JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

8 October 2008 *

In Case T-68/04,

SGL Carbon AG, established in Wiesbaden (Germany), represented by M. Klusmann and A. von Bonin, lawyers,

applicant,

v

Commission of the European Communities, represented by F. Castillo de la Torre and W. Mölls, acting as Agents, and H.-J. Freund, lawyer,

defendant,

APPLICATION for the annulment of Commission Decision 2004/420/EC of 3 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the

* Language of the case: German.

EEA Agreement (Case No C.38.359 — Electrical and mechanical carbon and graphite products) and, in the alternative, an application for the reduction of the fine imposed on the applicant in that decision,

THE COURT OF FIRST INSTANCE OF
THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President, M. Prek and V. Ciucă, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2008,

gives the following

Judgment

Facts at the origin of the dispute

1 SGL Carbon AG ('SGL' or 'the applicant') is a German undertaking which manufactures, inter alia, carbon and graphite products for use in the electrical and mechanical sectors.

2 On 18 September 2001, the representatives of Morgan Crucible Company plc ('Morgan') met with the Commission's agents in order to propose their cooperation in establishing the existence of a cartel on the European market for electrical and mechanical carbon products and to request the benefit of the leniency measures laid down in Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice').

3 On 2 August 2002 the Commission, pursuant to Article 11 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 17), sent requests for information concerning their conduct on the market at issue to C. Conradty Nürnberg GmbH ('Conradty'), Le Carbone-Lorraine ('LCL'), Schunk GmbH and its subsidiary Schunk Kohlenstoff-Technik GmbH (together referred to as 'Schunk'), Eurocarbo SpA, Luckerath BV, Gerken Europe SA and to the applicant. The letter which was sent to Schunk also concerned the activities of Hoffmann & Co. Elektrokohle AG ('Hoffmann'), taken over by Schunk on 28 October 1999.

4 By letter of 30 September 2002, the applicant replied to the request for information.

5 By letter of 17 March 2003, it requested that the Leniency Notice be applied and sent the Commission evidence concerning the cartel at issue.

6 On 23 May 2003, on the basis of the information which had been sent to it, the Commission sent a statement of objections to the applicant and the other undertakings concerned, namely Morgan, Conradty, LCL, Schunk and Hoffmann. In its reply the applicant stated that it did not substantially contest the facts set out in the statement of objections.

7 After hearing the undertakings concerned, with the exception of Morgan and Conradty, the Commission adopted Decision 2004/420/EC of 3 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case No C.38.359 — Electrical and mechanical carbon and graphite products) ('the Decision'), which was notified to the applicant by letter of 11 December 2003. A summary of the Decision was published in the Official Journal on 28 April 2004 (OJ 2004 L 125, p. 45).

8 The Commission stated in the Decision that the undertakings to which the Decision was addressed participated in a single and continuous infringement of Article 81(1) EC and, since 1 January 1994, Article 53(1) of the Agreement on the European Economic Area (EEA), consisting of fixing, directly or indirectly, sales prices and other trading conditions applicable to customers, sharing markets, in particular by allocating customers, and engaging in co-ordinated actions (quantity restrictions, price increases and boycotts) against competitors which were not members of the cartel (recital 2 in the preamble to the Decision).

9 The Decision contains the following provisions:

'*Article 1*

The following undertakings have infringed Article 81(1) [EC] and — from 1 January 1994 — Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices in the sector of electrical and mechanical carbon and graphite products:

— [Conradty], from October 1988 to December 1999;

— [Hoffmann], from September 1994 to October 1999;

— [LCL], from October 1988 to June 1999;

— [Morgan], from October 1988 to December 1999;

— [Schunk], from October 1988 to December 1999;

— [SGL], from October 1988 to December 1999.

Article 2

For the infringements referred to in Article 1, the following fines are imposed:

— [Conradty]: EUR 1 060 000;

— [Hoffmann]: EUR 2 820 000;

— [LCL]: EUR 43 050 000;

— [Morgan]: EUR 0;

— [Schunk]: EUR 30 870 000;

— [SGL]: EUR 23 640 000.

The fines shall be paid, within three months of the date of the notification of this Decision …

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision was adopted, plus 3.5 percentage points.'

10 As regards the method of setting fines, the Commission classed the infringement as very serious in the light of its nature, its impact on the EEA market for the goods concerned, even though it could not be measured precisely, and the scope of the geographic market concerned (recital 288 of the Decision).

11 In order to take account of the specific weight of the unlawful conduct of each of the undertakings involved in the cartel, and thus of its real impact on competition, the Commission divided the undertakings concerned into three categories according to their relative importance on the market concerned, determined by their market share (recitals 289 to 297 of the Decision).

12 Consequently, LCL and Morgan, regarded as being the two largest operators with market shares of more than 20%, were placed in the first category. Schunk and the applicant, which are medium-sized operators with market shares of between 10% and 20%, were placed in the second category. Hoffmann and Conradty, regarded as being small operators by reason of their market shares of less than 10%, were grouped together in the third category (recitals 37 and 297 of the Decision).

13 On the basis of the foregoing considerations, the Commission set starting amounts, determined on the basis of the gravity of the infringement, of EUR 35 million for LCL and Morgan, EUR 21 million for Schunk and the applicant, and EUR 6 million for Hoffmann and Conradty (recital 298 of the Decision).

14 As regards the duration of the infringement, the Commission considered that all the undertakings concerned had committed an infringement of long duration. On account of an infringement which lasted 11 years and 2 months, the Commission increased the starting amount which it set for the applicant, Morgan, Schunk and Conradty by 110%. In respect of LCL, the Commission found that the infringement lasted for 10 years and 8 months and increased the starting amount by 105%. As regards Hoffmann, the starting amount was increased by 50% as the duration of the infringement was found to be five years and one month (recitals 299 and 300 of the Decision).

15 The basic amount of the fine, determined in accordance with the gravity and the duration of the infringement, was thus set at EUR 73.5 million in relation to Morgan, EUR 71.75 million for LCL, EUR 44.1 million for the applicant and Schunk, EUR 12.6 million for Conradty and EUR 9 million for Hoffmann (recital 301 of the Decision).

16 The Commission did not conclude there to have been any aggravating or attenuating circumstances for or against the undertakings concerned (recital 316 of the Decision).

17 As regards the application of the Leniency Notice, Morgan benefited from an immunity from the fine imposed for having been the first undertaking to bring the existence of the cartel to the Commission's attention (recitals 319 to 321 of the Decision).

18 In accordance with Part D of that notice, the Commission granted LCL a reduction of 40% of the amount of the fine which would have been imposed on it had it not cooperated, a reduction of 30% to Schunk and Hoffmann, and a reduction of 20% to the applicant, which was the last undertaking to cooperate (recitals 322 to 338 of the Decision).

19 In the Decision, under the title 'Ability to pay and other factors', the Commission stated, after having rejected the applicant's argument that it was unable to pay the fine, that it had recently already imposed three significant fines on the applicant for its participation in other cartel activities.

20 The Commission pointed out that by Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement — Case COMP/E-1/36.490 — Graphite electrodes (OJ 2002 L 100, p. 1) in the 'graphite electrodes case', and by Decision 2006/460/EC of 17 December 2002 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case C.37.667 — Specialty Graphite) (OJ 2006 L 180, p. 20) in the 'speciality graphite case', the applicant was fined EUR 80.2 million for its participation in the graphite electrodes cartel, and EUR 18.94 million and EUR 8.81 million, a total of EUR 27.75 million, for its participation in the isostatic graphite and extruded graphite cartels (recital 358 of the Decision).

21 Taking account of the applicant's serious financial difficulties and of the fact that the different cartel activities for which it was fined occurred simultaneously, the Commission considered that, in those particular circumstances, it was not necessary, in order to ensure effective deterrence, to require the applicant to pay the full amount of the fine and it thus reduced it by 33% to EUR 23.64 million (recital 360 of the Decision).

Procedure and forms of order sought by the parties

22 By application lodged at the Registry of the Court of First Instance on 20 February 2004, the applicant brought the present action.

23 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned, as President, to the Fifth Chamber, and this case was therefore also assigned to it.

24 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and answered the questions put by the Court at the hearing on 27 February 2008.

25 The applicant claims that the Court should:

— annul the decision, in so far as it relates to it;

— in the alternative, reduce, as appropriate, the amount of the fine imposed;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

27 By letter received at the Registry of the Court on 22 February 2008, the applicant declared that it was abandoning its fourth, fifth and sixth pleas set out in the application, alleging, respectively, an erroneous assessment by the Commission of its cooperation during the administrative procedure, the Commission's failure to take account of its inability to pay taxes and the alleged disproportionate nature of the fine in the light of the assessment of the need to ensure effective deterrence.

28 At the hearing, the applicant confirmed that it wished to abandon those pleas and explained that the claims for annulment of the Decision, set out in the application, ought to be understood as seeking the annulment only of Article 2 of the Decision, in which the Commission imposes fines on the undertakings concerned. Those statements made by the applicant were recorded in the minutes of the hearing.

The determination of the basic amount

29 The applicant submits that, when setting the basic amount of the fine, the Commission infringed the principles of proportionality and equal treatment and its duty to give reasons.

The gravity of the infringement

— The infringement of the duty to give reasons

30 It is settled case-law that the statement of reasons for an individual decision must disclose, clearly and unequivocally, the reasoning of the institution which adopted

the measure, in such a way as to allow those concerned to know the grounds of the measure adopted and the competent court to exercise its power of review. The requirement to state reasons must be assessed by reference to the circumstances of the case. The reasoning is not required to go into all the relevant facts and points of law, since the question whether it meets the requirements of Article 253 EC must be assessed by reference not only to the wording of the measure in question but also to the context in which it was adopted (see Case C-367/95 P *Commission* v *Sytravel and Brink's France* [1998] ECR I-1719, paragraph 63, and the case-law cited).

31 As regards the determination of fines for infringements of competition law, the Commission fulfils its obligation to state reasons where it indicates, in its decision, the factors on the basis of which the gravity and duration of the infringement were assessed, and is not required to include in it a more detailed account or the figures relating to the method of calculating the fines (see, to that effect, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 38 to 47; Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1532). Statements of figures relating to the calculation of fines, however useful and desirable such figures may be, are not essential to compliance with the duty to state reasons (Case C-182/99 P *Salzgitter* v *Commission* [2003] ECR I-10761, paragraph 75).

32 As regards the reasoning behind the starting amounts in absolute terms, it should be pointed out that fines constitute an instrument of the Commission's competition policy and the Commission must be allowed a margin of discretion when fixing their amount, in order that it may channel the conduct of undertakings towards observance of the competition rules (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59). Moreover, it is important to ensure that fines are not easily foreseeable by economic operators. The Commission cannot therefore be required to set out reasons in that connection other than those relating to the gravity and duration of the infringement.

33 In the present case, it is apparent from the Decision that the fines were imposed pursuant to Article 15(2) of Regulation No 17 and that the Commission — even though the Decision does not refer expressly to the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines') — determined the amount of the fines in accordance with the method defined in the Guidelines.

34 As regards the applicant's claim that insufficient reasons are given in the Decision in relation to the assessment of the gravity of the infringement and the setting of the starting amount, it is sufficient to observe that it is apparent from recitals 277 to 288 of the Decision that the Commission clearly stated the factors which it took into account to assess the gravity of the infringement, namely its nature, its impact on the EEA market for the relevant goods, and the size of the relevant geographic market and explained, for each of those elements, how they were applied in the present case.

35 In the Decision, the Commission thus considered that:

— the infringement at issue had consisted essentially in the direct and indirect fixing of selling prices and other trading conditions to customers, the sharing of markets, in particular through client allocation, and in co-ordinated actions against competitors not members of the cartel. Such practices are by their very nature the worst kinds of violations of Article 81(1) EC and Article 53(1) of the EEA Agreement (recital 278 of the Decision);

— the cartel agreements had been implemented and had had an impact on the EEA market for the products concerned, but that this impact cannot be precisely measured (recital 286 of the Decision);

— the cartel covered the whole of the common market and, following its creation, the whole of the EEA (recital 287 of the Decision).

36 In the light of all those factors, the Commission considered that the undertakings concerned had committed a very serious infringement, for which point 1.A, second paragraph, third indent, of the Guidelines lays down a likely fine of above EUR 20 million.

37 Next, the Commission stated that, within the category of very serious infringements, the scale of applicable fines made it possible to differentiate between undertakings in order to take account of the effective economic capacity to cause significant damage to competition and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

38 In the context of that differentiation, which was all the more necessary given the considerable differences in terms of importance on the market of the undertakings which participated in the infringement, the Commission grouped the undertakings concerned into three categories, according to their relative importance on the market at issue, determined by their market shares. Since the applicant's market share was estimated at 14%, it was placed in the second category (recitals 288 to 297 of the Decision).

39 It is on the basis of the foregoing considerations that the Commission set a starting amount, determined on the basis of the gravity of the infringement, of EUR 21 million for the applicant (recital 298 of the Decision).

40 Such reasoning cannot be claimed, as the applicant does, to be a pure and simple repetition of the wording of the Guidelines and it must be considered that it satisfies

the requirements of Article 253 EC, as interpreted by the case-law cited in paragraphs 30 to 32 above.

41 It follows that the complaint alleging the infringement by the Commission of the duty to give reasons when setting the starting amount of the fine must be rejected.

— The Commission's practice in taking decisions

42 The applicant claims that the starting amounts set on the basis of the gravity of the infringement are disproportionate and or discriminatory in comparison with those set, under the same procedure, for other undertakings in similar cases.

43 According to settled case-law, the Commission's practice in taking decisions does not serve as a legal framework for the fines imposed in competition matters, that framework being constituted solely by Regulation No 17 (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 234), and decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (C-169/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraphs 201 and 205, and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 60).

44 In that regard, the applicant merely claims that the starting amounts set by the Commission are and were, in the case of price cartels concerning markets of

comparable importance, generally below EUR 20 million and that in the Decision the starting amount represents 'on average' 48% of the undertakings' turnover on the market concerned as opposed to 38.8% in the graphite electrodes case and 32.2% in Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article [81 EC] (Case No IV/35.691/E-4 — Pre-Insulated Pipe Cartel) (OJ 1999 L 24, p. 1) in the 'pre-insulated pipe case'. It must be noted, however, that such general and imprecise considerations, namely references to average figures, are not such as to establish the existence of disproportionate and/or discriminatory treatment of the applicant.

45 The more precise reference to the Commission's decision in the speciality graphite case, in which the starting amounts were clearly lower that those set in the present case in spite of the fact that the market shares of the undertakings concerned were higher as a whole, is also not relevant.

46 As rightly pointed out by the Commission, the specific figures relating to the size of the market shares concerned make it possible to distinguish the speciality graphite case from the present case. Even supposing that, as claimed by the applicant, the market volumes of the EEA for isostatic graphite and for extruded graphite were included in the context of the speciality graphite case, namely between EUR 100 and 120 million and between EUR 60 and 70 million respectively, they are undeniably and significantly lower than the total EEA market value for electrical and mechanical carbon and graphite products, which amounted to EUR 291 million in 1998 (recital 37 of the Decision).

47 At the hearing the applicant disputed for the first time the amount of EUR 291 million found by the Commission, criticising, more specifically, the fact that it had taken account of the value of the captive use in calculating the turnover and market shares of the undertakings concerned.

48 The Court considers that it is a new complaint which, under Article 48(2) of the Rules of Procedure of the Court of First Instance, may not be introduced in the course of proceedings. The challenge to the evaluation of the total value of the relevant market, which was raised very briefly at the hearing, is not based on new elements which came to light in the course of the procedure, since the sum of EUR 291 million found by the Commission and the reasoning justifying the taking into account of the value of captive use in the calculation of the turnover and the market shares of the undertakings concerned were clearly stated in recitals 37, and 291 to 295 of the Decision. The applicant's mere claim that in the application it disputed the setting of the starting amount of the fine does not permit the finding that the complaint at issue amplifies a complaint already set out, directly or implicitly, in the application initiating proceedings and is closely connected with it. It must therefore be declared inadmissible.

49 It should also be pointed out that the Commission has a margin of discretion when fixing the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127). The fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level, at any time, to ensure the implementation of Community competition policy (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109) and to strengthen the deterrent effect of fines (Case T-327/94 *SAC Holding* v *Commission* [1998] ECR II-1373, paragraph 179, upheld on appeal in Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101).

50 The applicant's claim that the increasing of the level of the fines was precisely not necessary it its regard, given the penalties which had been imposed on it in the parallel proceedings, falls within the discussion regarding the Commission's assessment of deterrent effect, as set out in recital 359 of the Decision. However, the applicant has expressly abandoned its plea alleging that the Commission wrongly assessed that notion.

51 It must be pointed out, in any event, that the Commission was right in drawing a distinction, in the context of the procedures and the fines, between the graphite electrodes, the isostatic graphite, and the extruded graphite cartels and the electrical and mechanical carbon and graphite products cartels, which are four separate infringements of Article 81(1) EC.

52 It follows that it was open to the Commission to impose a new fine on SGL in respect of its participation in the electrical and mechanical carbon and graphite products cartels in order to deter that undertaking with a penalty exceeding the level of a purely symbolic penalty, it being pointed out that in the particular circumstances of the case — characterised by the partial overlap of the various cartel activities in which the applicant participated — the Commission considered that an amount reduced by 33% was sufficient to ensure the desired deterrent effect (see, to that effect, judgment 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, '*Tokai II*', paragraph 336).

53 Finally, according to settled case-law, the Commission's power to impose fines on undertakings which intentionally or negligently commit an infringement of Articles 81(1) EC or 82 EC is one of the means conferred on the Commission with which to carry out the task of supervision conferred on it by Community law. That task certainly includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (*Musique diffusion française and Others* v *Commission*, paragraph 49 above, paragraph 105, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 105).

54 It follows that the Commission has the power to decide the level of fines so as to reinforce their deterrent effect where infringements of a given type, although established as being unlawful at the outset of Community competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them (*Musique diffusion française and Others* v *Commission*, paragraph 49 above, paragraph 108, and *Archer Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 53 above, paragraph 106).

55 As is clear from the case-law mentioned, the objective of deterrence which the Commission is entitled to pursue when setting fines is to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the Community or the EEA. It follows that the deterrent effect of a fine imposed for infringement of the Community competition rules cannot be assessed by reference solely to the particular situation of the undertaking sanctioned (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 53 above, paragraph 110).

56 In the present case, which corresponds to a classic type of infringement of competition law and conduct which the Commission has found to be unlawful time and time again since it first became active in the field, it was open to the Commission to consider it necessary to set the amount of the fine at a sufficiently dissuasive level within the limits laid down in Regulation No 17.

57 It follows that the complaint alleging disproportionate and/or discriminatory treatment of the applicant in relation to the setting of the starting amount of the fine and in light of the Commission's practice in taking decisions, must be rejected.

— The grouping of the members of the cartel into categories

58 It should be pointed out that, in the light of the large disparity in size between the undertakings concerned and in order to take account of the specific weight of each of them and, thus, the real impact of their unlawful conduct on competition, and in accordance with the fourth and sixth paragraphs of point 1.A of the Guidelines, each of the undertakings which had participated in the infringement was treated differently in the Decision. To that end, the Commission grouped the undertakings concerned into three categories on the basis of the EEA-wide turnover of each of them in relation to the goods concerned by the present proceedings, and including in that calculation the value of captive use of each undertaking. The resulting figure is the market share which represents the relative weight of each undertaking in the infringement and its effective economic capacity to cause significant damage to competition (recitals 289 to 291 of the Decision).

59 The comparison was based on the turnover figures (expressed in millions of euros) attributable to the goods in question in respect of the last year of the infringement, namely 1998, as shown in Table 1 set out in recital 37 of the Decision and entitled 'Estimates of turnover (including the value of captive use) and market shares in the EEA for the product group subject to the proceeding in the year 1998':

Supplier	Turnover (including the value of captive use)	Market share in EEA (%)
Conradty	9	3
Hoffmann	17	6
[LCL]	84	29
Morgan	68	23
Schunk	52	18
SGL	41	14
Others	20	7
Total	291	100

60 Consequently, LCL and Morgan, considered to be the two largest operators with market shares greater than 20%, were placed in the first category. Schunk and SGL, which are medium-sized operators with market shares of between 10 and 20%, were placed in the second category. Hoffman and Conradty, considered to be small operators by reason of their market shares of below 10%, were placed in the third category (recitals 37 and 297 of the Decision).

61 On the basis of the above findings, the Commission set a starting amount, determined on the basis of the gravity of the infringement, of EUR 35 million for LCL and Morgan, EUR 21 million for Schunk and SGL and EUR 6 million for Hoffmann and Conradty (recital 298 of the Decision).

62 It should be pointed out the applicant does not dispute as such the method of dividing the members of a cartel into categories for the purposes of treating them differently when setting the starting amounts of the fines. That principle, whose method has also been validated by the case-law of the Court of First Instance even though it has the effect of ignoring the differences in size between undertakings in the same category (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 385, and 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, paragraph 217 (‘*Tokia I*’)), results in a flat-rate starting amount for all undertakings in the same category.

63 However, the applicant bases its argument on the judgment in *Tokai I*, paragraph 62 above, to claim that if, as indicated by the Court in paragraph 223 of that judgment, the division in categories must be made in steps of approximately 5% of market share, since that enables the proportionality of the different market shares to be reflected correctly, the 10% steps chosen by the Commission in the present case are too approximate and do not reflect the market relationships.

64 It affirms that dividing the undertakings into six categories in divisions of 5% of the market shares would have led, by taking account of the average market share by category or an analysis of the thresholds, to a maximum starting amount of EUR 15.9 million or EUR 14 million.

65 Although it is not disputed that in the graphite electrodes case the Commission divided the undertakings concerned in three categories in divisions of 5% of the market shares, it is in no way apparent from paragraph 223 of the judgment in *Tokai I*, paragraph 62 above, nor from the Court's reasoning as a whole, that such a means of dividing the members of a cartel into categories is the only method of reflecting the proportionality of the different market shares without erroneous assessment in proceedings by which the Commission imposes penalties on cartels.

66 The applicant cannot infer from the judgment in *Tokai I*, paragraph 62 above, that the division into categories of the undertakings involved in the cartel at issue in the Decision was approximate or discriminatory solely because, in the present case and in exercising its broad discretion, the Commission followed a different method by creating three categories using three divisions of 10% of the market share, given that the number of operators concerned by the Decision in the graphite electrodes case and the division of their market shares were different from those of the present case.

67 Moreover, it should be pointed out that the applicant's reasoning leads to the creation of six categories in the present case, based on steps of 5% of market share (from 0 to 5% up to 25 to 30%), each containing only one undertaking, which is contrary to the very principle of dividing them into categories.

68 None the less, the division into categories made by the Commission in the Decision must respect the principle of equal treatment, according to which it is prohibited to treat comparable situations differently and different situations identically, unless such treatment is objectively justified. In addition, according to settled case-law, the amount of the fine must at least be proportionate in relation to the factors taken into account in the assessment of the gravity of the infringement (*Tokai I*, paragraph 62 above, paragraph 219, and the case-law cited).

69 To check whether a division of the members of a cartel into categories is consistent with the principles of equal treatment and proportionality, the Court, in the course of its review of the legality of the way in which the Commission exercised its discretion in the area, must none the less restrict itself to reviewing whether that division is coherent and objectively justified (*CMA CGM and Others* v *Commission*, cited in paragraph 62 above, paragraph 416, and *Tokai I*, cited in paragraph 62 above, paragraphs 220 and 222).

70 In that regard, it is necessary to hold that a division of the undertakings in three categories, namely large, medium and small operators, is not an unreasonable way of taking account of their relative importance on the market in order to set the starting amount, as long as it does not lead to a grossly inaccurate representation of the market concerned. In addition, it should be noted that, with rates of 3, 6, 14, 18, 23 and 29%, the market shares of the members of the cartel are divided in a relatively balanced manner on a scale of 0 to 30, and that the Commission's method of setting the thresholds of the categories at 10 and 20% cannot, *a priori*, be regarded as internally incoherent.

71 As regards the first category, the Commission grouped together LCL and Morgan and set a starting amount of EUR 35 million. Contrary to the applicant's claims, the Commission's choice cannot be qualified as arbitrary and does not go beyond the limits of the broad discretion which it enjoys in the area.

72 It should be pointed out, first, that the setting of the starting amount of EUR 35 million in recital 298 of the Decision constitutes the conclusion of the analysis carried out by the Commission, as set out in recitals 277 to 297 of the Decision, in which it characterised the infringement as such by taking account of objective elements, namely the very nature of the infringement, its impact on the market and the geographic extent of that market, and took account of subjective elements, namely the specific weight of each of the undertakings involved in the cartel and, consequently, the real impact of their unlawful conduct on competition. It is in the second part of its analysis that it, inter alia, aimed to ensure the deterrent effect of the fine, in light of the relative weight of each undertaking in the infringement and its effective economic capacity to cause significant damage to competition on the market at issue. At the end of its assessment of the gravity of the infringement, the Commission directly set a starting amount, in this case EUR 35 million for LCL and Morgan, taking account of all of the above elements, including the objective of deterrence.

73 Second, as regards specifically infringements which have to be classified as 'very serious', the Guidelines merely state that the likely fines are 'above [EUR] 20 million'. The only limits referred to in the Guidelines which apply in the case of such infringements are the general limit of 10% of overall turnover set by Article 15(2) of Regulation No 17 (see the preamble to and point 5.A of the Guidelines) — the infringement of which is not alleged in the present case — and the limits on the additional amount which may be imposed in respect of the duration of the infringement (see point 1.B, first paragraph, second and third indents of the Guidelines). There is nothing in the Guidelines to preclude, in the case of 'very serious' infringements, an increase whose value in absolute terms is identical to that applied by the Commission in the present case.

74 Third, contrary to the applicant's submissions, merely restricting the assessment of the proportionate nature of the starting amount of the fine set by the Commission to the correlation between that amount and the relevant product turnover would confer excessive importance on the latter. The starting amount referred to above may be justified by the particular nature of the infringement, its actual effect, the geographical extent of the market affected, the need for the fine to have a deterrent effect

and the size of the undertaking in question, all of which were taken into account by the Commission in this case. In that regard, the Commission was right to classify the infringement as 'very serious' in that the applicant participated in a horizontal agreement the object of which consisted essentially in the direct and indirect fixing of selling prices and other trading conditions to customers, in the sharing of markets, in particular through client allocation, and in co-ordinated actions against competitors not members of the cartel, which had a concrete impact on the market for the goods at issue in the EEA.

75 Fourth, the relevant turnover of LCL and Morgan amounted to EUR 84 million and EUR 68 million, their market shares being 29 and 23% respectively. The Commission thus rightly considered that it was appropriate to place those two undertakings in the same category with an average turnover of EUR 76 million and an average market share of approximately 26%.

76 Given that the composition of the first category and the corresponding starting amount may therefore be regarded as being coherent and objectively justified, it needs to be examined whether the second category, made up of the applicant and Schunk, was also constituted in a coherent and objectively justified manner.

77 The applicant claims that if, in accordance with the reasoning in *Tokai I*, paragraph 62 above, the relationship between the different market shares of the undertakings must be reflected in the starting amounts set for the different categories, it is necessary to compare 'the largest market share in the highest category with the smallest market share in the lowest category'. The ratio between those two market shares must at least correspond to the relative difference between the market shares in absolute terms. The ratio between the market shares of LCL and the applicant being 2.07, the starting amount of the applicant's fine and that of the other undertaking in the category, should thus have reflected that ratio and have been set, at the very most, at EUR 16.9 million.

78 It is necessary to point out, once again, the differences between the case which gave rise to the judgment in *Tokai I*, paragraph 62 above, and the present case, in the light of the number of operators concerned, the division of the market shares and the fact that, in the graphite electrodes case, the Commission had chosen to apply a specific arithmetical method consisting of divisions of approximately 5% of market share, each division corresponding to an amount of approximately EUR 8 million. In *Tokai I*, paragraph 62 above (paragraph 232), the Court reviewed the coherence of that method of differentiation and stated that, once it has voluntarily chosen to apply such an arithmetical method, the Commission is bound by the rules inherent therein, unless it provides express reasons for not doing so, in regard to all members of the same cartel.

79 In any event, there is nothing in *Tokai I*, paragraph 62 above, which indicates that the relationship between the starting amounts of the fines set in the context of the division of the members of the cartel into categories must be determined according to the relationship between the market share of the 'largest' undertaking in the highest category and that of the 'smallest' undertaking in the lowest category.

80 The applicant's approach whereby it isolates its market share and compares it exclusively with that of LCL in order to determine the relationship between the starting amounts set for it and LCL and then applies it to the two undertakings in the second category, essentially amounts to denying the principle, accepted in the case-law, of division into categories and the flat-rate starting amounts which it implies.

81 On the contrary, the taking into account of the average figures of the undertakings in the same category shows that the division into categories made in the Decision is coherent and objectively justified.

82 The average turnovers and the average market shares of LCL and Morgan (first category) were EUR 76 million and 26%, whereas those same figures for Schunk and the applicant (second category) were EUR 46.5 million and 16%. The ratio between those two average values is thus 1.634 (for the turnover) and 1.625 (for the market share).

83 Those ratios are very close to the ratio between the starting amount for the first category (EUR 35 million) and that for the second category (EUR 21 million), which is 1.66. Consequently, that ratio does not disadvantage the applicant but, on the contrary, benefits it since the ratio between the two average values is 1.634 (for the turnover) and 1.625 (for the market share).

84 As regards the third category, made up of Hoffmann and Conradty, the average turnover and the average market share of those undertakings were EUR 13 million and 4.5%. In the light of the figures for LCL and Morgan (first category), the ratio between the two average values is 5.846 (for the turnover) and 5.777 (for the market share). Those ratios are very close, once again, to the ratio between the starting amount for the first category (EUR 35 million) and that of the third category (EUR 6 million) which is 5.83.

85 As regards the comparison of the undertakings placed in the second and third categories, the ratio between the two average values is 3.576 (for the turnover) and 3.555 (for the market share), which corresponds almost exactly to the ratio between the starting amount for the second category (EUR 21 million) and that for the third category (EUR 6 million) which is 3.5.

86 In its reply, the applicant submits that an assessment based on the average also leads to a discriminatory and disproportionate result and states, in that regard,

that the Commission set a starting amount for LCL and Hoffmann representing EUR 1.207 million and EUR 1 million per point of market share (35: 29 = 1.207 and 6: 6 = 1) respectively, which, when transposed to its situation, should have resulted in a starting amount of EUR 16.9 million or EUR 14 million.

87 It is sufficient to note that the applicant thereby merely reproduces, but in different words, its arguments which are summarised in paragraph 77 above and are based on a requirement that, in the relations between each of those undertakings, proportionality be adhered to strictly.

88 As stated, that line of argument amounts to denying the principle of dividing the undertakings into categories, as applied by the Commission in the Decision and accepted in the case-law, and cannot be upheld by the Court, unless the applicant's classification in the second category is shown to be contrary to the principles of proportionality and equal treatment.

89 In its arguments, the applicant does in fact assert that its classification in the same category as Schunk amounts to unequal treatment to its detriment in so far as Schunk has a market share of 18%, which represents a turnover roughly EUR 12 million greater than its own.

90 Schunk and the applicant were placed in the same category with market shares of 18 and 14%, representing turnover on the market concerned of EUR 52 million and EUR 41 million, which clearly situated them in the band of undertakings with market shares of between 10 and 20%.

91 It should be pointed out that the difference in size between Schunk and the applicant, belonging to the same category, is smaller than that between the applicant and Hoffmann, which are in two separate categories. The applicant's market share (14%) was closer to Schunk's (18%) than to that of the largest operator in the third category (Hoffmann, 6%), 4 and 8 percentage points respectively separating it from those undertakings. The small difference between Schunk and the applicant (4 percentage points), in the light of the fact that Schunk's market share is not particularly high, thus enabled the Commission, in a coherent and objective manner and thus without infringing the principles of equal treatment and proportionality, to treat the applicant in the same way as Schunk, and unlike Hoffmann and Conradty, as a medium-sized operator and, consequently, to set the same starting amount for it as for Schunk, which is greater than the starting amount imposed on Hoffmann and Conradty, which had a very marginal position on the market at issue (6 and 3%).

92 It should also be pointed out that, even if the effect of the division into categories is that certain undertakings are allocated the same starting amount even though they differ in size, that difference in treatment is objectively justified by the greater importance attached to the nature of the infringement than to the size of the undertakings in the assessment of the gravity of the infringement (see *CMA CGM and Others* v *Commission*, paragraph 62 above, paragraph 411, and the case-law cited).

93 Finally, the applicant claims that the division into categories made by the Commission is erroneous in so far as the Commission ought to have added together the market shares of Schunk and Hoffmann, since the undertakings should be taken as they are at the time of adoption of the decision imposing a fine. Accordingly, the applicant should have been placed in the third category, corresponding to a market share of less than 20%, the first and second categories being made up respectively of LCL, with a market share of more than 25%, and Schunk and Hoffmann with a combined total market share of between 20 and 25%, in the present case 24%. Therefore, in accordance with the Commission's practice, the starting amount set for the applicant should have been EUR 17.5 million to EUR 13 million lower, than the amount set in the present case.

94 It should be pointed out that the Commission found Hoffmann itself to be liable on the basis of the fact that it participated, on an individual basis, in the infringement from September 1994 to October 1999; Schunk did not take over Hoffmann until 28 October 1999.

95 In accordance with that finding, which is not directly called into question by the applicant, the Commission placed the undertakings concerned, including Hoffmann, into three categories, on the basis of the EEA-wide turnover of each undertaking in respect of the products concerned by the present proceedings, including therein the value of the captive use of each undertaking. The result is a market share figure representing the relative weight of each undertaking in the infringement and its effective economic capacity to cause significant damage to competition.

96 The comparison was based on the figures concerning the turnover attributable to the goods in question during the last year of the infringement, namely 1998, which the applicant disputes by claiming, on the basis of the principle of equal treatment, that the Commission should have assessed the situation of the undertakings on the day the fine was imposed and, consequently, added the market shares of Schunk and Hoffmann.

97 Not only does that line of argument amount to calling into question Hoffmann's individual liability, as found by the Commission in the Decision but it must also be rejected as manifestly unfounded.

98 The applicant's complaint concerns a stage of the calculation of the fine on the basis of the gravity of the infringement during which the Commission varies the amount of the likely fine of more than EUR 20 million, owing to the classification as a 'very

serious' infringement, by taking account of the specific weight of each of the undertakings involved in the cartel and, therefore, the real impact of their unlawful conduct on competition.

99 As regards the determination of the scale of the infringement on the market and the share of responsibility to be borne for it by each participant in the cartel, it has been held that the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market (see, inter alia, *Musique diffusion française and Others* v *Commission*, paragraph 49 above, paragraph 121, and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 369). In particular, as the Court has pointed out, the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition (Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643).

100 The Commission thus rightly took into consideration, on that occasion, the turnover in respect of the goods at issue and the market share in the EEA of each of the undertakings present on the market concerned in 1998 during the last full calendar year of the infringement, and not the situation of those undertakings on the day the Decision was adopted, namely four years after the infringement had ended.

101 It is apparent from the above findings that all of the complaints relating to the Commission's division of the members of the cartel into categories in the Decision must be rejected.

The duration of the infringement

102 Under Article 15(2) of Regulation No 17, the duration of the infringement is one of the factors to be taken into consideration when determining the amount of the fine to be imposed on undertakings which have infringed the competition rules.

103 As regards the duration of the infringement, the Guidelines draw a distinction between short-term infringements (generally less than one year), for which the starting amount set for the gravity should not be increased, medium-term infringements (generally from one to five years), for which that amount can be increased by 50%, and long-term infringements (generally above five years), for which that amount may be increased for each year by 10% (point 1.B, first paragraph, first to third indents).

104 It is not disputed that the applicant participated in the cartel from October 1988 to December 1999, namely an infringement period of 11 years and 2 months, which corresponds to a long-term infringement, and that the starting amount of its fine was thus increased by 110% to reflect the duration of the infringement.

105 The applicant submits that that increase of 110% is disproportionate and contradicts both the method of calculation of fines laid down in the Guidelines and the Commission's earlier practice in its decisions.

106 As regards, first, the alleged failure to take account of the Guidelines, the applicant contradicts itself in claiming that the disputed increase renders meaningless the preliminary step of the assessment of the gravity of the infringement and takes account of that same gravity a second time, as price fixing agreements, classified by the Commission as a 'very serious' infringement, are by their very nature long-term infringements.

107 The applicant's first claim constitutes a mere assertion of principle which lacks any relevance. It is sufficient to note that, after its assessment of the gravity of the infringement, the Commission set a starting amount of EUR 21 million for the applicant. Having gone through that first stage, the Commission took account of the duration of the infringement and, in the light of its long duration, increased that starting amount. The mere fact that the additional amount of the fine represents an increase of more than 100% of the starting amount in no way means that the setting of starting amounts on the basis of the gravity of the infringement is meaningless.

108 The second claim is also unfounded in so far as it is based on the erroneous premise that there is a necessary correlation between the nature of certain infringements and their duration and ultimately confuses the criteria relating to gravity and duration laid down in Article 15(2) of Regulation No 17.

109 Even supposing that price fixing agreements are essentially created to last, the Commission cannot be prevented from taking account of their actual duration in each individual case. Certain cartels, in spite of their planned longevity, are detected by the Commission or reported by one of the participants shortly after entering into operation. Their harmful effect is necessarily less than in a situation where they have been in operation for a long period. Consequently, a distinction must always be drawn, pursuant to Article 15(2) of Regulation No 17, between the actual duration of the infringements and their gravity as resulting from their particular nature (*Tokai I*, paragraph 62 above, paragraph 259, *Tokai II*, paragraph 52 above, paragraph 275).

110 The Commission was therefore entitled to state, at point 1.B, third paragraph, of the Guidelines that the increase in the fine for long-term infringements would represent a considerable strengthening of the previous practice with a view to imposing effective sanctions on restrictions 'which have had a harmful impact on consumers over a long period' (*Tokai I*, paragraph 62 above, paragraph 260).

111 In addition, point 1.B, first paragraph, third indent, of the Guidelines does not provide for an automatic increase of 10% per year for long-term infringements but grants the Commission a discretion in that regard. It is clear from recitals 299 and 300 of the Decision that the Commission exercised its discretion in deciding to increase the starting amounts of the fines by 10% for each full year of infringement and an additional 5% for each additional period above six months but less than a year, and did so in view of the length of the period of infringement which was well above the five-year boundary within which infringements are classified as 'medium-term'.

112 The fact that the Commission adopted the principle of a 10% per annum increase for all the undertakings involved in the infringement, rightly classified as long-term, in no way contradicts the Guidelines, and the applicant's arguments concerning the infringement of a 'principle of decreasing fines' in the case of long-term infringements, the existence of which in Community law has not been shown, fail to have regard to the single and continuous nature of the infringement, found by the Commission, which is not disputed by the applicant.

113 Therefore, there was nothing preventing the Commission, in accordance with its self-imposed rules in the Guidelines, from increasing the starting amount of the applicant's fine by 110% for an infringement which lasted 11 years and 2 months. In addition, that increase of 110% cannot be regarded as manifestly disproportionate in the light of the long duration of the infringement.

114 As regards, second, the alleged failure to have regard to the Commission's previous practice, it should be pointed out that that practice cannot serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17 (*LR AF 1998* v *Commission*, paragraph 43 above, paragraph 234), and that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (*JCB Service* v *Commission*, paragraph 43 above, paragraphs 201 and 205, and *Britannia Alloys & Chemicals* v *Commission*, paragraph 43 above, paragraph 60).

115 In that regard, the applicant refers to three decisions of the Commission in which it increased the starting amount of the fine by taking account of the duration of the infringement only as of the second year of the period of infringement, and did so as the Guidelines provide for increases only for periods in excess of where an infringement is regarded as 'medium-term'.

116 It must be observed, however, that the cases cited by the applicant are not comparable with the present case.

117 Thus, in Commission Decision 2001/135/EC of 5 July 2000 relating to a proceeding pursuant to Article 81 [EC] (Case COMP.F.1/36.516 — Nathan-Bricolux) (OJ 2001 L 54, p. 1), the Commission took account of the fact that, unlike in the present case, the restrictions at issue had not been implemented systematically during the period in question.

118 In Commission Decision 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/36.545/F3 — Amino Acids) (OJ 2001 L 152, p. 24), the Commission fined several undertakings for their participation in a cartel on the lysine market. The Commission had applied the principle of an increase of 10% per year of infringement, but did not apply it uniformly and did not explain why. In Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraphs 130 to 139) the Court corrected the situation by lowering the increase imposed in respect of the duration of the infringement to the benefit of the undertaking to which the principle of an increase of 10% per year was applied.

119 In any event, it should be pointed out that respect for the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14; *SCA Holding* v *Commission*, paragraph 49 above, paragraph 160; and *LR AF 1998* v *Commission*, paragraph 43 above, paragraph 367).

120 Contrary to the applicant's statements, it is not apparent from point 1.B of the Guidelines that the first year of an infringement should not be taken into account. The provision merely states that, in the case of short-term infringements, in general less than one year, there should be no increase. On the other hand, there will be an increase for infringements of above one year. That increase may be set at 10% of the starting amount for 'each year' where, as in the present case, the infringement lasted for more than five years (*Cheil Jedang* v *Commission*, paragraph 118 above, paragraph 133).

121 It follows that the complaint alleging disproportionate and/or discriminatory treatment of the applicant in relation to the setting of the starting amount of the fine, and in respect of the duration of the infringement and the Commission's practice in taking decisions, must be rejected.

The maximum limit of the fine laid down in Article 15(2) of Regulation No 17

The non-application to the applicant of the ceiling of 10% of global turnover

122 Article 15(2) of Regulation No 17 provides that the fines imposed by the Commission on undertakings which have infringed Article 81 EC or Article 82 EC may not exceed '10% of the turnover in the preceding business year of each of the undertakings participating in the infringement'.

123 The applicant submits, first, that the Commission infringed Article 15(2) of Regulation No 17 since, in the present case, it should have reduced, of its own motion, the basic amount of the fine pursuant to that article, taking account of the fines, whether the basic or final amounts, which had already been imposed on it in the graphite electrodes and speciality graphite cases, the total amount of which, including the fine imposed in the Decision, is well in excess of 10% of its global turnover. That follows from the objective of the ceiling of 10%, set in Article 15(2) of Regulation No 17, which is to protect the undertaking from an excessive fine which might put its economic existence at risk.

124 It should be pointed out that, although the Commission has discretion, subject to review by the Court, as regards reducing fines under the Leniency Notice in the light of the circumstances of each case, it must, on the other hand, comply with the 10% upper limit. The Commission does not have discretion in the application of the 10% upper limit, which is linked solely to the level of turnover referred to in Article 15(2)

of Regulation No 17. As pointed out by Advocate General Tizzano in his Opinion in 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-5439, paragraph 125, 'by definition, a ceiling represents an absolute limit which applies automatically in the event of a specified threshold being reached, regardless of any other criterion'.

125 In the present case, the amount of the basic fine, determined on the basis of the gravity and the duration of the infringement, was set at EUR 44.1 million for the applicant. That amount remained unchanged following the examination by the Commission of any aggravating or attenuating circumstances since no such circumstances were found either against or in favour of the applicant. That sum of EUR 44.1 million is clearly below the limit of 10% of its global turnover, which was EUR 1 112 million in 2002. No reduction of the basic amount of the fine could therefore be granted to the applicant, and the Commission correctly applied Article 15(2) of Regulation No 17.

126 The applicant's argument set out in paragraph 123 above fails to take account of the clear wording of Article 15(2) of Regulation No 17 from which it follows that the ceiling of 10% applies separately to each infringement fined by the Commission (*Tokai II*, paragraph 52, paragraph 377). In that regard, it should be pointed out that Article 15(2) provides that when determining the amount of the fine within the limits laid down in that article, regard must be had to the gravity and the duration of 'the infringement'.

127 In interpreting the express reference to the turnover of the undertaking, the Community judicature has stated that the upper limit of 10% aims to prevent fines from being disproportionate in relation to the size of the undertaking and, since only the total turnover can effectively give an approximate indication of that size, the aforementioned percentage must be understood as referring to the total turnover (*Musique*

diffusion française and Others v *Commission*, paragraph 49 above, paragraph 119). The objective of the ceiling of 10%, as so defined, cannot, however, be considered separately from the wording and scope of Article 15(2) of Regulation No 17 as noted in the preceding paragraph. That objective cannot justify an interpretation such as that by the applicant which is contrary to the wording of that article.

128 In support of its complaint, the applicant also refers to Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins) (OJ 2003 L 6, p. 1), in which the Commission considered that two undertakings had each committed eight infringements of Article 81 EC and consequently imposed eight fines on each of them. It should be pointed out, in that regard, that the amount of each of those eight fines respects the ceiling of 10% and that the applicant's observation that the sum of the fines imposed on each of the undertakings was below 10% of the total turnover of that undertaking cannot establish that the Commission infringed Article 15(2) of Regulation No 17 in the present case.

129 Second, the applicant claims that the Commission essentially misused its powers. The Commission sought to circumvent the maximum limit of 10% by sanctioning, separately in three different decisions, conduct which was contrary to competition law and took place during the same period.

130 When questioned at the hearing about the precise scope of its argument, the applicant stated that it was not submitting that the cartels concerned in the graphite electrodes and speciality graphite cases and the one which gave rise to the adoption of the Decision actually constituted one and the same infringement.

131 At this stage, it should be pointed out that it was permissible for the Commission to impose on the applicant four separate fines, each respecting the limits laid down in Article 15(2) of Regulation No 17, on the condition that it had committed four separate infringements of Article 81(1) EC. In the speciality graphite case, the Commission initiated only one set of proceedings which led to the adoption of a single decision finding the existence of two distinct infringements, one concerning the market for isostatic graphite and the other the extruded graphite market, and imposing on the applicant two separate fines.

132 Accordingly, the applicant's argument relating to an alleged 'unlawful circumvention' of the ceiling laid down in Article 15(2) of Regulation No 17 is completely irrelevant. As the Commission points out, it is irrelevant, for the application of that ceiling, whether fines are imposed for the various infringements of the competition rules in a single set of proceedings or in separate proceedings at different points in time, since the maximum limit of 10% applies to each infringement of Article 81 EC.

133 The general considerations put forward by the applicant to the effect that the Commission's attitude in the present case has a demoralising effect for the undertaking, which is placed in a position in which it cannot stabilise its finances and is subject to constant public condemnation — an additional source of prejudice in the form of an attack on its reputation — are also irrelevant in the light of the requirements for proof of an infringement of Article 15(2) of Regulation No 17 or of the Commission's alleged misuse of its powers.

134 Finally, it should be pointed out that the Commission reduced the applicant's fine by 33% in order to take account of its serious financial difficulties and of the fact that in the graphite electrodes and speciality graphite cases it had recently been fined significant amounts for its participation in cartel activities which were carried out contemporaneously.

Discriminatory application of the ceiling of 10% to the benefit of Hoffmann

135 The applicant does not claim to have been in a similar situation to that of Hoffmann but that the Commission wrongly applied the ceiling of 10% to the benefit of Hoffmann in taking account of a wrongly determined total turnover. It states that Hoffmann was taken over by Schunk on 28 October 1999 and that the total of the basic amounts set for the two undertakings (EUR 53.1 million) represented less than 10% of their combined turnover in 2002 (EUR 624.4 million), thus ruling out any reduction of the amount of the fine by applying the ceiling of 10%.

136 In so far as the applicant claims that the fine obtained by Hoffmann was unlawfully reduced, and even supposing that the Commission unduly granted a reduction to that undertaking by incorrectly applying the ceiling of 10%, it must be pointed out that respect for the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (*Williams* v *Court of Auditors*, paragraph 119 above, paragraph 14; *SCA Holding* v *Commission*, paragraph 49 above, paragraph 160; and *LR AF 1998* v *Commission*, paragraph 43 above, paragraph 367).

137 For the sake of completeness, it should be pointed out that, in applying the 10% ceiling, the Commission must take into account the turnover of the undertaking concerned, namely the undertaking to which the infringement was attributed and which was therefore declared responsible and notified of the decision imposing the fine (Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 116).

138 It is not disputed in the present case that the Commission considered that Hoffmann had infringed Article 81 EC autonomously and been a member in its own right in the cartel from September 1994 to October 1999, namely before it was taken over by Schunk. In addition, after that takeover, Hoffmann retained separate legal personality, and business activities and adequate assets, even if management of the company is now in the hands of Schunk (recital 256 of the Decision). Consequently, the Commission was right to consider that Hoffmann should itself be held responsible for the infringement which it had committed before being taken over by Schunk and to base its decision solely on Hoffmann's turnover for the application of the limit of 10% of turnover laid down in Article 15(2) of Regulation No 17.

139 It follows that the complaints alleging an erroneous or discriminatory application and an 'unlawful circumvention' of the limit of 10% of turnover laid down in Article 15(2) of Regulation No 17 must be rejected.

The default interest

140 The applicant points out that, following the notification of the Decision and the expiry of a time-limit of three months, the amount of any unpaid fine automatically produces interest for late payment at a rate of 5.5%, namely the rate of repayment of the European Central Bank (ECB), 2% on the relevant date, increased by 3.5%; that rate of 5.5% is then reduced to 3.5% if a bank guarantee is provided.

141 It submits that the Commission in no way gave any reasons, in the Decision, for that very high and arbitrary rate of interest. In addition, it is a prohibitive interest rate

which acts, without a legal basis, as an additional form of punishment sanctioning a recourse to a means of legal protection, which infringes 'the general principle of Community law according to which any person has the right to an effective remedy, without being prejudiced for having sought legal protection'.

142 It should be observed that SGL had already put forward a similar complaint in the cases which led to the judgments in *Tokai I*, paragraph 62 above, and *Tokai II*, paragraph 52 above, in which the Court of First Instance rejected that ground. Those judgments were later upheld by the Court of Justice on appeal in Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraphs 113 to 118, and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraphs 109 to 115).

143 In that regard, it should be pointed out that, according to settled case-law (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 141 to 143; Case T-275/94 *CB* v *Commission* [1995] ECR II-2169, paragraphs 46 to 49; and *LR and AF 1998* v *Commission*, paragraph 43 above, paragraphs 395 and 396), the powers conferred on the Commission by Article 15(2) of Regulation No 17 include the power to determine the date on which the fines are payable and that on which default interest begins to accrue, the power to set the rate of such interest and to determine the detailed arrangements for implementing its decision by requiring, where appropriate, the provision of a bank guarantee covering the principal amount of the fines imposed plus interest. If the Commission had no such power, the advantage which undertakings might be able to derive from late payment of fines would weaken the effect of penalties imposed by the Commission when carrying out its task of ensuring that the rules on competition are applied. Thus, the charging of default interest on fines is justified by the need to ensure that the Treaty is not rendered ineffective by practices applied unilaterally by undertakings which delay paying fines imposed on them and to ensure that those undertakings do not enjoy an advantage over those which pay their fines within the period laid down (*Tokai I*, paragraph 62 above, paragraph 475).

144 In that regard, the case-law has recognised the Commission's right to set interest for late payment at the market rate plus 3.5 percentage points (*CB* v *Commission*, paragraph 143 above, paragraph 54; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201, paragraph 250; *LR AF 1998* v *Commission*, paragraph 43 above, paragraph 397) and, where a bank guarantee is provided, at the market rate plus 1.5 percentage points (*CB* v *Commission*, paragraph 143 above, paragraph 54).

145 That approach now has a legislative basis in Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1) and more precisely in Article 86 of that regulation, the lawfulness of which is not disputed by the applicant. According to Article 273 thereof, that regulation entered into force on 1 January 2003.

146 In the case-law, the Court has allowed default interest rates of 7.5%, 13.25% and 13.75%, holding that the Commission is 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 (see *Tokai I*, paragraph 62 above, paragraph 476, and the case-law cited). Accordingly, in the light of the legitimate objective referred to above, the interest rates of 5.5% and 3.5% set in the present case cannot be regarded as disproportionate.

147 The applicant's argument relating to the infringement of an alleged principle of Community law that 'any person has the right to an effective remedy without being prejudiced for having sought legal protection' effectively claims that an undertaking penalised with a fine should be able to bring an action without running any risks as

regards the consequences of that action being dismissed and ultimately denies the *ratio legis* of the setting of default interest, namely the prevention of abusive actions.

148 In any case, the applicant does not show that, in setting the interest rates at 5.5% and 3.5%, the Commission failed to have regard to the right to effective judicial protection which constitutes a general principle of Community law. In addition, it must be noted that the interest rates set by the Commission in its decisions in the graphite electrodes and speciality graphite cases and the present case clearly did not deter the applicant from bringing an action before the Court.

149 In addition, the applicant's arguments regarding the impact of the duration of proceedings before the Court, which constitutes an inherent risk in that sort of procedure, cannot rebut the above conclusion. It must also be pointed out that, in order to prevent the uncertain duration of those proceedings having an impact on the amount of interest, an undertaking may request suspension of the enforcement of the Commission's decision imposing a fine on it or provide a bank guarantee enabling it to reduce the interest rate from 5.5 to 3.5%.

150 Furthermore, the applicant refers to a practice whereby the Commission awards interest of 0.1% above the minimum interest rate offered for the refinancing operations of the ECB on payments made by undertakings in order to discharge their fines, which makes it possible to neutralise the risk referred to in the preceding paragraph.

151 In the applicant's view, that practice proves that the Commission itself considers that low amounts of interest seem to be sufficient to prevent abusive actions since otherwise no interest would be paid, and that, therefore, the amount of interest due in the present case is unjustified in any case, or at least unjustified to the extent of the amount of interest which exceeds the amount paid by the Commission.

152 By awarding interest of 0.1% above the minimum interest rate offered for refinancing operations of the ECB on provisional payments made by undertakings to discharge their fines, the Commission is granting the undertaking concerned a privilege not provided for by the Treaty, Regulation No 17, or Regulation No 2342/2002 (see, to that effect, *CB* v *Commission*, paragraph 143 above, paragraph 82) and which cannot validly support the applicant's complaint. The interest rate applied by the Commission to fines in respect of which it ultimately becomes apparent that they were wrongly paid pursues a totally different aim to that applied for late payment interest. The former interest rate aims to prevent the unjust enrichment of the Communities to the detriment of an undertaking whose action for annulment of its fine is successful, whereas the latter interest rate seeks to prevent abusive delays in the payment of a fine (*Tokai II*, paragraph 52 above, paragraph 414).

153 Finally, it should be pointed out that when Article 2 of the Decision is read jointly with the letter of 11 December 2003 by which the Commission notified the applicant of the Decision, it is evident that the method of calculating interest for late payment was clearly stated there and that the Commission thus complied with the duty to give reasons under Article 253 EC.

154 It follows that the complaint relating to the interest rates laid down in the Decision, as noted in paragraph 141 above, must be rejected.

155 It follows from all of the foregoing that the action must be dismissed in its entirety.

Costs

156 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders SGL Carbon AG to pay the costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 8 October 2008.

Registrar President

E. Coulon M. Vilaras

Table of contents

Facts at the origin of the dispute ..... II - 2520

Procedure and forms of order sought by the parties ..... II - 2526

Law ..... II - 2528

The determination of the basic amount ..... II - 2528

The gravity of the infringement ..... II - 2528

— The infringement of the duty to give reasons ..... II - 2528

— The Commission's practice in taking decisions ..... II - 2532

— The grouping of the members of the cartel into categories ..... II - 2537

The duration of the infringement ..... II - 2549

The maximum limit of the fine laid down in Article 15(2) of Regulation No 17 ..... II - 2554

The non-application to the applicant of the ceiling of 10% of global turnover .. II - 2554

Discriminatory application of the ceiling of 10% to the benefit of Hoffmann ... II - 2558

The default interest ..... II - 2559

Costs ..... II - 2564