and a bank guarantee given.'

The procedure before the Court of First Instance and the judgment under appeal

12 By separate applications lodged at the Registry of the Court of First Instance in March 2003, SGL Carbon and the other addressees of the decision in issue brought actions for annulment of that decision.

13 In the operative part of the judgment under appeal, the Court of First Instance, in particular:

'...

4. In Case T-91/03 *SGL Carbon* v *Commission*:

— [set] the fine imposed on [SGL Carbon] by Article 3 of Decision COMP/E-2/37.667 at EUR 9 641 970 in respect of the infringement committed in the isostatic graphite sector;

— dismisse[d] the remainder of the application;

— order[ed] [SGL Carbon] to bear two thirds of its own costs and to pay two thirds of the costs incurred by the Commission, and the Commission to bear one third of its own costs and to pay one third of the costs incurred by [SGL Carbon].'

Forms of order sought by the parties to the appeal

14 In its appeal, SGL Carbon claims that the Court should:

— primarily, set aside the judgment under appeal in so far as it dismisses its application;

— in the alternative, reduce the fine imposed on SGL Carbon and also the interest payable pending judgment and the default interest as fixed in the operative part of the judgment under appeal;

— order the Commission to pay the costs.

15 In its response, the Commission claims that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal

16 In support of its appeal, SGL Carbon puts forward six pleas in law.

17 By its first plea, SGL Carbon maintains that the Court of First Instance infringed the principle *non bis in idem* by failing to take into account the fines previously imposed on it in the United States. The second plea is directed against the increase of 35% in the amount of the fine imposed on SGL Carbon for its role as the sole ringleader. By its third plea, the appellant claims that the Court of First Instance did not examine the plea alleging that the rights of the defence, in so far as they include a right to be heard, were infringed because the members of the Commission's team responsible for the investigation had insufficient knowledge of German. The fourth plea concerns the evaluation by the Court of First Instance of SGL Carbon's cooperation with the Commission. By its fifth plea, the appellant claims that the Court of First Instance failed to take into account its economic performance when assessing its financial capacity to pay the fine and that the amount of the fine is disproportionate. Last, by its sixth plea, the appellant claims that the Court of First Instance miscalculated the rate of interest.

First plea, alleging breach of the obligation to take into consideration the penalties imposed in a non-member State

Arguments of the parties

18 By its first plea, SGL Carbon claims that the Court of First Instance was wrong to question the applicability of the principle *non bis in idem* in the present case, since the penalties imposed on it in the United States ought to have been taken into consideration in determining the amount of the fine, at least for the purpose of reducing it.

19 At the hearing, SGL Carbon observed that although in Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraphs 50 to 63, and Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraphs 26 to 39, the Court rejected the argument that sanctions imposed in a non-member State in the sphere of competition law must be taken into consideration when setting the fine, the Commission erred in wholly ignoring such circumstances.

20 SGL Carbon maintains that, in view of the need to ensure that the penalties imposed are proportionate, the Commission may be under an obligation, in the exercise of its discretion, to take account of penalties imposed by the authorities of a non-member State.

21 The Commission contends that the appellant is wrong to rely on the principle *non bis in idem* in the present case. The administrative and judicial proceedings in the sphere of competition law in the United States and in the Community do not pursue the same objectives.

22 The Commission claims that it follows from *Showa Denko* v *Commission* and *SGL Carbon* v *Commission* that the obligation to take into consideration penalties imposed on a company in a non-member State has no legal basis in Community law.

23 The Commission further submits that the non-existence of any obligation to take such penalties into consideration is consistent with the general principles of law. Where a cartel operating throughout the world fixes prices on a global scale, the undertakings participating in the cartel do not commit a single infringement but a number of infringements corresponding to the number of sovereign legal orders which prohibit price-fixing having actual or potential effects on their respective territories.

Findings of the Court

24 It must be borne in mind, as a preliminary issue, that in *Showa Denko* v *Commission* and *SGL Carbon* v *Commission* the Court has already considered whether the principle *non bis in idem*, which is enshrined in Article 4 of Protocol No 7 to the Convention on the Protection of Human Rights and Fundamental Freedoms, may be applied to situations in which the authorities of a non-member State have taken action under their power to impose penalties in the sphere of competition law applicable on the territory of that State.

25 On that question, the Court observed at paragraphs 28 and 52, respectively, of *SGL Carbon* v *Commission* and *Showa Denko* v *Commission* that a cartel operating in an international context is characterised, in particular, by the action of legal systems of non-member States on their respective territories.

26 In that regard, the Court held, at paragraphs 29 and 53 respectively of *SGL Carbon* v *Commission* and *Showa Denko* v *Commission*, that the exercise of powers by the authorities of those non-member 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 sphere 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.

27 The Court further held that 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 by authorities of non-member States (see *SGL Carbon* v *Commission*, paragraph 312, and *Showa Denko* v *Commission*, paragraph 55).

28 Accordingly, the Court concluded that the principle *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 (see *SGL Carbon* v *Commission*, paragraph 32, and *Showa Denko* v *Commission*, paragraph 56).

29 As regards the present appeal, it must be observed that the Court of First Instance, essentially following the same reasoning, held at paragraphs 112 to 116 of the judgment under appeal that the principle *non bis in idem* does not apply where the

Commission is called upon to exercise its powers under Community law, even though penalties have already been imposed on the undertaking concerned by the authorities of a non-member State for infringement of the competition rules applicable in that State.

30 In those circumstances, the argument put forward in its appeal alleging breach of the principle *non bis in idem* cannot be accepted.

31 As regards the argument put forward by the appellant at the hearing that the judgments in *SGL Carbon* v *Commission* and *Showa Denko* v *Commission* should be taken to mean that the Commission's discretion as to whether or not it is required to take into account the penalties imposed on the undertaking concerned by the authorities of a non-member State for infringement of the competition rules applicable in that State might in appropriate cases be 'reduced' in the sense that the Commission might none the less be required to take such penalties into consideration, it is sufficient to observe that such an interpretation of those judgments rests on a misreading of them and, in particular, paragraphs 36 and 60 respectively thereof.

32 In effect, at paragraphs 36 and 60 of those judgments, the Court did not make a determination as to the applicability of the principle *non bis in idem* but answered a subsidiary argument whereby the appellants sought to establish that the Court of First Instance had failed to have regard to the principles of proportionality and fairness.

33 In that regard, the Court of Justice merely recalled that the determination of the fines imposed for infringements of Community competition law falls within the discretion which the Commission enjoys in such matters.

34 It follows that, in holding at paragraph 128 of the judgment under appeal that the Commission was not required to take the penalties which had been imposed on SGL Carbon by the authorities in the United States into consideration, the Court of First Instance did not err in law.

35 Accordingly, the first plea put forward by SGL Carbon in support of its appeal must be rejected.

Second plea, alleging that the increase in the amount of the fine imposed on the appellant because of its role as ringleader of the cartel is unlawful

36 This plea consists of two parts. In the first place, SGL Carbon claims that the increase in the basic amount of the fine is unlawful on the ground that the findings of fact made by the Court of First Instance do not establish any basis for such an increase. In the second place, in the appellant's submission, the Court of First Instance failed to have regard to the rights of the defence on that point, since before the decision in issue was adopted the appellant could not acquaint itself with a circumstance essential for its defence, namely that it would be considered by the Commission as the sole ringleader of the cartel.

First part of the second plea

— Arguments of the parties

37 SGL Carbon claims that the position of ringleader of the cartel attributed to it by the Court of First Instance does not correspond to the factual context of the case as set out in the judgment under appeal.

38 It also contends that neither the factual circumstances nor the findings of the Court of First Instance, which, moreover, are contradictory, can constitute factors capable of justifying an increase in the fine imposed on it.

39 The Commission asserts that, in so far as the appellant disputes the assessments of fact made by the Court of First Instance in respect of the appellant's role as ringleader of the cartel, this part of the plea is inadmissible.

40 It further submits that the appellant's argument that its characterisation as ringleader was reflected in the amount of the fine is also inadmissible, since it amounts to a repetition of arguments already raised before the Court of First Instance.

— Findings of the Court

41 It must be borne in mind, as a preliminary point, that it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the

evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraphs 51 and 52 and the case-law there cited).

42 As to the first part of the second plea, it must be observed that at paragraphs 316 to 331 of the judgment under appeal the Court of First Instance examined in detail the factual circumstances which led the Commission to regard SGL Carbon as the ringleader of the cartel and to take the view that such a role constituted an aggravating circumstance.

43 As regards such a circumstance, it must be observed that, in accordance with a consistent line of cases (see, in particular, Case C-189/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 240 to 242), the gravity of an infringement is assessed in the light of numerous factors, in respect of which the Commission has a margin of discretion. In taking into consideration, in accordance with the Guidelines referred to above, when determining the amount of the fine, the fact that there are aggravating circumstances, the Commission is merely carrying out its task of ensuring compliance with the Community competition rules.

44 For the purpose of determining the gravity of the infringement, it is necessary to take into consideration, in particular, the conduct of each of the undertakings, the role played by each of them in the establishment of the cartel and the profit which they were able to derive from it (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 129).

45 In those circumstances, SGL Carbon's argument relating to the aggravating circumstance associated with its role as ringleader of the cartel seeks to have the Court re-examine all the factual evidence by reference to which the Court of First Instance has reached its decision.

46 In that regard, SGL Carbon refers to no other document or to any other factor of such a kind as to demonstrate that the Court of First Instance erred in law in its assessment relating to the appellant's role in both establishing and developing the cartel.

47 Nor is that assessment vitiated by contradictions in respect of the evaluation of SGL Carbon's conduct and that of the other undertakings that participated in the cartel.

48 It follows that the first part of the second plea must be rejected as inadmissible.

Second part of the second plea

— Arguments of the parties

49 SGL Carbon maintains that it was not given a proper hearing as regards the assessment of its infringement by the Commission and that the Court of First Instance misconstrued the legal import of such a circumstance. In the statement of

objections, the Commission attributed to it and another undertaking the role of ringleaders of the cartel. At recitals 485 to 488 to the decision in issue, on the other hand, the Commission considered that the appellant alone was 'the leader and instigator of the infringement in the isostatic specialty market' and imposed on it the highest increase in the basic amount, namely 50%.

50 SGL Carbon therefore maintains that the Court of First Instance failed to observe its rights of defence. The statement of objections cannot merely mention that a fine will take account of the gravity and duration of the infringement but, in order to permit an effective defence, must set out the circumstances that may be taken into consideration when the Commission adopts its decision.

51 SGL Carbon emphasises that its alleged capacity as ringleader is an essential element for the purpose of fixing the amount of the fine. If the statement of objections had stated that the Commission envisaged making such an assessment of the gravity of the infringement, SGL Carbon would have opposed it.

52 The Commission submits that the Court of First Instance was correct to hold that the rights of the defence, in particular the right to be heard, had been observed, since, in the statement of objections, the main elements of fact and of law concerning the infringements, such as their gravity and duration, had been stated. The right to be heard has no bearing on the way in which the Commission proposes to make use of the criteria of the gravity and the duration of the infringement for the purpose of determining the amount of the fines.

53 The Commission contends that the importance of the appellant's activity as leader of the cartel or the way in which the Court of First Instance assessed the circumstances relating to the appellant are questions of fact which can be reviewed at the appeal stage only where the evidence has been distorted.

54 It observes in that regard that the appellant has not questioned the lawfulness of the findings of fact made by the Court of First Instance. Nor has it put forward any arguments capable of showing that the evidence may have been distorted by the Court of First Instance.

— Findings of the Court

55 It must be borne in mind that it is the statement of objections, on the one hand, and access to the file, on the other, that allow the undertakings under investigation to acquaint themselves with the evidence which the Commission has at its disposal and to render the rights of the defence fully effective (see 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, paragraphs 315 and 316, and also 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, paragraphs 66 and 67).

56 It also follows from a consistent line of decisions that, provided that the Commission sets out in the statement of objections the main elements of fact and of law capable of leading to the imposition of a fine, such as the gravity and the duration of the alleged infringement and also the circumstance that the infringement was committed deliberately or negligently, the Commission satisfies its obligation to observe the undertakings' right to be heard (see, to that effect, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraphs 19 and 20, and *Dansk Rørindustri and Others* v *Commission*, paragraph 428).

57 As regards the present appeal, it must be held that at paragraphs 138 to 142 of the judgment under appeal the Court of First Instance correctly determined the legal framework governing the statement of objections and the right of the undertakings to be heard.

58 Subsequently, the Court of First Instance correctly considered, at paragraphs 144 and 145 of the judgment under appeal, that the rights of the defence had been observed because SGL Carbon had been given the opportunity to comment on the duration, the gravity and the nature of the infringement. The Court of First Instance was also correct to state, at paragraph 146 of the judgment, that the Commission was not required to explain in the statement of objections the way in which it might make use of each of those elements in determining the amount of the fine (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraphs 434, 435 and 439).

59 It follows that the Court of First Instance did not err in law when it held that the statement of objections contained sufficiently precise indications of the way in which the Commission proposed to determine the amount of the fine, in particular as regards the gravity of the infringement.

60 It should be observed, in particular, that the Court of First Instance held, at paragraph 148 of the judgment under appeal, that the statement of objections indicated that SGL Carbon had played the role of leader and instigator of the infringement. The appellant was therefore made aware that that fact might be taken into account when the fine was set.

61 The Court of First Instance was also correct to hold, at paragraph 149 of the judgment under appeal, that there was nothing to suggest that SGL Carbon's liability as ringleader of the cartel was increased by the fact that the Commission, in the decision in issue, no longer attributed the same role to another undertaking which had participated in the cartel.

62 In those circumstances, as the Advocate General observed at point 59 of his Opinion, the fact that in the contested decision SGL Carbon was considered by the Commission to be the sole ringleader of the cartel did not alter, vis-à-vis the Commission, that undertaking's position to the point of breaching the rights of the

defence, since it is inherent in the nature of the statement of objections that it is provisional and subject to amendments to be made by the Commission in its subsequent assessment on the basis of the observations submitted to it by the parties and other findings of fact.

63 The second part of the second plea is therefore unfounded.

64 It follows from the foregoing that the second plea put forward by SGL Carbon in support of its appeal must be rejected in its entirety.

Third plea, alleging breach of the rights of the defence in so far as they include the right to be heard

Arguments of the parties

65 SGL Carbon claims that the Court of First Instance was wrong to hold, at paragraph 154 of the judgment under appeal, that the allegation that the Commission officials responsible for the investigation had insufficient knowledge of German was not supported by any reliable evidence. The appellant submits that it demonstrated the extent to which and the factors on the basis of which it could only assume that none of those officials had sufficient command of that language.

66 According to SGL Carbon, the Commission's officials must be capable of understanding all the data relied on by the undertakings concerned, whether directly or by means of translations.

67 The Commission observes that the Court of First Instance considered that the appellant had adduced no reliable evidence capable of supporting that allegation.

68 The Commission emphasises that the individual language knowledge of a particular official cannot play the slightest role as regards respect for the rights of the defence. The administrative procedure is conducted by the Directorate-General for competition and is concluded by a decision adopted by the Commission acting in its capacity as an institution.

69 The Commission further submits that all the correspondence exchanged during the procedure was in German, with only one exception. Only the third request for information sent to the appellant was in English, but the appellant did not request a translation and merely replied in German.

Findings of the Court

70 It should be recalled by way of preliminary point 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, in particular, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 30).

71 Observance of the rights of the defence requires, in particular, that the undertaking under investigation is put in a position during the administrative procedure to put forward its point of view on the reality and the relevance of the alleged facts and also on the documents used by the Commission (see Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 21).

72 As regards the third plea invoked in support of the appeal, it must be observed that, in so far as SGL Carbon challenges the rejection by the Court of First Instance, at paragraph 154 of the judgment under appeal, of its argument that the Commission had entrusted the case-file to officials who did not have sufficient knowledge of German, that conclusion is based on an assessment of fact and an evaluation of the evidence submitted to the Court of First Instance, which, as recalled at paragraph 41 of the present judgment, cannot be challenged in an appeal.

73 However, even on the assumption that certain officials of the Commission responsible for the case did not have the necessary language knowledge, it is sufficient to observe, in so far as SGL Carbon claims that the Commission breached its rights of defence, that the language knowledge of a member of the team responsible for investigating a cartel cannot in itself be decisive for the purpose of determining whether there was any breach of the rights of the defence by the Commission.

74 Consequently, the Court of First Instance did not err in law in considering that the rights of the defence had not been breached by the Commission.

75 The third plea in law put forward by SGL Carbon in support of its appeal cannot therefore be upheld.

Fourth plea in law, alleging failure to take SGL Carbon's cooperation with the Commission into account

Arguments of the parties

76 SGL Carbon claims that the Court of First Instance did not take into consideration the arguments that its cooperation with the Commission was undervalued by comparison with that of the other undertakings concerned. The Commission reduced the fine imposed on the appellant by only 35%, whereas a reduction of 50 to 75% would have been appropriate.

77 The appellant maintains that it cooperated at least to the same extent as the other undertakings and that it was the only one to provide information about the participation of other undertakings in the cartel.

78 SGL Carbon also claims that the question whether or not the Commission takes into account in its decision the infringements revealed by undertakings which cooperated is not the only relevant issue. Otherwise, undertakings wishing to cooperate would at any time have to fear that their cooperation, like the appellant's, would not be taken into consideration, or not be fully taken into consideration.

79 The Commission contends that the Court of First Instance did not err in law as regards its assessments relating to SGL Carbon's cooperation during the investigation. The Court of First Instance properly assessed the appellant's

contributions and those of the other undertakings concerned. Since the appellant's cooperation did not contribute to the establishment of the infringement, there was no need to take it into consideration and to reduce the fine accordingly.

80 The Commission contends that the Court of First Instance properly examined the evidence concerning the respective contributions of the undertakings concerned during the investigation. The appellant has not explained to what extent that examination may have distorted the evidence, which is the only matter amenable to review in an appeal.

Findings of the Court

81 As observed at paragraph 43 of this judgment, the Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. In that context, the Commission is required to make complex assessments of fact, such as those relating to the cooperation provided by the individual undertakings concerned.

82 As regards the present case, it must be observed that, at paragraphs 358 to 362 of the judgment under appeal, the Court of First Instance based its assessments in that regard, in reliance on the Leniency Notice, on the consideration that a single undertaking, namely the first one to provide evidence concerning the existence of a cartel, may receive a substantial reduction in the fine, to the exclusion of other undertakings which, at a subsequent stage in the administrative procedure, produce particular evidence relating to the same cartel.

83 With respect to the cooperation which an undertaking provides to the Commission, it is settled case-law that such a contribution may justify a reduction in the fine under the Leniency Notice only if it actually allows the Commission to achieve its task of establishing the existence of an infringement and putting an end to it (see, to that effect, Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36, and *Dansk Rørindustri and Others* v *Commission*, paragraph 399).

84 More specifically, while the Leniency Notice already provides, in Sections C and B, for a reduction in the fine for the first undertaking to adduce evidence of the existence of a cartel, the objective of promoting cooperation by undertakings in detecting secret cartels affecting the Community, in particular the undertakings which are the first to adduce evidence, was confirmed and reinforced by the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

85 In the present case, the Court of First Instance pointed out, at paragraph 360 of the judgment under appeal, that only a single undertaking, which was not SGL Carbon, had been the first to adduce such evidence.

86 Consequently, the Court of First Instance held, at paragraph 367 of the judgment under appeal, that SGL Carbon, as ringleader of the cartel, did not satisfy the conditions set out in the Leniency Notice and could not claim a significant reduction in the fine imposed on it. Such an assessment, based on fact, cannot be challenged in an appeal.

87 As regards SGL Carbon's argument concerning the taking into consideration of its cooperation with the Commission, independently of the fact that the appellant was

characterised as ringleader of the cartel, it must be noted that the Court of First Instance was correct to hold, at paragraph 368 of the judgment under appeal, that the Commission was not required to reward such cooperation by a substantial reduction in the fine, since that cooperation had not effectively facilitated the establishment of the existence of that cartel and enabled the Commission to put an end to it.

88 As regards, finally, SGL Carbon's claim that the cooperation provided by it was undervalued by comparison with that of the other members of the cartel, it should be noted, as the Court of First Instance rightly pointed out at paragraph 371 of the judgment under appeal, that the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings.

89 In fact, SGL Carbon has adduced no evidence capable of showing how the Court of First Instance erred in law in its analysis of the Commission's exercise of its discretion with respect to the way in which the undertakings cooperated with it during the investigation.

90 It follows from the foregoing that SGL Carbon is not correct to maintain that the findings of the Court of First Instance relating to its cooperation with the Commission during the investigation are vitiated by an error of law.

91 The fourth plea in law put forward by SGL Carbon in support of its appeal must therefore be rejected.

Fifth plea in law, alleging that the fine is disproportionate

Arguments of the parties

92 SGL Carbon claims that the Court of First Instance was wrong to consider that the Commission is not required to evaluate the economic position of the undertaking concerned when setting the amount of the fine.

93 The appellant maintains that it is unacceptable that the Court of First Instance should approve an undertaking's becoming insolvent as a result of the imposition of a fine without taking the financial consequences of the fine into consideration. It submits that the principle of proportionality means that the impact of penalties by reference to the economic situation of the undertaking concerned must be taken into account.

94 The Commission contends that the fifth plea is inadmissible. In effect, SGL Carbon seeks to secure a reconsideration of the appropriateness of the determination of the amount of the fine by submitting a series of allegations which fall outside the findings made by the Court of First Instance in the judgment under appeal. However, such findings of fact cannot be reviewed by the Court of Justice in an appeal.

95 The Commission maintains that the fifth plea is unfounded in any event. In the exercise of its unlimited jurisdiction, the Court of First Instance approved the consistent case-law that the Commission is not required to take an undertaking's economic situation into account when determining the amount of a fine.

96 The Commission further submits that the Court of First Instance considerably reduced the amount of the fine imposed on the appellant, in excess of the reduction granted by the Commission.

Findings of the Court

97 It must be borne in mind at the outset that, as already stated at paragraph 41 of this judgment, review by the Court of Justice, in an appeal, does not extend to the findings of fact made by the Court of First Instance, save where the substantive inaccuracy of those findings is apparent from the documents in the file, where the evidence has been distorted by the Court of First Instance, where the legal characterisation of the facts by that Court is incorrect and where it is necessary to ascertain whether the rules relating to the burden of proof and the taking of evidence have been observed.

98 Nor is it open to the Court of Justice, when determining an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law (see Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 31, and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-835, paragraph 152).

99 In so far as SGL Carbon disputes the proportionality of the fine imposed on it, the plea must be declared inadmissible, since it attempts to secure a reconsideration of findings of fact for which the Court of Justice does not have jurisdiction in an appeal (see also Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraphs 47 and 48, and *Dansk Rørindustri and Others* v *Commission*, paragraphs 245 and 246).

100 As regards the argument that the Court of First Instance failed to take account of SGL Carbon's financial capacity, it must be observed that, according to settled case-law which rightly provides inspiration for paragraph 333 of the judgment under appeal, the Commission is not required, when determining the amount of the fine, to take into account the 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 *SGL Carbon* v *Commission*, paragraphs 105 and 106).

101 In those circumstances, the Court of First Instance did not err in law in rejecting, at paragraph 333 of the judgment under appeal, the plea based on the fact that the Commission failed to take the appellant's financial capacity into account.

102 The fifth plea put forward by SGL Carbon in support of its appeal cannot therefore be upheld.

Sixth plea, alleging that the interest rates fixed by the Commission are illegal

Arguments of the parties

103 SGL Carbon maintains that the Court of First Instance did not examine its arguments concerning the fixing of the interest rates and that the judgment under appeal is therefore vitiated by an error of law on that point.

104 It contends that the interest charged is too high. In the absence of a legal basis, the Commission cannot set interest at a rate considerably higher than the market rate. By fixing high interest rates, the Commission imposed a further penalty on the appellant.

105 SGL Carbon submits that the Court of First Instance cannot in any event properly reject the reference to the interest rate applied to the provisional payments made by undertakings in order to pay the fines imposed on them by asserting that the sole purpose of that rate is to prevent the unjust enrichment of the Communities. Even the rate of interest applicable to unpaid fines must have as its sole purpose to prevent the undertaking concerned from deriving a benefit from providing a guarantee.

106 The Commission contends that the sixth plea is inadmissible in so far as it seeks to have the setting of the interest reconsidered by the Court of Justice in the context of the appeal.

107 The Commission maintains that, in any event, the plea is unfounded. If undertakings were able to obtain economic advantages by delaying payment of the fines imposed on them, the penalty would be weakened and the undertakings delaying payment of the fines would have financial advantages by comparison with those paying promptly.

108 The Commission further submits that the Court of First Instance justified to the requisite legal standard the reasons why the Commission had not abused its discretion when fixing the interest and that the appellant has put forward no argument capable of showing that the default interest was fixed disproportionately.

Findings of the Court

109 It must be borne in mind that the Court of First Instance, in response to the plea raised before it, referred at paragraph 411 of the judgment under appeal to the consistent case-law according to which the Commission's powers under Article 15(2) of Regulation No 17 include the power to set the date by which the fines are payable and on which interest begins to accrue, and also the rate of that interest and the detailed arrangements for implementing its decision.

110 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 (*SGL Carbon* v *Commission*, paragraph 114).

111 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 (*SGL Carbon* v *Commission*, paragraph 115).

112 It is appropriate to add that SGL Carbon has not shown how the Court of First Instance erred in law in holding, at paragraph 412 of the judgment under appeal,

that the Commission did not exceed its discretion in setting the rate of the default interest. The appellant has merely requested a re-examination of the findings of fact made by the Court of First Instance in that regard.

113 Such a line of argument falls outside the scope of the Court's power of review in an appeal (see Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraphs 81 to 83). On that point, the plea must therefore be declared inadmissible.

114 As regards SGL Carbon's allegation that its argument that the Commission grants interest rates of 2% on provisional payments was wrongly rejected as being out of time, it must be observed that the Court of First Instance properly regarded that argument, which had not been raised in the originating application, as constituting a fresh plea, within the meaning of Article 48(2) of its Rules of Procedure. The Court of First Instance was therefore correct to reject it, as it did at paragraph 413 of the judgment under appeal, as inadmissible.

115 The sixth plea put forward by SGL Carbon in support of its appeal is therefore unfounded in part and inadmissible in part.

116 It follows from all of the foregoing considerations that none of the pleas on which SGL Carbon relies in support of its appeal can succeed and that the appeal must therefore be dismissed.

Costs

117 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 (Fourth Chamber) hereby

1. Dismisses the appeal;

2. Orders SGL Carbon AG to pay the costs.

[Signatures]