JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

8 October 2008 *

In Case T-73/04,

Le Carbone-Lorraine, established in Courbevoie (France), represented initially by A. Winckler and I. Simic, and subsequently by A. Winckler and H. Kanellopoulos, lawyers,

applicant,

v

Commission of the European Communities, represented by F. Castillo de la Torre and É. Gippini Fournier, acting as Agents,

defendant,

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

* Language of the case: French.

Agreement (Case No C.38.359 — Electrical and mechanical carbon and graphite products), and, in the alternative, annulment or reduction of the fine imposed on the applicant by 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 28 February 2008,

gives the following

Judgment

Facts

1 Le Carbone-Lorraine ('LCL' or 'the applicant') is a French undertaking which manufactures 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 Commission officials in order to propose their cooperation in establishing the existence of a cartel on the European market for electrical and mechanical carbon and graphite products and to apply for leniency as provided for 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. 87), sent requests for information concerning their conduct on the relevant market to C. Conradty Nürnberg GmbH ('Conradty'), SGL Carbon AG ('SGL'), Schunk GmbH and its subsidiary Schunk Kohlenstoff-Technik GmbH (together referred to as 'Schunk'), Eurocarbo SpA, Luckerath BV, Gerken Europe SA ('Gerken') and 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 fax sent to the Commission on 16 August 2002, the applicant requested that the Leniency Notice be applied.

5 On 22 August and 23 September 2002 the applicant sent evidence regarding the cartel to the Commission.

6 On 30 September 2002 the Commission received the applicant's response to the request for information based on Article 11 of Regulation No 17.

7 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, SGL, Schunk and Hoffmann. In its response, the applicant stated that it did not substantially contest the facts set out in the statement of objections.

8 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'), of which the applicant was notified by letter of 11 December 2003. A summary of the Decision was published in the *Official Journal of the European Union* on 28 April 2004 (OJ 2004 L 125, p. 45).

9 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, from 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 engaged in coordinated actions (quantity restrictions, price increases and boycotts) against those competitors which were not members of the cartel (recital 2 in the preamble to the Decision).

10 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.'

11 As regards the method of setting fines, the Commission categorised the infringement as very serious, in the light of its nature, its impact on the EEA market for the relevant products, even though that could not be precisely measured, and the scope of the relevant geographic market (recital 288 of the Decision).

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

13 As a result, the applicant and Morgan, considered to be the two largest operators with market shares of more than 20%, were placed in the first category. Schunk and SGL, which are medium-sized operators with market shares between 10% and 20%, were placed in the second category. Hoffmann and Conradty, considered to be the smallest operators by reason of their market shares of less than 10%, were placed in the third category (recitals 37 and 297 of the Decision).

14 On the basis of the foregoing considerations, the Commission set starting amounts, according to the gravity of the infringement, of EUR 35 million for the applicant and Morgan, EUR 21 million for Schunk and SGL, and EUR 6 million for Hoffmann and Conradty (recital 298 of the Decision).

15 In respect of the length of the infringement, the Commission held that all the undertakings concerned committed an infringement of long duration. On account of an infringement lasting 11 years and 2 months, the Commission increased the starting amount for SGL, Morgan, Schunk and Conradty by 110%. As regards the applicant, the Commission found an infringement lasting for 10 years and 8 months and increased the starting amount by 105%. In relation to Hoffmann, the starting amount was increased by 50% on account of an infringement lasting for five years and one month (recitals 299 and 300 of the Decision).

16 The basic amount of the fine, calculated according to the gravity and the duration of the infringement, was therefore set at EUR 73.5 million for Morgan, EUR 71.75 million for the applicant, EUR 44.1 million for Schunk and SGL, EUR 12.6 million for Conradty, and EUR 9 million for Hoffmann (recital 301 of the Decision).

17 The Commission found no aggravating or mitigating circumstances against or in favour of the undertakings concerned (recital 316 of the Decision).

18 As regards the application of the Leniency Notice, Morgan benefited from immunity from the fine as it was the first undertaking to draw the Commission's attention to the existence of a cartel (recitals 319 to 321 of the Decision).

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

20 In the Decision, under the title 'Ability to pay and other factors', the Commission, after having rejected the arguments of SGL and the applicant seeking to establish that they were unable to pay the fines, recalled that it had already recently imposed on SGL two significant fines for its participation in other cartel activities.

21 The Commission indicated 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 — Speciality graphite) (OJ 2006 L 180, p. 20), in the 'speciality graphite' case, SGL received a fine of EUR 80.2 million for its participation in the graphite electrodes cartel and two fines amounting to EUR 27.75 million for its participation in the isostatic graphite and extruded graphite cartels (recital 358 of the Decision).

22 Taking account of SGL's serious financial difficulties, the recent fines imposed on it and the fact that the various cartel activities being punished occurred at the same time, the Commission held that, in those particular circumstances, it was not necessary to impose the full amount of the fine to ensure effective deterrence and thus reduced the fine by 33%, lowering it to EUR 23.64 million (recital 360 of the Decision).

23 Holding that the applicant's situation was very different from that of SGL, the Commission did not grant it any reduction in the amount of the fine on the basis of 'other factors' (recitals 361 and 362 of the Decision).

Procedure and forms of order sought

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

25 Upon a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned as President of the Fifth Chamber, to which the present case was then allocated.

26 Upon 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 of the Court at the hearing on 28 February 2008.

27 At that hearing, once the applicant had made clear the scope of some of its arguments, the Commission withdrew its application, by way of counterclaim, seeking an increase in the amount of the fine, formal note of which was taken in the minutes of the hearing.

28 At the request of the Court, the Commission produced at the hearing the letter of 30 October 2001 which Morgan had sent to it in the context of seeking the application of the Leniency Notice in its favour. That letter, which formed part of the Commission's administrative file, was forwarded to the applicant, which lodged its observations thereon, received at the Registry of the Court on 26 March 2008. The oral proceeding ended on 1 April 2008, of which the parties were informed by a letter from the Court Registry of the same date.

29 The applicant claims that the Court should:

— annul the Decision, in so far as it applies to the applicant;

— in the alternative, annul or reduce the amount of the fine imposed;

— order the Commission to pay the costs.

30 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

31 Although the action brought by the applicant pursues two objectives, that is to say, principally, an application for the annulment of the Decision and, in the alternative, an application for the annulment or reduction in the amount of the fine, the various pleas in law submitted by the applicant in its pleadings do not distinguish between the two.

32 Requested by the Court, at the hearing, to submit its observations on the exact scope of some of its arguments, the applicant stated that the argument concerning its passive role in the implementation of the infringement on the market in carbon and graphite blocks related solely to the corresponding claim of mitigating circumstances and, therefore, to the reduction in the amount of the fine. In addition, the applicant made clear that it did not dispute that it was present at the meetings of the Technical Committee for mechanical carbon and graphite products and, therefore, that it participated in the infringement in that sector. The Court took formal note of those statements in the minutes of the hearing.

33 It should be noted at this point that, while the applicant has specifically requested the Court to annul the Decision in its entirety, in so far as it applies to the applicant, all of the grounds submitted by the applicant seek to call into question only that part of the Decision devoted to the fines and, in particular, to Article 2 of the Decision in which the Commission fixed the amount of the fine to be imposed on the applicant at EUR 43 050 000. In the absence of any ground supporting the plea in law seeking annulment of the Decision in its entirety, that plea must be rejected and it is necessary to examine only whether the applicant's claim for annulment or reduction in the amount of the fine is well founded.

The error in law allegedly committed by the Commission on account of its failure to define the relevant product markets or, at the very least, the categories of relevant products

34 The applicant claims that defining the relevant product markets or, at the very least, the categories of relevant products was, in the present case, indispensable in order to classify correctly the infringement and its actual effects, for the purposes of setting the amount of the fine. In addition, the lack of a genuine definition of the relevant markets led the Commission to initiate the administrative proceedings in an 'illogical' way and to set the amount of the fine at a manifestly excessive level.

Classification of the infringement

35 The applicant claims that the Commission was required, in accordance with the case-law, to carry out an analysis of the relevant product markets or, at the very least, the categories of relevant products and referred, in that regard, to Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 206.

36 In that case, the Court recalled that, for the purposes of applying Article 81 EC, the reason for defining the relevant market, if at all, is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 74, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 1093). Consequently, there is an obligation on the Commission to define the relevant market in a decision applying Article 81 EC only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 230; see also, to that effect, Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraphs 93 to 95 and 103).

37 The applicant alleges, in the present case, that defining the relevant product markets or, at the very least, the categories of relevant products was necessary not for the purpose of classifying unlawful practices with regard to Article 81 EC, but to classify correctly the infringement and its actual effects, with a view to setting the amount of the fine, which is a different question from that of whether something is unlawful.

38 The reference to *CMA CGM and Others* v *Commission*, in paragraph 35, appears, therefore, to be irrelevant, as it is noted, first, that the Commission defined, in detail, the sector for electrical and mechanical carbon and graphite products, clearly distinguishing between the various types of relevant products (recitals 4 to 13 of the Decision) and the geographic scope of the market for those products (recitals 48 to 50 of the Decision) and, second, that the horizontal agreements providing for price fixing and covering the entire territory of the EEA, such as that covered by the Decision, constitute obvious infringements of Community competition law.

39 It appears, in reality, that the argument expounded by the applicant concerns the Commission's assessment of the gravity of the infringement and the associated calculation of the starting amount of the fine.

40 The applicant considers, in essence, that the Commission should have assessed the gravity of the infringement, specifically, for each category of products covered by the cartel. In the framework of such an analysis, it alleges that the cartel had an extremely limited impact on the market for electrical carbon and graphite products and claims that it was not involved, or barely involved, in the European market for carbon and graphite blocks and the mechanical carbon and graphite products sector, which should have led the Commission to set different starting amounts.

41 It should be noted, at this point, that the applicant relies on the same arguments in its claims relating to the disproportionate nature of the starting amount of the fine and to the Commission's incorrect assessment of the mitigating circumstances and those arguments will also be examined later.

42 Considered independently, the claim alleging an error in law on the part of the Commission on account of its failure to define the relevant product markets or, at the very least, the categories of relevant products cannot be accepted by the Court.

43 It should, at the outset, be pointed out that the Commission held that the addressees of the Decision had participated in a continuous 'single complex infringement' of Article 81(1) EC and Article 53(1) of the EEA Agreement, which extended throughout the territory of the EEA, and that the applicant had specifically indicated, in the reply, that it did not dispute the existence, in the present case, of a single infringement.

44 It follows, then, from the Decision that the fines were imposed pursuant to Article 15(2) of Regulation No 17 and that the Commission — even if the Decision does not directly refer to the guidelines on the method for 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 by applying the method set out in the Guidelines.

45 According to that method, the Commission takes as its starting point for calculating the amount of the fines to impose on the undertakings concerned a specified amount according to the gravity of the infringement. The assessment of the gravity of the infringement must take account of the nature of the infringement, its actual impact on the market where that can be measured and the size of the relevant geographic market (Section 1.A, first paragraph, of the Guidelines). Within that framework, infringements are classed in three categories, namely 'minor infringements', for which the likely amount of the fines is between EUR 1 000 and EUR 1 million, 'serious infringements' for which the likely amount of the fines is between EUR 1 million and EUR 20 million and 'very serious infringements' for which the likely amount of the fines is above EUR 20 million (Section 1.A, second paragraph, first to third indents). Within each of those categories, the level of the penalty chosen allows for different treatment to be applied to the undertakings depending on the nature of the infringements committed (Section 1.A, third paragraph). It is, in addition, necessary to take into account the effective economic capacity of the offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1.A, fourth paragraph).

46 It thus appears that the actual impact of the 'infringement' on the market must be taken into account where it can be measured and that, contrary to the applicant's assertions, there is no obligation on the Commission, in the Guidelines, to assess the impact of a cartel, specifically, for each category of relevant products.

47 The applicant's position is also undermined by Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, referred to by both parties, which dismissed an action brought by an undertaking ordered by the Commission to pay a single fine in respect of a number of infringements of Article 82 EC. In paragraph 236 of that judgment, the Court stated:

'[T]he Commission is not bound, as the applicant claims, to break down the amount of the fine between the various aspects of the abuse. In particular, such a breakdown is impossible where, as here, all the infringements found are part of a coherent overall strategy and must accordingly be dealt with globally for the purposes both of applying Article [82 EC] and of setting the fine. It is sufficient for the Commission to specify in the Decision its criteria for setting the general level of the fine imposed on an undertaking. It is not required to state specifically how it took into account each factor mentioned among those criteria which contribute to setting the general level of the fine.'

48 Furthermore, the Court held in *Cimenteries CBR and Others* v *Commission*, cited in paragraph 36, paragraph 4761, that under Article 15(2) of Regulation No 17 the Commission may impose a single fine on an undertaking which has committed several infringements without being required to break down the amount of the fine by reference to each infringement. That is all the more so where the various infringements found are part of a coherent overall strategy.

49 It follows from those judgments that the applicant is not justified in claiming that the Commission was obliged, in the present case, to carry out a separate assessment for each aspect of the single infringement found, because of, inter alia, the existence of an overall strategy shared by all the members of the cartel, even though the Commission is not obliged to examine the gravity of each infringement when it imposes a single fine on an undertaking which has committed several infringements.

50 Contrary to the applicant's assertions, that conclusion is not such as to allow an 'arbitrary collective punishment' of undertakings involved in a cartel.

51 Thus, the Commission, in the Decision (recitals 289 to 298), applied 'differential treatment' in the course of setting the starting amount by distinguishing, pursuant to the sixth paragraph of Section 1.A of the Guidelines, several categories of undertakings in accordance with the level of their market share. In the context of that treatment, a limited presence on a market could possibly lead to a lower starting amount, even though, in the circumstances of the case and taking account of its turnover on the relevant product markets, the applicant was included in the first category.

52 In addition, the relative gravity of the participation of each of the undertakings in question referred to by the applicant in its allegations that it was not involved, or barely involved, in the unlawful practices in respect of some products, had to be and was examined by the Commission in the assessment of mitigating circumstances.

53 The validity of the Commission's assessment in that regard will therefore be examined later with the applicant's claims linked directly to those issues.

The proceeding taken by the Commission

54 According to the applicant, the fact that the Commission initiated only one proceeding for practices covering a number of totally distinct categories of products

is manifestly illogical and contrary to the principle of sound administration. The Commission should have:

— either adopted a single decision relating to all the cartels in the carbon- and graphite-based products sector, as the US competition authorities have done, which would have led the Commission to impose a maximum fine of EUR 61.37 million on the applicant;

— or adopted a number of decisions relating to each category of relevant products in accordance with its practice in previous decisions as illustrated by the graphite electrodes and the speciality graphite cases, which would have led the Commission to set a starting amount at a level considerably lower than EUR 35 million.

55 It should be noted, first, that the applicant does not claim that the cartels referred to in the Commission's decisions regarding the graphite electrodes and speciality graphite cases and the cartel which gave rise to the adoption of the Decision are, in fact, one and the same infringement, but merely asserts that the US competition authorities took a global approach to the carbon- and graphite-based products sector, which led to the adoption of a single decision.

56 The applicant has therefore not alleged, never mind established, that the Commission unlawfully carried out three separate proceedings, found four infringements and imposed four separate fines on the applicant for the graphite electrodes market, the speciality graphite market and the market for electrical and mechanical carbon and graphite products. It should be made clear that it was open to the Commission to impose four separate fines on the applicant — each fine respecting the limits set out in Article 15(2) of Regulation No 17 — so long as the applicant had committed four

separate infringements of the provisions of Article 81(1) EC, bearing in mind that, in the speciality graphite case, the Commission initiated a single proceeding which led to the adoption of a single decision which found that two separate infringements had occurred, involving the isostatic graphite market on the one hand and the extruded graphite market on the other, and which imposed two separate fines on the applicant.

57 It is, in addition, obvious that the practice adopted by the US competition authorities cannot be imposed on the Commission which is responsible for the implementation and guidance of Community competition policy.

58 In that regard, the exercise of powers by the authorities of 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 field of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules (Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 29).

59 On the other hand, the legal situation is completely different where an undertaking is caught exclusively — in competition matters — by the application of Community law and the law of one or more Member States on competition, that is to say, where a cartel is confined, as in the present case, exclusively to the territorial scope of application of the legal system of the European Community (see, to that effect, Case C-308/04 P *SGL Carbon* v *Commission*, cited in paragraph 58, paragraph 30).

60 It follows that, when the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard the free competition within the common market which constitutes a fundamental objective of the Community under Article 3(1)(g) EC. On account of the specific nature of the legal interests protected at Community level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those of authorities of non-member States (Case C-308/04 P *SGL Carbon* v *Commission*, cited in paragraph 58, paragraph 31).

61 In those circumstances, the applicant's head of claim as regards the maximum fine of EUR 61.37 million which could be imposed on it, and an alleged Commission infringement of Article 15(2) of Regulation No 17, which the applicant relates to the hypothetical situation where a Commission decision is based on an analysis of all carbon- and graphite-based products, is totally irrelevant.

62 It should be noted, second, that, contrary to the applicant's assertions, it does not follow from the graphite electrodes and speciality graphite cases that each market for carbon- and graphite-based products has been the subject of a separate administrative proceeding on the part of the Community competition authorities.

63 In the speciality graphite case, the Commission initiated a single proceeding which led to the adoption of a single decision which found that two separate infringements had occurred, involving the isostatic graphite market on the one hand and the extruded graphite market on the other, and which imposed two separate fines on the applicant.

64 In any event, it must be pointed out that the Commission held in the present case that the addressees of the Decision had committed a single infringement of Article 81 EC. It justified that position in recital 230 of the Decision, which states:

'Despite the argument of [LCL] that blocks of carbon and graphite are not substitutable with finished products of carbon and graphite, the Commission considers that the entire product group covered by this proceeding was the object of a single complex infringement. In this respect, the Commission observes that the substitutability of products is merely one element which it takes into consideration. Other factors can play an important role. This applies in particular to the functioning of the cartel itself. In this proceeding, the same cartel members coordinated their commercial behaviour in the same meetings in respect of an entire group of related (albeit not substitutable) products which all or most of them produced and sold. Moreover, the main purpose of the cartel's agreement not to sell blocks to third parties or at very high prices was to strengthen and defend against possible competition the cartel's principal agreement on the products made from those blocks. The agreement on blocks was therefore ancillary to the principal agreement on finished products. In the light of these factual circumstances, the Commission has chosen to treat the activities of the cartel as a single complex infringement. None of the addressees of this Decision has argued that there were several infringements.'

65 It is for objective reasons that the Commission, in the present case, initiated a proceeding, found a single infringement and imposed a fine on the applicant in the Decision. Furthermore, it should be noted that the applicant is not disputing the existence of a single infringement.

66 In those circumstances, the Commission's choice to adopt one decision to penalise a single and continuous infringement cannot be labelled 'illogical' or contrary to the principle of sound administration.

67 It follows from all of the foregoing considerations that the plea alleging that the Commission erred in law on account of its failure to define the relevant product markets or, at the very least, the categories of relevant products must be rejected.

The alleged incorrect assessment of the gravity of the infringement and the alleged disproportionate nature of the starting amount of the fine

68 In accordance with a consistent line of cases, the gravity of an infringement is assessed in the light of numerous factors, in respect of which the Commission has a margin of discretion (Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 43; see also, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 240 to 242).

69 As has been set out above, the Commission, in the present case, determined the amount of the fines by applying the method laid down in the Guidelines.

70 According to the case-law, although the Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 209, and the case-law cited).

71 In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 211, and the case-law cited).

72 Furthermore, according to the same case-law, the Guidelines determine, generally and in the abstract, the method which the Commission has bound itself to use in assessing the fines imposed under Article 15 of Regulation No 17. Those Guidelines — for the drafting of which the Commission had, inter alia, recourse to the criteria extracted from the Court's case-law — consequently ensure legal certainty for the undertakings (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 213).

73 It should be pointed out that the Guidelines provide, in the first place, for the assessment of the gravity of the infringement as such, on the basis of which a 'general starting amount' can be set. In the second place, the gravity is assessed in relation to the characteristics of the undertaking involved, in particular its size and its position on the relevant market, which can give rise to the weighting of the starting amount, to grouping the undertakings into categories and to setting a 'specific starting amount'.

The alleged excessive nature of the starting amount of the fine with regard to the limited impact of the offending practices

74 As regards the assessment of the gravity of the infringement as such, the Guidelines state, in the first and second paragraphs of Section 1.A, that:

'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.'

75 In the Decision, the Commission observed the following three factors:

— the infringement 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 coordinated 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 impact could not 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).

76 The Commission's conclusion, set out in recital 288 of the Decision, states:

'Taking all those factors into account, the Commission considers that the undertakings concerned by this Decision have committed a very serious infringement. In the view of the Commission, the nature of the infringement and its geographic scope are such that the infringement must qualify as very serious, irrespective of whether or not the impact of the infringement on the market can be measured. It is, in any case, clear that the cartel's anti-competitive arrangements were implemented and did have an impact on the market, even if that impact cannot be precisely measured.'

77 The applicant alleges that the Commission did not carry out an assessment of the actual impact of the infringement on the relevant markets and that it limited itself to maintaining, on the basis of the mere implementation of the cartel, that that cartel had an impact on the market, without examining the significance of that impact, which runs counter to its guidelines and its practice in previous decisions. The applicant adds that, taking account of the objective limited impact of the offending practices on the relevant markets, the Commission could, at the very most, have classified those practices as 'serious' and set the starting amount at a level below EUR 20 million.

78 It should be observed, first, that, at the hearing, the Commission's representatives indicated that the classification of the infringement as 'very serious' resulted from taking account solely of the nature of the infringement and its geographic scope, and that, even if the existence of the agreement's actual impact on the market was recorded in the Decision, that factor was not taken into account in classifying the infringement and, therefore, in the determination of the starting amount of the fine.

79 That position is, however, contradicted by merely reading recitals 278 to 288 of the Decision. In recital 281 of the Decision, the Commission holds that there were actual anti-competitive effects resulting, in the present case, from the cartel agreements, even if it is not possible to quantify them precisely, a statement which follows the description of the particular nature of the infringement and which comes before the determination of the geographic scope of that infringement. The wording of recital 288 of the Decision and, in particular, the use of the expression '[t]aking all those factors into account', allows the conclusion to be drawn that the Commission did take the actual impact of the cartel on the market into account when classifying the infringement as 'very serious', even if it added that that classification was justified independently of the possibility of measuring that impact.

80 It must be observed, second, that the Commission was not, contrary to the applicant's claims, bound to carry out a concrete assessment of the unlawful practices on each of the relevant markets, since the Commission held that all the agreements or concerted practices referred to in the Decision constituted a single continuous infringement, which the applicant does not dispute, and that only the combined effects of the infringement taken as a whole need be taken into account (see, to that effect, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 152, and Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 342).

81 It follows, third, from recitals 244 to 248 and 280 to 286 of the Decision that the Commission inferred from the implementation of the cartel that it had a genuine impact on the sector in question.

82 The Commission states in that regard that '[t]he general percentage price increases agreed were implemented by each cartel member issuing new price lists … public transport companies award[ed] tenders to the company whose bid had been prearranged to be slightly less high than the bids of other cartel members, … private customers ha[d] no choice but to purchase from a particular prearranged supplier at

a particular prearranged price, without effective competition being allowed to play a role and cutters [were] unable to purchase blocks or only at artificially high prices, so that they were unable to offer effective competition on the market for finished products'. Having regard to the duration of the period of infringement and to the fact that the undertakings in question together controlled more than 90% of the EEA market, it is beyond doubt, according to the Commission, that the cartel had actual anti-competitive effects on that market (recitals 245 and 281 of the Decision).

83 It should be recalled that, in order to assess the actual effect of an infringement on the market, the Commission must take as a reference the competition that would normally exist if there were no infringement (see, to that effect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 619 and 620; Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 235; Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 645; and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597 ('*ADM I*'), paragraph 150).

84 In the case of a price cartel, the Commission may legitimately infer that the infringement had effects from the fact that the cartel members took measures to apply the agreed prices, for example by announcing them to customers, instructing their employees to use them as a basis for negotiation and monitoring their application by their competitors and their own sales departments. In order to conclude that there has been an impact on the market, it is sufficient that the agreed prices have served as a basis for determining individual transaction prices, thereby limiting customers! room for negotiation (*Hercules Chemicals* v *Commission*, cited in paragraph 80, paragraphs 340 and 341; Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931 ('*PVC II*'), paragraphs 743 to 745; and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 285).

85 By contrast, the Commission cannot be required, once the implementation of a cartel has been established, to systematically show that the agreements have actually allowed the undertakings in question to obtain a level of transaction price higher than that which would have prevailed in the absence of the cartel. In that regard, the argument that only the fact that the level of transaction prices would have been different from that which would have applied in the absence of collusion can be taken into consideration in determining the gravity of the infringement cannot be upheld (Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 53 and 62). In addition, it would be disproportionate to insist on such proof, which would absorb considerable resources, given that it would require making hypothetical calculations based on economic models, whose accuracy would be difficult for the Court to verify, and whose infallibility is in no way proved (Opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, I-9858, point 109).

86 To assess the gravity of the infringement, it is decisive to know that the members of the cartel did all that they could to give concrete effect to their intentions. What then happened at the level of the market prices actually obtained was liable to be influenced by other factors outside the control of the members of the cartel. The members of the cartel cannot therefore benefit from external factors which counteracted their own efforts, by turning them into factors justifying a reduction in the fine (Opinion of Advocate General Mischo in *Mo och Domsjö* v *Commission*, cited in paragraph 85, points 102 to 107).

87 Therefore, the Commission was entitled to rely on the implementation of the cartel to find that there was an impact on the market — having noted, pertinently, that the cartel had lasted for more than 11 years and that the members of that cartel controlled more than 90% of the EEA market — without it being necessary to determine precisely the significance of that impact.

88 As regards the validity of the facts on the basis of which the Commission made that finding, it must be pointed out that the applicant has neither proved nor even alleged that the cartel was not implemented.

89 It is true that the applicant has relied on its 'marginal' role in the implementation of the unlawful practices in the mechanical carbon and graphite products sector, and on the lack of sales of carbon and graphite blocks to third parties. It has also put forward, in the context of a plea relating to the Commission's incorrect assessment of mitigating circumstances, its actual non-implementation of some cartel agreements. However, the applicant's arguments which rely on its own conduct cannot be accepted. The actual conduct which an undertaking claims to have adopted is not relevant for the purposes of assessing the impact which a cartel had on the market; only the effects resulting from the whole of the infringement are to be taken into account (*Commission* v *Anic Partecipazioni*, cited in paragraph 80, paragraph 152, and *Hercules Chemicals* v *Commission*, cited in paragraph 80, paragraph 342).

90 It is clear from the applicant's pleadings that it is, in essence, restricting itself to relying on the fact that the cartel had a limited impact for some of the relevant products and was only partially implemented, an assertion which, even accepted in its entirety, is not such as to show that the Commission has incorrectly assessed the gravity of the infringement by taking account of the fact that the unlawful practices at issue had a genuine anti-competitive effect on the EEA market for the relevant products (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 148).

91 It should again be pointed out that, even supposing that the actual impact of the cartel had not been proved to the requisite legal standard by the Commission, the classification of the present infringement as 'very serious' would not be any less appropriate. The three factors in the assessment of the gravity of the infringement do not have the same weight in the context of an overall assessment. The nature of the infringement plays a primary role, in particular, for classifying infringements as 'very

serious'. In that regard, it follows from the description of very serious infringements in the Guidelines that agreements or concerted practices involving in particular, as in the present case, price fixing may be classified as 'very serious' on the basis of their nature alone, without it being necessary for such conduct to have a particular impact or cover a particular geographic area. That conclusion is corroborated by the fact that, while the indicative description of serious infringements expressly mentions the market impact and the effects on extensive areas of the common market, that of very serious infringements does not mention any requirement as to the actual market impact or the effects produced in a particular geographic area (Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 178, and *Groupe Danone* v *Commission*, cited in paragraph 90, paragraph 150).

92 In relation to the allegation that the Commission had an earlier practice which ran counter to the approach adopted in the Decision, it must be borne in mind that, according to settled case-law (Case C-167/04 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), the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters 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. It must be held that the applicant has not produced proof of such discrimination in the present case.

93 The applicant claims, lastly, that even if the offending practices could be classified as 'very serious' — although the applicant does not concede that they could — the Commission should have set the starting amount of the fine at the lowest level on the applicable scale of fines for 'very serious' infringements, specifically to take into account the limited impact of those practices on the relevant markets.

94 By that line of reasoning, the applicant seems to be claiming that, even allowing that the infringement was correctly classified as 'very serious', the Commission breached the principle of proportionality by setting the starting amount of the fine at EUR 35 million. It argues that, having regard to the limited impact of the infringement, on account of the applicant's lack of participation in the infringement committed on the market in carbon and graphite blocks and slabs, its marginal involvement in the infringements committed in the mechanical products sector, and the extremely limited impact of the offending practices on the markets for electrical products, the starting amount should not exceed EUR 20 million.

95 It should, however, be borne in mind that, as has been set out in paragraph 89, the actual behaviour which an undertaking claims to have adopted is not relevant for the purposes of assessing the impact which a cartel had on the market.

96 It follows, furthermore, from recitals 120 and 124 of the Decision that the Commission did not find that the cartel had had a significant impact for all the relevant products and customers concerned and it even accepted, on the contrary, that that impact could have been more limited for some particular products, as the applicant points out, basing its contention on the Commission's findings. Nor does the applicant claim, let alone prove, that the Commission described the effects of the cartel incorrectly by exaggerating them.

97 It should also be borne in mind that the applicant participated in a set of agreements and/or concerted practices for electrical and mechanical carbon and graphite products and for carbon and graphite blocks from which those products are manufactured, the whole group of associated products being subject to a single continuous infringement. However, only the effects resulting from the infringement as a whole must be taken into consideration for the assessment of the impact on the market (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 80, paragraph 152, and *Hercules Chemicals* v *Commission*, cited in paragraph 80, paragraph 342), and the applicant has not suggested that the cartel had a limited impact

on semi-finished products, on mechanical products, or even, moreover, on electrical products intended for 'minor' customers.

98 In those circumstances, the plea relating to the disproportionate nature of the starting amount of the fine, with regard to the alleged limited impact of the unlawful practices at issue, must be rejected.

The alleged excessive nature of the starting amount of the fine with regard to the low-level involvement of the applicant in the cartel

99 The applicant argues that the Commission should take account, in determining the gravity of the infringement and therefore the starting amount of the fine, of the relative gravity of the participation of each of the offending undertakings. Referring to Case T-59/99 *Ventouris* v *Commission* [2003] ECR II-5257, paragraphs 200 and 219, the applicant asks the Court to reduce substantially the amount of the fine, in order to take account of its lack of participation in the practices implemented in the market for carbon and graphite blocks and the minor role which it played in the practices implemented in the mechanical carbon and graphite products sector. By imposing a starting amount of EUR 35 million on the applicant, an amount which is equal to that imposed on Morgan, and imposing a fine of only EUR 21 million on Schunk and SGL, although those three undertakings participated in all of the practices referred to in the Decision, the Commission breached the principle of equal treatment.

100 As the Commission correctly points out, the applicant's line of reasoning confuses the assessment of the gravity of the infringement, which is used to determine the starting amount of the fine, and the assessment of the relative gravity of the partici-

pation of each of the undertakings concerned, that latter issue having to be examined in the context of a possible application of aggravating or mitigating circumstances.

101 As has already been set out, the Commission, in the course of its assessment of the gravity of the infringement and in accordance with the Guidelines, took into account the nature of that infringement, its actual impact on the relevant market and its geographic scope.

102 When the Commission relies on the impact of the infringement to assess its gravity, in accordance with the first and second paragraphs of Section 1.A of the Guidelines, the effects to be taken into account are those resulting from the whole of the infringement in which all the undertakings participated (*Commission* v *Anic Partecipazioni*, cited in paragraph 80, paragraph 152), so that a consideration of the individual conduct or figures relating to each undertaking is not relevant in that regard.

103 The reference to *Ventouris* v *Commission* in paragraph 99 (paragraphs 200 and 219) is also totally irrelevant, inasmuch as it does not relate to a single infringement situation, as in the present case, but relates to the penalties imposed by the Commission for two separate infringements. In that case, the Court states that the Commission penalised undertakings which took part in the two infringements in the same way as those undertakings which had taken part in only one of them, disregarding the principle of proportionality. The applicant therein, which had not participated in one of the two infringements, but which had been penalised as if it had participated in both infringements, benefited from a reduction in the amount of its fine by the Court.

104 In the present case, the applicant does not dispute the existence of a single infringement or its participation in that infringement. It claims merely that the relative gravity of its participation is less significant than that of other undertakings involved, such as Morgan, Schunk and SGL. The applicant's arguments developed in support of that contention will therefore be examined in the context of the pleas alleging that the Commission incorrectly assessed the mitigating circumstances.

The alleged excessive nature of the starting amount of the fine with regard to the applicant's turnover

105 Having regard to the considerable disparity between the sizes of the undertakings involved, and in order to take account of the specific weight of each of them, and, therefore, the real impact of their offending conduct on competition, the Commission, in accordance with the fourth and sixth paragraphs of Section 1.A of the Guidelines, carried out a differentiated treatment of the undertakings which had participated in the infringement. For that purpose, it grouped the undertakings involved into three categories, relying on the turnover figures, at an EEA level, for each undertaking for the products covered by the present proceeding, including the captive use of each undertaking. The result is a market share figure 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).

106 The comparison was based on figures relating to turnover (expressed in million euros) attributable to the relevant products for the last year of the infringement, namely 1998, as indicated in Table 1 in recital 37 of the Decision and entitled 'Esti-

mates 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 the 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

107 As a result, the applicant and Morgan, considered to be the two largest operators with a market share above 20%, were classified in the first category. Schunk and SGL, which are medium-sized operators with a market share between 10% and 20%, were placed in the second category. Hoffmann and Conradty, considered to be small operators on account of their market share of less than 10%, were grouped in the third category (recitals 37 and 297 of the Decision).

108 On the basis of the foregoing considerations, the Commission decided on a starting amount, determined according to the gravity of the infringement, of EUR 35 million for the applicant and Morgan, EUR 21 million for Schunk and SGL and EUR 6 million for Hoffmann and Conradty (recital 298 of the Decision).

109 In its plea, the applicant claims that the Commission was required to take account of the turnover coming from sales of the relevant products in the EEA and that the starting amount of EUR 35 million, set by the Commission, was disproportionate with regard to the turnover obtained on each of the relevant markets (that amount representing 41.7% of the turnover of EUR 84 million referred to in the Decision, 46.3% of the turnover for electrical carbon and graphite products and 421% of the turnover for mechanical carbon and graphite products). That view is supported by the Commission's practice in previous decisions and the case-law. The latter requires that the amount of the fine should be 'reasonably related' to the turnover obtained on the relevant market.

110 It must be borne in mind, first, that, according to settled case-law of the Court (*JCB Service* v *Commission*, cited in paragraph 92, paragraphs 201 and 205, and *Britannia Alloys & Chemicals* v *Commission*, cited in paragraph 92, paragraph 60), the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters 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.

111 It must be stated that the applicant has not proved such discrimination. It asserts, generally, that analysis of the Commission's practice in recent cases shows that the highest starting amount generally decided on in cases involving 'very serious' infringements and implemented worldwide or throughout the EEA represents, generally, between 10% and 20% of the turnover obtained by the undertaking in question on the relevant markets. The applicant claims that, in the speciality graphite case, the Commission imposed a starting amount of EUR 7.5 million on it, which represents approximately 14.5% of the worldwide turnover for sales of the products in question.

112 That contention is contradicted by the Commission, which supplies examples of decisions in which it decided on starting amounts above 20% of the turnover obtained by the undertakings involved in the relevant market. The Commission also cites the case of Asea Brown Boveri Ltd which, in the context of 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), amended before its publication, was subject to a starting amount of a fine of EUR 50 million which represented 23% of the turnover obtained by the products at issue. The Commission also relies on Decision 2003/437/EC of 11 December 2001 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.027 — Zinc phosphate) (OJ 2003 L 153, p. 1), in which the starting amount of EUR 3 million represented nearly 100% of the turnover of each of the four principal members of the cartel in the relevant market.

113 Furthermore, it is important to remember that the Commission must be allowed 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 moment if that is necessary 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 in order to strengthen the deterrent effect of fines (Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 179).

114 It should be noted, second, that, contrary to what the applicant alleges, the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertakings concerned and more particularly the turnover obtained from the relevant products (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 255).

115 The gravity of the infringements must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the deterrent effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (see *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 241, and the case-law cited).

116 Subject to compliance with the upper limit laid down in Article 15(2) of Regulation No 17, which refers to total turnover (see *Musique diffusion française and Others* v *Commission*, cited in paragraph 113, paragraph 119), it is permissible for the Commission to take account of the turnover of the undertaking concerned in order to assess the gravity of the infringement when determining the amount of the fine, but disproportionate importance must not be attributed to that turnover by comparison with other relevant factors (see *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 257, and the case-law cited).

117 In the present case, the Commission applied the calculation method laid down in the Guidelines which envisage that numerous factors will be taken into account in assessing the gravity of the infringement for the purpose of determining the amount of the fine, including in particular the nature of the infringement, its actual impact, the geographic size of the market affected and the necessary deterrent effect of the fines. Although the Guidelines do not provide that the fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover on the relevant product market, they do not preclude such turnover from being taken into account in determining the amount of the fine in order to comply with the general principles of Community law and where circumstances demand it (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraphs 258 and 260).

118 It follows that, while it cannot be denied, as the applicant points out, that the turnover for the relevant products can constitute an appropriate basis for establishing, as the Commission did in the Decision, the threat to competition in the relevant product markets within the EEA and the relative importance of the participants in the cartel vis-à-vis the relevant products, it is nevertheless true that turnover is not,

by any means, the only criterion according to which the Commission must assess the gravity of the infringement.

119 Consequently, contrary to what the applicant claims, to limit the assessment of the proportional nature of the starting amount, decided on by the Commission, to a comparison of that starting amount and the turnover for the relevant products would be to grant that factor excessive importance. The nature of the infringement, its actual impact, the geographic scope of the market affected and the necessary deterrent effect of the fine are further factors, taken into consideration by the Commission in the present case, which justify the aforementioned figure. In that regard, the Commission correctly decided on the classification 'very serious', in so far as the applicant participated in a horizontal agreement having had as its principal objective to fix, directly or indirectly, sale prices and other trading conditions applicable to customers, to divide up markets, in particular by sharing out customers, and to carry out coordinated actions against competitors, which were not members of the cartel, and which has had a concrete impact on the relevant product markets in the EEA.

120 As regards, third, the contention that the starting amount is disproportionate with regard to the turnover obtained in 'each of the relevant markets', that contention disregards the finding of a single infringement which the applicant explicitly accepted in its pleadings. Therefore, the connection made by the applicant between the starting amount and the turnover obtained for electrical carbon and graphite products, on the one hand, and mechanical carbon and graphite products, on the other hand, is irrelevant, and only the relationship between the starting amount and the turnover obtained on the relevant market, estimated at EUR 84 million in the Decision, can be taken into account.

121 The fact that the starting amount of the fine is almost equivalent to half that turnover is not, of itself, conclusive. Indeed, that figure of EUR 35 million is merely an intermediate figure which, in accordance with the method laid down in the Guidelines, is then adapted to reflect the duration of the infringement and any aggravating

and mitigating circumstances (Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 95).

122 In relation, specifically, to infringements which must be classified as 'very serious', the Guidelines restrict themselves to stating that the amount of the fines envisaged are 'above [EUR] 20 million'. The only limits mentioned in the Guidelines, which may be applicable regarding such infringements are the general limit of 10% of the overall turnover laid down in Article 15(2) of Regulation No 17 (see the preamble to and Section 5(a) of the Guidelines) — which the applicant has not claimed was exceeded in the present case — and the limits relating to additional amounts determined on the basis of the duration of the infringement (see Section 1.B, first paragraph, second and third indents, of the Guidelines). For a 'very serious infringement', nothing in the Guidelines precludes the increase of the fine to a level in absolute terms equal to that applied by the Commission in the present case.

123 According to the case-law, Article 15(2) of Regulation No 17 does not therefore prohibit the Commission from referring, for the purpose of its calculation, to an intermediate amount in excess of the general limit of 10% of total turnover. Nor does it preclude intermediate calculations that take account of the gravity and duration of the infringement from being applied to an amount above that limit (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 278).

124 The applicant cannot, lastly, rely effectively on *Musique diffusion française and Others* v *Commission*, cited in paragraph 113, or Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, inasmuch as those cases involved the setting of the final amount of the fine and not that of the starting amount of the fine with regard to the gravity of the infringement and because the Commission has not, in the present case, based its calculation of that amount on the applicant's total turnover (see, to that effect, *Cheil Jedang* v *Commission*, cited in paragraph 121, paragraphs 98 and

99, and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 156).

125 It follows from the foregoing considerations that the plea alleging that the starting amount of the fine was excessive with regard to the applicant's turnover must be rejected.

The taking into account of the deterrent effect of the fine

126 The applicant alleges, in the first place, and, for the first time in its reply, that the Commission infringed Article 253 EC in respect of the taking into account of the necessary deterrent effect of the fine.

127 It follows from the case-law that a plea alleging absence of reasons or an inadequacy of the reasons stated involves a matter of public policy which must be raised by the Community judicature of its own motion (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67) and which, consequently, may be raised by the parties at any stage of the proceedings (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 25, and Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 125).

128 It is settled case-law that the statement of reasons for an individual decision must disclose in a clear and unequivocal fashion the reasoning followed by the institution

which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to the wording of the document in question but also to the context in which it was adopted (see *Commission* v *Sytraval and Brink's France*, cited in paragraph 127, paragraph 63, and the case-law cited).

129 Regarding the setting of the fines for an infringement of competition law, the Commission satisfies the requirement to state reasons when, in its decision, it states the factors which enabled it to determine the gravity of the infringement and its duration, without being required to provide a more detailed account of figures relating to the method for setting the fine (see, to that effect, *Cascades* v *Commission*, cited in paragraph 85, paragraphs 38 to 47; see also 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).

130 Concerning the reasons for the starting amounts in absolute terms, it must be pointed out that fines constitute an instrument of the Commission's competition policy, and it 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). In addition, it is important to avoid the level of fines being easily predictable by economic operators. Therefore, the Commission cannot be required to provide, in that regard, aspects of its reasoning other than those relating to the gravity of the infringement.

131 As regards, in the present case, the claim that the Commission failed to state reasons in the Decision in relation to the taking into account of the deterrent effect during the determination of the starting amount, and failed to examine that aspect individually, it should be noted, first, that, as deterrence is an objective of the fine, the need to ensure it is a general requirement which must be a reference point for the Commission throughout the calculation of the fine and does not necessarily require that there be a specific step in that calculation in which an overall assessment is made of all relevant circumstances for the purposes of attaining that objective (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 226).

132 For the purposes of taking account of the deterrent effect, the Commission did not define, in the Guidelines, a methodology or individual criteria, which it may be obligatory to detail specifically. The fourth paragraph of Section 1.A of the Guidelines, in the context of instructions on the assessment of the gravity of an infringement, mentions only the need to set the fine at a level which ensures that it has a sufficiently deterrent effect.

133 It must be stated, second, that, contrary to the applicant's assertions, the Commission specifically stated the need to set the fines at a level with deterrent effect when it set out the general approach followed in setting the fines, applied differential treatment to the cartel participants in accordance with their market share, and set the starting amount of the fine at EUR 35 million for LCL (recitals 271 and 289 of the Decision).

134 It is entirely clear from the Decision that, in setting the starting amount of the fine in accordance with the gravity of the infringement, the Commission has, on the one hand, classified the infringement as it did taking account of objective factors, that is to say, the nature of the infringement, its impact on the market and the geographic scope of that market and, on the other hand, taking account of subjective factors, that is to say, the specific weight of each of the undertakings involved in the cartel and, therefore, the actual effect of their unlawful conduct on competition. It is in the

course of the second part of that analysis that the Commission, in particular, pursued the objective of ensuring that the fine had a deterrent effect with regard to the relative weight of each undertaking in the infringement and the actual economic capacity of each to cause significant damage to competition in the relevant market. At the end of its assessment of the gravity of the infringement, the Commission directly set a starting amount taking account of all of the aforementioned factors.

135 It is therefore obvious that the Commission stated in the Decision, in accordance with the case-law cited in paragraph 129, the factors for assessment which enabled it to determine the gravity of the infringement and that it cannot, therefore, be held to have infringed Article 253 EC.

136 The applicant claims, in the second place, that, by increasing the starting amount on the basis of the deterrent effect, the Commission has breached the *non bis in idem* principle. According to the applicant, in the Decision and in the defence, the Commission wrongly justifies two successive increases in the amount of the fine based on the same ground, namely knowledge and awareness of the unlawful nature of the offending practices. The applicant submits that, in so doing, the Commission penalises it twice on the same basis and thus breaches the aforesaid principle.

137 It should be borne in mind that it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure of the Court of First Instance that the original application must contain, inter alia, a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a submission which may be regarded as amplifying a submission made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 38, and Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraph 142).

138 It is not in dispute that the plea alleging breach of the *non bis in idem* principle was raised for the first time by the applicant in response to an alleged new ground of defence introduced by the Commission, according to which it is entitled to set the amount of the fine taking account of the deterrent effect of that fine, especially when dealing with a classic infringement of competition law.

139 That simple observation formulated by the Commission in its defence cannot be held to be a matter of law or of fact which came to light in the course of the proceedings, given that, in the Decision, the Commission stated clearly the need to ensure that the amount of the fine was at a level sufficient to ensure deterrent effect. Moreover, the specific allegation of a breach of the *non bis in idem* principle, with regard to the application of the deterrent effect, is not an amplification of a plea in law already made, directly or indirectly, in the original application.

140 In those circumstances, the plea alleging a breach of the *non bis in idem* principle must be rejected as inadmissible.

141 The applicant submits, in the third place, that reliance on the deterrent effect was, in any event, pointless and therefore unfounded. The applicant claims to have carried out a radical shake up in the management of its commercial policy since the beginning of the procedure in the United States in April 1999, and well before the Commission intervened, which shows that it was already deterred from committing new infringements of competition law. Therefore, according to the applicant, the increase in the fine imposed on the basis of deterrent effect should be annulled and the starting amount of the fine substantially reduced.

142 The plea referred to above must also be rejected as inadmissible on the basis of Article 48(2) of the Rules of Procedure of the Court of First Instance for the same reasons as those referred to in paragraph 139.

143 In any event, it is clear from the case-law that, although it is important that an undertaking takes measures to prevent future infringements of Community competition law by its personnel, that fact does not alter the reality of the infringement found. The Commission is not, therefore, bound to consider such a factor as a mitigating circumstance, all the more so when the infringement in question is, as in the present case, a clear infringement of Article 81 EC (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 373). Although the applicant relies on that fact in the context of the taking into account of the deterrent effect of the fine, and not formally in relation to mitigating circumstances, the same approach must be applied in these circumstances.

144 It should, in that regard, be noted that it is impossible to determine the effectiveness of internal measures taken by an undertaking to prevent future infringements of competition law. In the present case, and as the Commission correctly points out, the real and radical changes in the applicant's commercial policy management, which occurred once the initiation of a proceeding in the United States was announced in April 1999, and which took the form of the implementation of a strict programme of adherence to competition rules, did not lead the applicant to report on the cartel which is the subject of the Decision, as the applicant only agreed to cooperate once it was informed of the Commission's investigation.

145 As a result, the plea alleging an incorrect assessment of the deterrent effect and the associated claim for a reduction in the amount of the fine cannot be accepted.

Breach of the principle of the protection of legitimate expectations

146 It should be observed that the principle of the protection of legitimate expectations extends to any individual in a situation where the Community authorities have caused him to entertain legitimate expectations (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products* v *Commission* [1987] ECR 1155, paragraph 44, and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 26), it being understood that no one may plead infringement of that principle unless he has been given precise, unconditional and consistent assurances, from authorised, reliable sources, by the administration (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 ('*Tokai I*'), paragraph 152, and the case-law cited).

147 In the present case, the applicant limits itself to maintaining that the relevant Commission department provided it with 'information' on the basis of which it could legitimately 'expect' that, taking account of its contribution to establishing the infringement, the starting amount would not exceed EUR 20 million. It suffices to state that that description, provided by the applicant itself, of its relationship with the administration does not equate to the supply of precise assurances by Commission staff. The reference to a telephone conversation in the course of which a Commission staff member indicated to the applicant that the fine would inevitably be greater than EUR 15 million, 'were the Commission to set a starting amount of EUR 20 million', is, in that regard, not relevant in respect of proving precise assurances, as it involves the Commission commenting on a hypothetical situation.

148 It follows that the plea alleging breach of the principle of the protection of legitimate expectations must be rejected.

149 It follows from all of the foregoing considerations that the pleas alleging an incorrect assessment of the gravity of the infringement and that the starting amount of the fine is disproportionate must be rejected.

The duration of the infringement

150 Pursuant to 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 guilty of infringing competition rules.

151 In regard to the factor relating to the duration of the infringement, the Guidelines draw a distinction between infringements of short duration (in general, less than one year), for which the starting amount determined on the basis of the gravity of the infringement should not be increased, infringements of medium duration (in general, one to five years), for which the amount may be increased by up to 50%, and infringements of long duration (in general, more than five years), for which the amount may be increased by up to 10% for each year (Section 1.B, first paragraph, first to third indents).

152 In recital 300 of the Decision, the Commission stated that all the undertakings had committed an infringement of long duration and that the starting amounts of the fines should, consequently, be increased by 10% for each full year of infringement, and by 5% for any remaining period of six months or more but less than a year, which leads to an increase of 105% in the starting amount of the fine for the applicant, regard being had to its participation in the infringement for a period of 10 years and 8 months.

153 It should be pointed out, first, that the applicant does not expressly challenge the duration of the period of infringement found by the Commission. However, it asserts, in paragraph 140 of the application, that the Commission increased the starting amount by 105% for an infringement spanning 10 years and 8 months 'despite the fact [that it] put an end to the infringement six months before the other participants'. That assertion is repeated in the discussion of the mitigating circumstances and the taking account of the fact that the applicant had ended the infringement before the Commission had even intervened 'in June 1999 at the latest' (paragraph 165 of the application). It thus appears that there is no disagreement between the applicant and the Commission on the issue of the duration of the period of infringement, which began in October 1988 and ended in June 1999 according to recital 299 of the Decision.

154 It should, second, be observed that the applicant claims that, by increasing the starting amount by 105%, the Commission breached the principles of legal certainty and proportionality, and in support of that assertion it relies solely on the Commission's practice in previous decisions on the matter, which is claimed to show a maximum increase of 100%, even for infringements lasting over 20 years.

155 It is sufficient, however, to point out that the applicant itself provided an example of a Commission decision involving an increase of 125% for an infringement lasting 12 years and 6 months, namely Commission Decision 2003/674/EC of 2 July 2002 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case C.37.519 — Methionine) (OJ 2003 L 255, p. 1). That decision was the subject of an action before the Court of First Instance (Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897) in which the Court upheld the duration of the infringement found by the Commission, but was not called upon to give a ruling on the amount of the increase applied on that basis.

156 In addition, in its defence, the Commission provided other examples of decisions in which it applied increases greater than 100%, which were not disputed by the applicant in its reply.

157 Furthermore, according to settled case-law (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33, and the case-law cited), traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained.

158 In the area of Community competition rules, it is clear from the case-law (*Musique diffusion française and Others* v *Commission*, cited in paragraph 113, paragraph 109, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 237) that the proper application of those rules requires that the Commission may at any time adjust the level of fines to the needs of competition policy. Consequently, the fact that the Commission, in the past, imposed fines at a certain level for certain types of infringement does not preclude the possibility of that level being increased within the limits laid down in Regulation No 17.

159 It must be noted, lastly, that the increase in the starting amount by 105% cannot be considered to be manifestly disproportionate having regard to the lengthy duration of the infringement admitted by the applicant.

160 It follows from the foregoing considerations that the plea alleging a breach of the principles of legal certainty and proportionality on account of the increase in the starting amount of the fine by 105% on the basis of the duration of the infringement must be rejected.

Mitigating circumstances

161 As is clear from the case-law, where an infringement has been committed by a number of undertakings, the relative gravity of the participation of each of them in

the infringement must be examined (*Suiker Unie and Others* v *Commission*, cited in paragraph 83, paragraph 623, and *Commission* v *Anic Partecipazioni*, cited in paragraph 80, paragraph 150) in order to determine whether there are, in regard to them, aggravating or mitigating circumstances.

162 Section 3 of the Guidelines provides for an adjustment to the basic amount of the fine on the basis of certain mitigating circumstances.

The failure to take account of the applicant's alleged passive role

163 In accordance with Section 3, first indent, of the Guidelines, 'an exclusively passive' role in the infringement will, where it is established, constitute a mitigating circumstance. A passive role implies that the undertaking will adopt a 'low profile', that is to say, not actively participate in the creation of any anti-competitive agreements (*Cheil Jedang* v *Commission*, cited in paragraph 121, paragraph 167).

164 It is clear from the case-law that, among the factors likely to demonstrate an undertaking's passive role in a cartel, a significantly more sporadic participation at meetings than that of the other ordinary members of the cartel can be taken into account (see, to that effect, Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 343) as well as its late entry on the market which is the subject of the infringement, independently of the duration of the undertaking's participation (see, to that effect, Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 100), or even the existence of statements dealing specifically with that point coming from other representatives of undertakings which participated in the infringement (see, to that effect, Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 264).

165 The applicant submits, first, that it has never been present on the market in carbon and graphite blocks and therefore could not have committed an infringement on that market. In any event, even if it had participated in the infringement committed on the market for semi-finished products, its role could be classified only as passive in the implementation of that infringement, as the Commission acknowledged in recital 232 of the Decision.

166 Questioned by the Court, at the hearing, on the exact scope of that argument, formulated in the context of a plea concerning the taking account of mitigating circumstances, and for which the sole claim is for a reduction in the amount of the fine, the applicant indicated that it was not seeking to dispute the Commission's finding of an infringement but merely claiming a passive role.

167 As regards the anti-competitive conduct linked to the exclusion of 'cutters', the Commission explains, in recital 154 of the Decision, that, apart from selling finished products made from carbon, such as carbon brushes, members of the cartel also sold blocks of carbon, which have been pressed but not yet cut and tooled into brushes or other products. A number of third-party cutters purchase these blocks of carbon, cut and work them into final products and sell them to customers. These cutters, while customers of the cartel members, also represent competition to them for finished products.

168 It is clear from recitals 154 to 166 of the Decision that the cartel policy aimed to restrict the cutters from being competitive for the finished products manufactured from those blocks, and did so by refusing to supply them or, when they were supplied, by fixing the price for the carbon blocks supplied at high levels.

169 In recitals 159 to 232 of the Decision, the Commission clearly criticises the applicant for taking part in that policy of the cartel. Recital 232 of the Decision states:

'The Commission does not, in any case, accept [LCL's] claim that it did not participate in the cartel's activity of cutting out cutters, because it used all the blocks it produced internally. As described in [point] 7.8, [LCL] did participate in the cartel's practice of either not selling blocks to cutters at all or only at very high prices. In particular, in the cartel meeting of 14 October 1993, in discussing the question "Should we sell blocks and give our margin away or not?", [LCL] is reported as stating that it "tries to sell as [few] blocks as possible and believes it is better to only sell to own companies". Even if [LCL] had not itself participated in the actual boycotting of cutters, it clearly subscribed to the general policy of the cartel to stop supplying cutters or to supply to them only at very high prices and, like the other members of the cartel, it benefited from the reduced competition from cutters. These facts suffice to establish the responsibility of [LCL].'

170 It therefore appears, contrary to the applicant's claims, that recital 232 of the Decision contains no acknowledgement of the applicant's passive role, that is to say, a lack of active participation in the development of the anti-competitive agreement in relation to the exclusion of cutters, but shows, on the contrary, that it took a specific position in favour of ceasing to provide blocks to the cutters and even advocated the same approach for the other members of the cartel.

171 The applicant submits, second, that the Commission acknowledged that it only played a minor role in the practices implemented for the mechanical carbon and graphite products sector. In addition, according to the Commission's own findings, the applicant had ceased to take part in meetings of the Technical Committee in

April 1999, that is to say, eight months before the break-up of the cartel, something which was considered a major problem, at least by Schunk.

172 It claims, in essence, that it did not participate in numerous meetings, organised between Morgan, Schunk and SGL at the fringes of Technical Committee meetings and in the course of which the majority of important decisions (in particular, price fixing and customer sharing) were taken and relies on the witness evidence of one of its employees, the Head of International Production for Mechanical Products, who pointed out in his statement that, apart from three meetings organised in the context of the European Carbon and Graphite Association (ECGA) (on 2 April 1998 in Bandol (France), 12 October 1998 in Berlin (Germany) and 8 April 1999 in Stratford-upon-Avon (United Kingdom)), [LCL] participated in no other bilateral or multilateral meeting for mechanical products.

173 Questioned by the Court, at the hearing, on the exact scope of that claim, the applicant indicated that the witness evidence of its employee referred merely to the participation of the person concerned and it did not dispute its participation in the Technical Committee meetings relating to mechanical carbon and graphite products.

174 It is clear from the Decision that the cartel functioned on the basis of three types of meeting, namely Summit meetings, meetings of the Technical Committee and local meetings. The first two types of meeting took place twice a year. The European-level cartel meetings often took place on the fringes of the meetings of the European professional association for that sector, namely, first, the Association of European Graphite Electrode Producers (AEGEP), and, subsequently, ECGA.

175 Decisions on price levels and price rises were normally made annually in the autumn meeting of the Technical Committee. Following a discussion, the Technical Committee would agree on price increases for the coming year. Where cartel members were unable to agree on a price rise in relation to a particular country, the decision would often be referred to the local cartel meeting for that country. The price increases agreed in the Technical Committee or local meetings would be ratified at a later date by the Summit meeting (recitals 98 and 99 of the Decision).

176 The Commission points out that both the Summit meetings and the meetings of the Technical Committee concerned carbon and graphite products used for electrical and mechanical applications, a category which in the Decision (recital 4) covers finished and semi-finished products, it being understood that as the number of products and the complexity of the arrangements increased, Technical Committee meetings were often split up into a session on electrical products and a separate session on mechanical products (recitals 75 and 76 of the Decision).

177 The applicant does not challenge the Commission's findings in respect of how the cartel functioned. Having regard to the functioning of the cartel as described, to the undisputed participation of the applicant in the Summit meetings and the meetings of the Technical Committee, already accepted in its response to the statement of objections, and to the fact that a representative of the applicant was the official rapporteur for Summit meetings on mechanical products, the applicant cannot legitimately claim the mitigating circumstance relying on its exclusively passive role.

178 It should also be noted that the applicant is attempting to benefit from mitigating circumstances by stressing its conduct with regard to some collusive agreements or unlawful practices covered by the infringement, classified, correctly, as single and complex by the Commission.

179 It must be stated that the very wording of Section 3, first indent, of the Guidelines dealing with the relevant mitigating circumstance undermines the applicant's claim. A simple literal reading of Section 3, first indent, of the Guidelines, containing the adverb 'exclusively' and the word 'infringement' in the singular, allows one to conclude that it is not sufficient that the applicant adopted a 'low profile' during certain periods of the cartel or in relation to certain cartel agreements (see, to that effect, Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 254).

180 In addition, an approach which consists of separating the assessment of an undertaking's attitude depending on the subject-matter of the agreements or concerted practices in question seems, at the least, theoretical when those agreements or concerted practices are part of a general strategy, which determines the conduct of the members of the cartel on the market and limits their commercial freedom in order to pursue an identical anti-competitive objective and a single economic aim, namely to distort the normal conditions of competition in the relevant market.

181 In that regard, it should be pointed out that it is the existence of that single identical anti-competitive objective shared by the undertakings in question which justifies the classification of the infringement as single and continuous by the Commission in the Decision. The Commission also took account of a substantive factor, namely the functioning of the cartel itself. In recital 230 of the Decision, it thus stated 'in this proceeding, the same cartel members coordinated their commercial behaviour in the same meetings in respect of an entire group of related (albeit not substitutable) products which all or most of them produced and sold'.

182 It is clear from *Cheil Jedang* v *Commission*, cited in paragraph 121, which the applicant has relied on in support of its claims, that the functioning of the cartel in lysine was different from that for the cartel which gave rise to the adoption of the Decision. The reasoning of the judgment in *Cheil Jedang* v *Commission* makes it clear that there were cartel meetings about the volume of sales, separate from the meetings

concerning price fixing. Furthermore, the Court explicitly took account of the weak position of the Cheil Jedang company in its analysis which led to the finding that that company had a passive role in the volume of sales cartel. The reference to *Cheil Jedang* v *Commission* seems, therefore, to be totally irrelevant with regard to the circumstances of the present dispute.

183 In those circumstances, while the Commission accepts, admittedly, that the applicant, due to its relatively small turnover in mechanical products, played a less important role in the cartel's activities for those products than Morgan, Schunk and SGL (recital 192 of the Decision), an undertaking which, like the applicant, does not dispute having participated in a single infringement lasting more than 10 years and which held the most significant market share and which bases its claim on the taking into account of relatively secondary factors of the infringement, cannot be held to have had 'an exclusively passive role in the infringement'. Thus the Commission points outs, correctly, that:

— the value of the products for mechanical applications market (only EUR 70 million, according to the applicant, in 1998) is weak in comparison with the total value of the relevant market (which amounted to EUR 291 million for the same year) and clearly less than that for products for electrical applications; as a result

— the purpose of the agreement not to sell blocks to third parties or at very high prices was to strengthen and defend against possible competition the cartel's principal agreement on the products made from those blocks. The agreement on blocks was therefore ancillary to the principal agreement on finished products (recital 230 of the Decision).

184 Lastly, while the fact that the applicant put an end to its participation in the cartel only a few months before the other members of the cartel does not justify a reduction

in the amount of the fine on the basis of the mitigating circumstance relating to an 'exclusively passive role in the infringement', it must be pointed out that that fact was taken into account specifically by the Commission in applying, for the lesser period, an increase which was 5% lower than that applied to the other members of the cartel in question.

185 It follows from the foregoing considerations that the plea alleging a failure, by the Commission, to take account of the applicant's alleged passive role is not substantiated and must be rejected.

The failure to take account of the non-implementation in practice of some agreements and/or unlawful practices

186 It must be stated, at the outset, that the Commission points out that the applicant did not claim as a mitigating circumstance, in its response to the statement of objections, that it had not applied the agreements in question. The Commission takes the view that the refusal to allow a mitigating circumstance which the applicant has never raised could not, under any circumstances, constitute a ground for annulling a decision.

187 The Commission's view on that cannot be upheld.

188 Article 4 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC] (OJ 1998 L 354, p. 18), applicable at the time of the facts, provides solely that parties which wish to make known their views on the objections raised against them shall do so

in writing and may in their written comments set out all matters relevant to their defence. They may attach any relevant documents as proof of the facts set out and may also propose that the Commission hear persons who may corroborate those facts. Undertakings, which are the addressees of a statement of objections, are therefore in no way required specifically to make requests for acknowledgement of mitigating circumstances.

189 It should be borne in mind, moreover, that the statement of objections is a preparatory act as opposed to the decision which constitutes the final stage in the proceeding and in which the Commission gives its view on the responsibilities of the undertakings and, if appropriate, on the penalties to be imposed on them.

190 To determine the amount of the fine, the Commission must take account of all the circumstances of the case and in particular the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation No 17. As has already been stated, where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined by the Commission (*Suiker Unie and Others* v *Commission*, cited in paragraph 83, paragraph 623, and *Commission* v *Anic Partecipazioni*, cited in paragraph 80, paragraph 150) in order to determine whether there are, in regard to those undertakings, aggravating or mitigating circumstances.

191 Sections 2 and 3 of the Guidelines provide for a variation in the starting amount of the fine on the basis of certain aggravating or mitigating circumstances, which are unique to each of the undertakings concerned. In particular, Section 3 of the Guidelines sets out, under the title of attenuating circumstances, a non-exhaustive list of circumstances which might lead to a reduction in the starting amount of the fine. Thus, reference is made to the passive role of the undertaking, to the non-implementation in practice of the offending agreements or practices, to termination of the infringement as soon as the Commission intervenes, to the existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement, to the fact that the infringement was committed as a result of negligence and to the effective cooperation by the undertaking in the proceedings outside of the scope of the Leniency Notice.

192 It is settled case-law that the Commission may not depart from rules which it has imposed on itself (see *Hercules Chemicals* v *Commission*, cited in paragraph 80, paragraph 53, and the case-law cited). In particular, where the Commission adopts guidelines intended to specify, consistent with the Treaty, criteria which it intends to apply in the exercise of its discretion, there is a self-imposed limitation of that discretion in that it is obliged to comply with the guiding rules which it imposed on itself (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2619, paragraph 57; Case T-214/95 *Vlaams Gewest* v *Commission* [2003] ECR II-717, paragraph 89; and *ADM I*, cited in paragraph 83, paragraph 267).

193 For the purposes of setting the amount of the fines, the Commission applied, in the Decision, the method laid down in the Guidelines and examined the relative gravity of the participation of each of the undertakings involved in the infringement. Recital 272 of the Decision is, in that regard, perfectly clear, as it states therein that '[t]he Commission will … determine for each undertaking whether any aggravating and/or attenuating circumstances apply' and that '[t]he basic amount for each undertaking will be increased or reduced accordingly'. In recital 316 of the Decision, the Commission states that 'it is therefore concluded that there are neither aggravating nor attenuating circumstances applicable in this case', which means that, on the basis of the results of its investigation, and the response of the applicant to the statement of objections, it takes the view that the applicant cannot benefit from any mitigating circumstances, such as, inter alia, the non-implementation in practice of the agreements or the offending practices referred to in Section 3, second indent, of the Guidelines, on the basis of which the Commission has calculated the amount of the fine.

194 The applicant is, therefore, entitled to challenge, before the Court, the Commission's finding referred to in recital 316 of the Decision and to claim the benefit of mitigating circumstances and the reduction in the amount of the associated fine, given that the Court has, under Article 17 of Regulation No 17, unlimited jurisdiction within the meaning of Article 229 EC in relation to actions brought against decisions whereby the Commission has fixed a fine, and it may, consequently, cancel, reduce or increase the fine imposed.

195 It should also be observed that, in its response to the statement of objections, the applicant clearly indicated that it did not sell graphite blocks and slabs to third parties and that it had had a minor role in the agreement relating to mechanical carbon and graphite products. In paragraph 78 of that response, the applicant even states that it has provided the statement of one of its employees (mentioned again in its reply) that it did not apply the scale established each year at the meetings of the Technical Committee in relation to mechanical products, and that the other operators regularly complained to it that it was not respecting the agreements. Although the applicant may not have explicitly claimed, in paragraph 78 of that response, the benefit of mitigating circumstances, it must be held that the issue of the non-implementation in practice of the agreements in question, within the meaning of Section 3, second indent, was clearly raised by the applicant.

196 It must therefore be ascertained whether the Commission was entitled to hold that the applicant could not benefit from mitigating circumstances on the basis of the non-implementation in practice of agreements under Section 3, second indent, of the Guidelines. To that end, it is necessary to determine whether those circumstances, put forward by the applicant, are capable of showing that, during the period in which the applicant was party to the offending agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, whether it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation (Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 113).

197 The applicant bases its claim on four specific circumstances which demonstrate that it did not claim to have avoided any implementation of the unlawful agreements, but submits it only partly applied those agreements.

198 The applicant submits, first, its failure to respect the agreed prices for products intended for mechanical applications and refers, in that regard, to the complaints

from its competitors. It refers to a note sent to it from Schunk on 18 September 1989 and a statement, of 18 September 2002, from one of its employees, M.G.

199 In the Decision (recitals 307 and 308), the Commission observes that, in respect of the applicant, there seem to be no serious complaints from fellow cartel members about alleged instances of low pricing until the first half of 1999, when the applicant was preparing to leave the cartel. It adds that occasional cheating is quite common in a cartel, if and when companies think that they can get away with it, and that such cheating is not evidence of non-implementation of the agreements reached in the cartel.

200 Recital 106 of the Decision refers to the aforementioned note in which Schunk complained that the applicant was selling carbon rings to a particular French client at prices 15% to 20% below the normal French level and invited the applicant to a meeting to discuss that issue and to explain to Schunk according to what scheme it had determined those prices.

201 It should be observed that that document mentions a single complaint, from a single member of the cartel, concerning the marketing of mechanical products only and, more precisely, of a particular product — although there are a wide variety of them (recital 9 of the Decision) — intended for 'a particular French client'.

202 In his statement of 18 September 2002, M.G. states that he took part in three meetings, on 2 April 1998 in Bandol, on 12 October 1998 in Berlin, and on 8 April 1999 in Stratford-upon-Avon. He states as follows:

'At the three meetings [which] I attended, the other competitors complained to [LCL] that it was not respecting the agreements. We replied that we were a minor player on the European market.'

203 The applicant submits that, in that statement, M.G. also provided an example of a complaint from M.T. (Morganite Industries Inc., the US subsidiary of Morgan), which 'complained that [LCL] was setting its prices too low (outside of the scale)'. That reference does not appear in the statement of M.G. produced by the applicant at the hearing annexed to the application.

204 It appears that the witness evidence in question concerns only three cartel meetings which took place during the period from 2 April 1998 to 8 April 1999, that is to say, a period of one year, while the total duration of the infringement was 10 years and 8 months, and the Summit meetings and Technical Committee meetings each took place twice a year, not counting the local meetings.

205 Furthermore, having regard to the existence of a subordinate link between the author of the statement in question, made after the Commission had sent the request for information referred to in Article 11 of Regulation No 17, and the applicant which produced that witness statement annexed to its application, that statement could not be admitted as evidence unless it was corroborated by objective documentary evidence from the file.

206 The applicant submits that M.G.'s statement is corroborated by the note of 18 September 1989 from Schunk to the applicant. However, as the Commission correctly notes, that statement, concerning the meetings which had taken place between 2 April 1998 and 8 April 1999, cannot be corroborated by a complaint which relates to events from 1989, that is to say, which occurred 10 years earlier.

207 The applicant also refers to a statement of the other members of the cartel minuted in a report from an ECGA meeting of 19 April 1996 as stating:

'Deutsche Carbone [German subsidiary of LCL] began operating in the mechanical products sector without any reference to the existing price level. P. [LCL] has been asked to supervise those activities and to ensure that the price level is respected.'

208 That document is therefore referring to the initial activities of a subsidiary of the applicant, and gives no indication as to the attitude that the applicant could have adopted after that meeting. The applicant provides no additional document showing genuine independent and competitive conduct from its German subsidiary after the report in question, and the continued discontent of the other members of the cartel on that issue.

209 Lastly, M.G.'s statement is not further corroborated by the statement of another employee of the applicant, that is to say, M.N. The latter indicates that he took part in meetings of the Technical Committee for mechanical and electrical products, organised in the framework of the ECGA, during the period from 1997 to April 1999. M.N. makes no reference to any complaint from another member of the cartel on the issue of the applicant's conduct, although his statement also covers the period from 2 April 1998 to 8 April 1999, covered by M.G.'s statement.

210 The applicant claims, second, that it did not fully implement the general policy of the cartel in France, for which it was in principle responsible, in the electrical products sector. The applicant relies on recital 127 of the Decision, according to which '[t]aking the bareme prices for OEMs in the Netherlands as the index figure of 100,

the real bareme in France, which had the worst price level for the cartel, was only 61, and the actually achieved prices 40'.

211 However, that assertion from the applicant is the result of a partial and truncated reading of the Decision.

212 It should be pointed out that the demand for electrical and mechanical carbon and graphite products is divided between a relatively small group of large customers and a much larger group of small customers. In the electrical products sector, the largest customers consist of automobile suppliers and producers of consumer products (abbreviated to 'OEMs'). Those customers, which are very few in number and which tend to be very large companies, buy, in very large volumes, a limited number of types of carbon and graphite products and therefore their negotiating position is strong (recitals 39, 40 and 124 of the Decision).

213 The cartel attempted to counter the risk that those large customers would benefit from different prices in different countries. A first strategy was an attempt to harmonise prices at a European level and was based on a proposal from the applicant entitled 'Draft of a uniform European pricing scheme for brushes destined for constructors of electrical industrial machines'. That strategy of harmonised prices throughout Europe for OEM customers proved difficult to implement in practice, as is clear from a special meeting of the Technical Committee on OEM prices which was held on 22 February 1994 (recitals 126 and 127 of the Decision).

214 It is specifically that meeting which indicates the persistence of considerable differences between the scale prices, and even greater differences between the real prices

applied in the OEM sector from one country to another, for example, the situation in France, which is described in recital 127 of the Decision. It was therefore a quite generalised divergence, existing in countries other than France, which did not have its origins in a desire on the part of the applicant to avoid implementing in practice the collusive agreements. On the contrary, the applicant was even behind an anti-competitive strategy of harmonised prices at a European level for customers in the OEM sector. The Commission further observes that the members of the cartel, after the meeting of 22 February 1994, agreed to 'close the gap'.

215 The applicant does not challenge any of the findings made by the Commission in recital 127 of the Decision, but merely provides to the Court a subjective interpretation which is advantageous to it.

216 The applicant claims, third, that the Commission accepted, in recital 232 of the Decision, 'that it did not participate in the cartel's activity of cutting out cutters'.

217 A full reading of that recital shows that the applicant's assertion is, once again, based on a clear distortion of the wording of the Decision.

218 Recital 232 of the Decision states:

'The Commission does not, in any case, accept [LCL]'s claim that it did not participate in the cartel's activity of cutting out cutters, because it used all the blocks it produced internally. As described in [point] 7.8, [LCL] did participate in the cartel's

practice of either not selling blocks to cutters at all or only at very high prices. In particular, in the cartel meeting of 14 October 1993, in discussing the question "Should we sell blocks and give our margin away or not?", [LCL] is reported as stating that it "tries to sell as [few] blocks as possible and believes it is better to only sell to own companies". Even if [LCL] had not itself participated in the actual boycotting of cutters, it clearly subscribed to the general policy of the cartel to stop supplying cutters or to supply to them only at very high prices and, like the other members of the cartel, it benefited from the reduced competition from cutters. These facts suffice to establish the responsibility of [LCL].'

219 It thus appears that the applicant left out the first two words of the phrase which it cites, which show that the subsequent analysis of the Commission is based on a hypothesis. As the applicant's line of reasoning is based solely on a misreading of recital 232 of the Decision, it can only be rejected.

220 The applicant asserts, fourth, that the notes taken by Morgan at a meeting of the Technical Committee on 4 October 1999 demonstrate that it was totally separated from the cartel, at the very least, during its final year.

221 The wording of that note is set out in recital 186 of the Decision, but the applicant makes the following incomplete reference to it:

'G [Schunk] recommended to see P [the applicant] as an outsider because there is no communication possible. Still a controlled competition amongst the three other parties is possible. G further claimed that P was undercutting price levels.

S [Morgan], B [SGL] and H [Morgan's national subsidiary] have not seen yet real price undercutting by P. G is willing to attack to send them a clear message.'

222 It must be held that that document lacks any probative value. Schunk's claim that the applicant was no longer respecting the agreed prices is not confirmed by the other members of the cartel attending the meeting. In addition, the document in question contains no details of the timing, except for the date of the meeting, namely 4 October 1999, which is subsequent to the date of the end of the offending period established by the Commission in respect of the applicant, namely June 1999.

223 The circumstances relied upon by the applicant in the context of this plea, even considered as a whole, do not allow a conclusion that, during the period in which it was party to the offending agreements, it actually avoided implementing them by practising competitive conduct on the market, or that, at the very least, it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.

224 It follows from the foregoing considerations that the plea alleging a failure on the part of the Commission to take account of the mitigating circumstances in relation to the non-implementation in practice of the offending agreements is not substantiated and must be rejected.

The failure to take account of the termination of the infringement before the start of the investigation

225 The applicant claims that it terminated the offending practices at the latest in June 1999, that is to say, three years before the Commission intervened, and that it has, since that time, put in place a programme of compliance with competition rules, applied at the heart of the company, systematically, for more than four years.

226 It must, first, be borne in mind that the Guidelines provide, in Section 3, for a reduction in the starting amount of a fine where there are specific mitigating circumstances such as, inter alia, termination of the infringement as soon as the Commission intervenes. That mitigating circumstance should, a fortiori, apply, according to the applicant, where the termination of the offending behaviour occurs before that intervention, as in the present case.

227 That reasoning cannot be accepted by the Court. Logically, there can be an attenuating circumstance within the meaning of the Guidelines only if the undertakings concerned were encouraged to cease their anti-competitive conduct by the interventions in question. The purpose of that provision is to encourage undertakings to terminate their anti-competitive conduct as soon as the Commission launches an investigation into it. The fine cannot be reduced on that basis where the infringement has already come to an end before the date on which the Commission first intervenes. A reduction in such circumstances would duplicate the reduction for duration in calculating the fine (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 291; see also, to that effect, *Tokai I*, cited in paragraph 146, paragraph 341).

228 It should also be borne in mind that a reduction of the fine on account of the termination of an infringement as soon as the Commission intervenes cannot be automatic, but depends on an assessment of the circumstances of the case by the Commission in the exercise of its discretion. In that regard, the application of that provision of the Guidelines in favour of an undertaking will be particularly appropriate where the conduct in question is not manifestly anti-competitive. Conversely, its application will be less appropriate, as a general rule, where the conduct is clearly anti-competitive, on the assumption that it is proven (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 281, upheld on appeal in Case C-411/04 P *Salzgitter Mannesmann* v *Commission* [2007] ECR I-959 and *Tokai II*, cited in paragraph 227, paragraphs 292 and 294).

229 In the present case, it cannot be held that the applicant could have had a reasonable doubt as regards the anti-competitive nature of its conduct, in regard to its participation in a horizontal agreement on prices — which is a manifest infringement of Article 81 EC — the members of which attempted, by way of numerous precautions, to keep it secret for more than 10 years.

230 Lastly, it should be observed that, in the present case, as in *Tokai I*, cited in paragraph 146, paragraph 341, it was following the intervention of the US competition authorities and not of the Commission that the applicant terminated its anti-competitive practices at issue, which the Commission specifically points out in recital 311 of the Decision, on the basis of the applicant's own statements. A simple literal reading of Section 3, third indent, of the Guidelines allows for the rejection of the applicant's claim.

231 As regards, second, the implementation of a programme of compliance with competition rules, it has already been explained that, while it is indeed important that an undertaking should take measures to prevent further infringements of Community competition law being committed in the future by its staff members, taking such measures does not affect the reality of the established infringement. The Commission is therefore not bound to consider such a factor as a mitigating circumstance (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 373),

all the more so when the infringement at issue is, as in the present case, a manifest infringement of Article 81 EC. The circumstance, submitted by the applicant, that the programme had been put into place before the Commission's intervention is irrelevant, as the measures were adopted following the intervention of the US competition authorities.

232 It follows from the foregoing considerations that the plea alleging a failure on the part of the Commission to take account of the mitigating circumstances in relation to the termination of the infringement before the start of the Commission investigation and the implementation of a programme for compliance with competition rules is unsubstantiated and must be rejected.

The failure to take account of the effective cooperation by the applicant in the proceeding outside of the scope of the Leniency Notice

233 Among the mitigating circumstances referred to in Section 3 of the Guidelines, at the sixth indent, is the 'effective cooperation of the undertaking in the proceedings, outside of the scope of the [Leniency] Notice'.

234 In the Decision, it is stated that the applicant asserted, in support of its claim of mitigating circumstances, the fact that it provided some information to the Commission regarding the role of Gerken and the activities of the cartel throughout the period prior to October 1988 (recital 314 of the Decision).

235 The Commission rejected the applicant's claim stating that it had not brought a proceeding against Gerken, that the period prior to October 1988 was not included in the scope of the present proceeding, and that the information which 'neither assists

the Commission in establishing the existence of an infringement nor in determining the fines to be imposed on the undertakings (if the latter type of cooperation could be considered at all) does not qualify as effective cooperation outside the scope of the … Leniency Notice' (recital 315 of the Decision).

236 In its pleadings, the applicant claims that the information which it provided in the course of the administrative proceeding not only clearly assisted the Commission in its task, but also enabled it, first, not to grant immunity from a fine to Morgan under the Leniency Notice and, second, to establish the participation of Gerken in the cartel activities. The fact that the Commission may not have used that information for those purposes is irrelevant.

237 Although the wording used appears to refer to two separate propositions, the applicant's assertion that it provided information in the course of the administrative proceeding which clearly facilitated the Commission in its task is supported by no example, other than that information relating to the conduct of Morgan and Gerken. It therefore appears that the claim of mitigating circumstances related to the applicant's effective cooperation outside of the scope of the Leniency Notice is based solely on that information.

238 At this point, it should be borne in mind that, according to settled case-law, a reduction in the fine on the ground of cooperation during the administrative proceeding is justified only if the conduct of the undertaking in question enabled the Commission to establish the existence of an infringement more easily and, where relevant, to bring it to an end (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36; see *BPB de Eendracht* v *Commission*, cited in paragraph 164, paragraph 325, and the case-law cited).

239 Moreover, in the context of interpreting the aforementioned case-law in accordance with its spirit, the Court has held that the provision of information enabling the Commission to evaluate more precisely the degree of cooperation offered by one of the undertakings involved in a cartel during the administrative proceeding for the purposes of determining the amount of its fine, and which therefore made the Commission's task during the investigation easier, constitutes 'effective cooperation outside of the scope of the [Leniency] Notice', within the meaning of Section 3, sixth indent, of the Guidelines (*ADM I*, cited in paragraph 83, paragraphs 305 and 306).

240 In the present case, it suffices to state, as is clear from the Decision (recitals 265, 266 and 319 to 321, and Article 1), that the Commission did not use any of the information provided by the applicant, either in relation to the conduct of Gerken and Morgan, to find or penalise an infringement of Community competition law, or to assess more rigorously the level of the undertaking's cooperation for the purposes of determining the amount of the fine. The Commission was therefore under no obligation to reward the cooperation invoked by the applicant in that regard by a substantial reduction in the fine, since that cooperation did not enable it to perform its duty of establishing the existence of an infringement, bringing it to an end, or determining the amount of the fines (see, to that effect, *Tokai II*, cited in paragraph 227, paragraph 368, upheld on appeal in Case C-328/05 P *SGL Carbon* v *Commission*, cited in paragraph 68, paragraph 87).

241 *ADM I*, cited in paragraph 83, to which the applicant refers to justify its assertion, actually confirms the merit of the Commission's stance.

242 Thus, the Court decided to grant the applicant in that case an additional reduction of 10%, on the basis of effective cooperation with the proceeding outside of the scope of the Leniency Notice, after stating that that applicant had actually informed the Commission of the destruction of documents by another undertaking involved in the cartel and that that fact was noted in one of the recitals of the Commission decision and used by the Commission to deduce that the cooperation of that undertaking was not complete, within the meaning of Section B of the Leniency Notice, and did

not therefore justify a reduction of the fine under that head (*AMD I*, cited in paragraph 83, paragraphs 304 to 312).

243 By contrast, the Court held that the information supplied by the applicant in that case concerning the supposed existence of collusion between lysine producers in the 1970s and 1980s had not enabled the Commission to establish the existence of any infringement whatsoever 'inasmuch as' that decision of the Commission was concerned only with the existence of the cartel between the producers in question from July 1990 onwards (*ADM I*, cited in paragraph 83, paragraph 301).

244 For the sake of completeness, it must be held that the information provided by the applicant is, in any event, not relevant.

245 In relation to Gerken's situation, the applicant claims to have provided information which enabled the Commission to establish Gerken's participation in the cartel at issue.

246 In the Decision, the Commission replied to the objections of Hoffmann and the applicant in relation to its failure to send a statement of objections to Gerken. Recital 266 of the Decision states:

'In the Commission's view, the role of Gerken was quite different from that of Hoffmann during the period for which Hoffmann is held liable. In particular, to the Commission's knowledge, Gerken never participated in any European-level meetings

of the cartel, whether in the form of Technical Committee meetings or Summit meetings. Gerken cannot, therefore, be considered to have been a member of the cartel like Hoffmann. Gerken may, like some other relatively small companies, have participated in one or a few local meetings organised by the cartel. However, the Commission's evidence of any such participation is quite limited and sporadic, as opposed to the ample evidence the Commission has of Hoffmann's continuous participation in the period for which it [was] held liable. Finally, it should be noted that as a cutter, Gerken was dependent on the continued supply of blocks at reasonable prices. The one period where Gerken appears to have been most inclined to follow the cartel in terms of prices charged to customers is exactly the period following SGL's acquisition of the speciality graphite business of Gerken's US supplier of blocks. But a few years later, Gerken seems to have re-established itself as one of the few remaining competitors to the cartel in the EEA. According to Morgan's notes of a Technical Committee meeting on 11 December 1997, Gerken was visiting all large end users in the Netherlands and Belgium and offering prices that were 20 to 25% lower: "General impression is that "G" (Gerken) is now an even bigger danger than two years ago. Absolutely no control"'.

247 In terms of information supplied to the Commission deemed to provide evidence of Gerken's participation in the cartel, the applicant limits itself to producing a statement from one of its employees, dated 18 February 2003, mentioning discussions between the applicant and Gerken, for the period from 1997 to 1999, on the level of respective prices in the context of calls for tenders, in particular for return conductor brushes used in the rail industry and brushes for use in electric motors used by urban networks. That statement is completed by summary tables, drawn up by the applicant, regarding calls for tenders issued by French public transport companies, with the indication, notably, of the markets covered by the offending undertakings or the turnover, for each type of product, obtained by each of the competitors.

248 It must be stated that that statement alone, completed by the tables of figures — some of which are irrelevant — was not such as to enable the Commission to find an infringement on Gerken's part, in the sense of participation in the cartel at issue.

The information provided by the applicant could, at most, constitute indications of participation by Gerken in some aspects of the infringement concerning exclusively France and certain specific products, as it is noted that, in the course of that same year 1997, Gerken developed an aggressive commercial stance in the Netherlands and Belgium (recital 266 of the Decision). The details provided do not demonstrate that Gerken participated in the single and continuous infringement, covering the EEA and a vast group of electrical and mechanical carbon and graphite products, and carbon and graphite blocks from which those products are manufactured, as defined in the Decision (see, to that effect, Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraphs 40 to 52).

249 Furthermore, the applicant's arguments, contained in the documents lodged in the course of the present proceedings, on the alleged participation of Gerken in local meetings of the cartel, and on the alleged contradiction in the Commission's practice in previous decisions, having regard to the way the applicant was treated in the Decision compared with Gerken, are irrelevant in the context of the assessment of the relevance of the information provided to the Commission and deemed to demonstrate Gerken's participation in the cartel.

250 As regards Morgan, the applicant claims that the three pieces of information that it supplied in the course of the administrative proceeding show that Morgan did not meet any of the conditions laid down in Section B of the Leniency Notice for benefiting from immunity from a fine, inasmuch as that undertaking did not send all the relevant information regarding its involvement in unlawful practices to the Commission and even provided misleading information as regards the date of the termination of its participation in those practices.

251 The applicant, refers, first, to the fact that, in its response to the statement of objections (paragraph 145), it informed the Commission that it had contacted the Antitrust Division of the US Department of Justice in March 2003 in order to bring to

its attention the actions of a subsidiary of Morgan, which seemed, to the applicant, manifestly unlawful with regard to competition rules.

252 It relies, second, on the fact that, in its response to the statement of objections (paragraph 137), it informed the Commission that Morgan had omitted to inform it that, since April 1999, and through the intermediary of its US subsidiary Morganite Industries, it was already the subject of a proceeding in the United States for an unlawful agreement on the price of graphite-based products.

253 As regards those first two pieces of information, it is clear from reading the response to the statement of objections that they do not at all relate to the cartel which is the subject of the Decision, as they concern, in the first place, South Korea, and, in the second place, the US market. Contrary to the applicant's assertions, the obligations on an undertaking that is requesting immunity are limited, logically, to information relevant to the anti-competitive practices which are the subject of the investigation. The cartel which was the subject of the Commission's investigation and the Decision does not concern South Korea or the United States, but rather European territory and that covered by the EEA.

254 The applicant asserts, third, that it sent to the Commission a copy of indictments, dated 24 September 2003, against four former managers at Morgan from a Federal Grand Jury of the United States for bribing of witnesses and destruction or withholding of documents including for the period from April 1999 to August 2001. It was clear from those documents that, in the course of that period, Morgan destroyed and withheld from the US competition authorities, and the Community competition authorities, numerous documents relating to price-fixing agreements, so that it could continue applying those agreements until August 2001, although it stated that it had terminated all participation in unlawful practices in December 1999.

255 The applicant goes into further detail on its allegations in the following passage:

> 'In the course of the period from April 1999 to June 1999, the working group created by CC-2 visited Morgan sites in Europe and withdrew, concealed or destroyed all documents and registers in Morgan's files which contained evidence of the price-fixing agreement … The members of the working group, including CC-3, transferred to CC-4 the documents gathered which referred to the price-fixing agreement so that CC-4 could conceal those documents from the US and European authorities but also so that those documents could be held in a secret place to enable Morgan to continue to apply the price-fixing agreement … In August 2001, the employees destroyed the relevant documents relating to the Grand Jury investigation on the instructions of CC-1.'

256 As regards that third piece of information, it should be pointed out that, in the Decision (recital 67), the Commission stated that the US Department of Justice announced on 4 November 2002 that the US subsidiary of Morgan had agreed to plead guilty to charges of participation in an international cartel to fix the price of various types of electrical carbon products sold in the United States and elsewhere and that the UK parent company, Morgan, had agreed to plead guilty to charges of attempting to obstruct the investigation. The Decision explicitly refers to the indictments, of 24 September 2003, of four former Morgan employees by a Federal Grand Jury for bribing of witnesses and destruction or withholding of documents during the period from April 1999 to August 2001.

257 It is, moreover, agreed between the parties that the Commission received a letter from Morgan, dated 30 October 2001, completing the information already provided in accordance with its application for leniency lodged on 18 September 2001, in which it clearly stated that 'it is clear that some employees removed and/or destroyed relevant documentation'.

258 It therefore seems that the Commission was informed by Morgan itself, in 2001, of the withholding and destruction, by members of staff of that undertaking, of documents relating to the cartel reported on. The forwarding of the indictments by the applicant, in September 2003, only confirmed the actions of which the Commission was already aware, and Morgan's willingness, at first, to try to conceal its responsibility, while providing information on the actual implementation of that willingness.

259 In those circumstances, the fact that Morgan also stated, in the letter of 30 October 2001, that it would send to the Commission all additional information obtained and that it did not send the indictments of 24 September 2003, nearly two years later — and after providing the Commission with a file of not less than 4 789 pages in relation to the cartel at issue — is not relevant.

260 The applicant carried out a detailed interpretation of the meaning of the relevant documents. It alleges that it is clear from them that Morgan continued to participate in unlawful practices, both in the United States and in Europe, at least until August 2001 and not until December 1999 as it indicated to the Commission, which would explain why Morgan did not forward those documents.

261 The text reproduced in paragraph 255 of this judgment refers to the withholding of relevant documents 'to enable Morgan to continue to apply the price-fixing agreement'. Even assuming that that agreement did not relate to the US market alone, but also involved European territory, it is not clear from that text, which refers only to an objective to be attained, or from the indictments generally, that that agreement actually continued to be applied by Morgan and other operators on the European market after December 1999 — the date of the termination of unlawful practices as found in the Decision — and until August 2001. Taking account of the fact that the applicant does not dispute that the other members of the cartel terminated their participation at the latest in December 1999, it is hardly conceivable that a cartel could have existed after December 1999.

262 The fact that the Commission finally decided that Morgan should benefit from immunity from a fine in so far as it, inter alia, provided decisive evidence, terminated its participation in the cartel, at the latest, at the moment when it reported that cartel, provided useful information, and all the documents and evidence which it had concerning the cartel, 'at the moment when it made its application', and maintained total and permanent cooperation throughout the investigation is part of an assessment which it is not for the Court to review in the context of the present case.

263 Taking account of the foregoing, the plea alleging a failure by the Commission to take account of the effective cooperation by the applicant in the proceeding outside of the scope of the Leniency Notice is unsubstantiated and must be rejected.

264 It follows from all of the foregoing considerations that the applicant has not established that the Commission committed errors in the assessment of mitigating circumstances and that the applicant's request seeking a reduction in the amount of the fine on the basis of mitigating circumstances must be rejected.

The cooperation of the applicant during the administrative proceeding

The claim for the maximum reduction of 50%

265 In the Leniency Notice, the Commission sets out the conditions under which undertakings cooperating with the Commission during its investigation into a cartel may

be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them (Section A, paragraph 3, of the Leniency Notice).

266 Section D of the Leniency Notice provides:

'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 materially contribute to establishing the existence of the infringement;

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

267 In the present case, the applicant benefited from a reduction of 40% of the amount of its fine pursuant to Section D of the Leniency Notice.

268 To justify its assessment, the Commission points out the following in recital 324 of the Decision:

'[LCL] applied for leniency soon after having received the Commission's Article 11 [of Regulation No 17] letter. Its cooperation largely exceeded the required replies to the Article 11 letter. [LCL] spontaneously provided a considerable number of contemporaneous documents, including several reports of cartel meetings not identified in the Commission's Article 11 letter. [LCL] also provided several signed declarations from company officials and former company officials, attesting to their part in the cartel's activities. Finally, it provided a detailed and useful description of the product market and the cartel's activities in respect of each type of client. Because of the quantity and quality of the evidence already provided by Morgan, the voluntary evidence submitted by [LCL], as indeed that of the other leniency applicants, added only limited value to the evidence already in the possession of the Commission. Nevertheless, the Commission considers that the voluntary evidence provided by [LCL] as a whole did materially contribute to establishing the existence of the infringement.'

269 The Commission also stated that, after receiving the statement of objections, the applicant informed the Commission that it did not substantially contest the facts on which the Commission based its allegations (recital 325 of the Decision).

270 It should be noted that there is no dispute over the fact that the applicant, at the time the Decision was adopted, met the conditions laid down in Section D, paragraph 2, first and second indents, of the Leniency Notice, as the reductions granted were, respectively, 30% and 10% according to the information provided by the Commission in its pleadings. The dispute concerns the size of the reduction granted, which, according to the applicant, should have been 50% in total, that is to say, the maximum possible reduction.

271 It must be borne in mind that the Commission has a wide discretion as regards the setting of 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 (Case C-328/05 P *SGL Carbon* v *Commission*, cited in paragraph 68, paragraph 81).

272 In that regard, 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 (Case C-328/05 P *SGL Carbon* v *Commission*, cited in paragraph 68, paragraph 88).

273 The applicant's line of reasoning — which suggests the automatic maximum reduction of 50% where the conditions laid down in Section D, paragraph 2, first and second indents, of the Leniency Notice are met — is tantamount to denying the Commission that wide discretion, which is expressed, inter alia, by the indication of a range for the size of the reduction of 10% to 50%.

274 As is clear from recital 324 of the Decision, the Commission based its assessment of the level of reduction granted on the fact, on the one hand, that the evidence provided by the applicant added only limited value to the evidence already in the Commission's possession, and provided by Morgan, and on the other hand, that the applicant's cooperation started after it had received the letter sent to it pursuant to Article 11 of Regulation No 17.

275 The applicant questions the relevance of the first criterion of assessment used by the Commission.

276 It must be borne in mind that, according to the case-law, the reduction of the fines, where there is cooperation from undertakings which participated in the infringements of Community competition law, is justified only if the conduct made it easier for the Commission to establish an infringement and, as the case may be, to put an end to it (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 399; *BPB de Eendracht* v *Commission*, cited in paragraph 164, paragraph 325; Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363; and *Mayr-Melnhof* v *Commission*, cited in paragraph 83, paragraph 330).

277 Having regard to the rationale behind the reduction, the Commission cannot disregard the usefulness of the information provided, as it is necessarily part of the evidence already in its possession.

278 The applicant claims that the Commission is not justified in relying on the usefulness of its contribution compared with that of Morgan, in so far as the respective usefulness of the information provided by those two undertakings is reflected already in the choice of a different category of reduction for each of those undertakings.

279 In that respect, the fact that the Commission held that Morgan should benefit from immunity from a fine in accordance with Section B of the Leniency Notice — regard being had to the specific quality of the established cooperation — does not prevent it, subsequently, from assessing the applicant's cooperation under Section D of that notice and, accordingly, the usefulness of the information provided having regard to the evidence already provided by another undertaking, in the present case Morgan. As the Commission rightly points out, since the fundamental difference at the root of Sections B, C and D of the Leniency Notice is the usefulness of the information provided, the Commission may use the usefulness criterion to determine the level of the reduction for each category of reduction of fine laid down in those sections.

280 Although the applicant questions the relevance of the first criterion for assessment used by the Commission, it does not call into question, by contrast, the Commission's findings on the quality of the cooperation from Morgan, which produced a file of 4 789 pages on the cartel, and the subsequent deduction of the limited added value of the evidence which the applicant itself provided. The applicant expressly states that it does not dispute the fact that its cooperation in the proceeding was less useful than Morgan's cooperation.

281 As regards the second criterion applied by the Commission in setting the level of the reduction granted to the applicant at 40%, the applicant claims that the Commission wrongly disputes the spontaneous nature of its cooperation and that it cooperated well before the statement of objections was issued, the only condition laid down in Section D of the Leniency Notice.

282 It is important to point out that the Commission states, as is clear from the wording of the Decision and more particularly from recital 324, that it did not dispute the spontaneous nature of the applicant's cooperation per se. It does, however, state that, in the context of its overall assessment of that cooperation, it can take into account the fact that the applicant started to cooperate after the request for information was sent to it. It adds that it is the limited use of that information provided by the applicant which was the decisive factor in justifying the refusal to grant the maximum reduction of 50%.

283 As has been indicated, the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking (Case C-328/05 P *SGL Carbon* v *Commission*, cited in paragraph 68, paragraph 88), and, in the context of an overall assessment, it can take account of the fact that that undertaking sent it the documents only after the request for information (*LR AF 1998* v *Commission*, cited in paragraph 158, paragraph 365, upheld on appeal in *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 68, paragraph 408), without, however, being able to consider it as the determining factor to minimise the cooperation provided by

that undertaking under Section D, paragraph 2, first indent, of the Leniency Notice (*Tokai I*, cited in paragraph 146, paragraph 410).

284 The applicant claims that the Commission has not, in any event, demonstrated that it had knowledge of the request for information when the letter of 16 August 2002 was sent, a letter in which it applied for leniency. It claims that, some hours before the receipt of the request for information on 16 August 2002, it submitted a request seeking the application of the Leniency Notice of which it provided a copy annexed to the application.

285 In that document, actually dated 16 August 2002 — and which is a faxed message on which there is no indication of its successful transmission, or the date of transmission — it is mentioned that '[LCL] seeks the benefit of the [Leniency] Notice in the case concerning the brushes intended for electric motors and in the course of the proceeding initiated by the Commission against the undertaking', a wording which confirms the accuracy of the chronology referred to in the Decision.

286 In reply to the Commission's observation that the reference to 'in the course of the proceeding initiated' proves the receipt and acknowledgement of the request for information by the applicant, the latter contends, in its reply, that it was referring to the procedure initiated in the isostatic graphite sector.

287 As the Commission points out, if that assertion from the applicant was accurate, it would be necessary to hold that the letter of 16 August 2002, which contained an offer of cooperation from the applicant, had no link with the present case and that it should, therefore, be ignored by the Court. The applicant would therefore still have to prove that it cooperated before the receipt of the request for information.

288 It should, furthermore, be noted that, in that letter of 16 August 2002, reference is explicitly made to the case involving the 'brushes intended for electric motors' which are among the mechanical and electrical carbon and graphite products that are the subject of the cartel at issue in the Decision.

289 In any event, the applicant actually started to cooperate only from 22 August 2002, the date on which it sent to the Commission the first documents relating to the cartel and, therefore, after the alleged date of receipt of the Commission letter, sent to it pursuant to Article 11 of Regulation No 17.

290 As regards, lastly, the reference to the Commission's practice in previous decisions, which would support the maximum reduction of 50% claimed by the applicant, it has already been pointed out in paragraph 110 that the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters 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. It must be held that the applicant has not proved such discrimination. The mere fact that the Commission, in its practice in previous decisions, granted a certain rate of reduction for specific conduct does not mean that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (*Groupe Danone* v *Commission*, cited in paragraph 90, paragraph 458, and the case-law cited).

291 It follows from the foregoing considerations that the applicant has not demonstrated that the Commission committed a manifest error of assessment in relation to its cooperation by granting it a reduction of 40% pursuant to Section D of the Leniency Notice.

The alleged breaches of the principle of equal treatment

292 As regards the allegation of breaches of the principle of equal treatment, it is settled case-law that, when assessing the cooperation provided by the undertakings concerned, the Commission cannot ignore that principle, which is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (*Tokai I*, cited in paragraph 146, paragraph 394, and the case-law cited).

293 The applicant claims, first, that the Commission granted Morgan a reduction of 100% of the fine on the basis of Section B of the Leniency Notice, although that undertaking withheld from the Commission certain useful information in relation to its participation in an agreement on the price of graphite-based products in the United States, and provided the Commission with misleading information regarding the termination of its participation in unlawful activities in the United States and Europe.

294 It infers from that that the Commission should, so as not to commit a serious breach of the principle of equal treatment, have reclassified the application for leniency which it made and granted it immunity from a fine under Section B or, at least, granted it the maximum reduction in the amount of the fine provided for in Section D of the Leniency Notice, since it granted Morgan the maximum reduction in the amount of the fine provided for in Section B of that notice.

295 In so far as the applicant claims an unlawful reduction of the fine in favour of Morgan, and even if the Commission did unduly grant a reduction to that undertaking by

an incorrect application of the Leniency Notice, it is necessary to bear in mind 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; Case T-327/94 *SCA Holding* v *Commission*, cited in paragraph 113, paragraph 160; and *LR AF 1998* v *Commission*, cited in paragraph 158, paragraph 367).

296 It must further be noted that Morgan and the applicant were not in comparable situations and that that objective difference in their situations explains and justifies the different treatment to which they were subject from the Commission in the context of the application of the Leniency Notice.

297 It is important to point out that, among the conditions for the non-imposition of a fine, or a significant reduction in its amount, as provided for in Section B of the Leniency Notice, is the fact that the undertaking is the first to adduce decisive evidence of the cartel's existence. The applicant itself states, in its reply, that it does not dispute that its cooperation with the proceeding was less useful than that of Morgan, and that it could not have been otherwise, since the information provided by Morgan enabled the Commission to establish the existence of a cartel, such that its contribution could inevitably only contribute to confirming the existence of the infringement.

298 In those circumstances, the allegation that there was unequal treatment with respect to the treatment received by Morgan and the related claim by the applicant for the benefit of the provisions of Section B of the Leniency Notice, or the maximum reduction of the fine provided for in Section D of that notice, must be rejected.

299 The applicant asserts, second, that despite the extremely limited and late nature of SGL's cooperation in the proceeding, indicated by the Commission itself in the Decision, the Commission nevertheless granted it a reduction of 20% in the amount of the fine on the basis of the Leniency Notice, although the applicant only benefited from a reduction of 40% for full and complete cooperation.

300 That proposition does not involve any breach of the principle of equal treatment or, moreover, the principle of proportionality, in that the applicant's cooperation, which was objectively more significant than that of SGL, was actually taken into account by the Commission in the appropriate way.

301 The reduction obtained by the applicant on the basis of its cooperation before the statement of objections was issued is three times greater than that granted to SGL, as it is 30% for the applicant and 10% for SGL. Since those two undertakings had admitted the material facts set out in the statement of objections, they then benefited, logically, from an identical reduction of 10% on that basis alone.

302 In that regard, it should be noted that the applicant does not demonstrate how the Commission was not entitled to explain, in the course of these proceedings, the breakdown of the reductions of 40% and 20% granted. The details provided by the Commission in its pleadings, which complete the Decision, cannot be considered as a new ground of defence prohibited under Article 48(2) of the Rules of Procedure.

303 The applicant claims that, so as not to breach the principle of equal treatment, the Commission should have granted it a reduction appreciably higher than 50% of the amount of the fine on the basis of the Leniency Notice, since it granted to SGL — which impeded the Commission's inquiries — a reduction of '55%' (20% for cooperation and 33% on the basis of other factors).

304 As the applicant itself points out, the 33% reduction was granted on the basis of 'other factors', which does not allow the applicant to establish the alleged relevant unequal treatment in the application of the Leniency Notice. The fact that the Commission took account of 'other factors' is moreover relied on by the applicant in a specific plea to be examined subsequently.

305 Lastly, in so far as the applicant claims that SGL obtained an unlawful reduction of the fine, and even if the Commission did unduly grant a reduction to that undertaking by an incorrect application of the Leniency Notice, it is necessary to bear in mind 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.

306 It follows from the foregoing considerations that the applicant has not shown that it was subject to discriminatory treatment and/or disproportionate treatment in the Commission's application of the Leniency Notice.

The failure to reduce the amount of the fine on the basis of 'other factors'

307 It must be recalled that, in the part of the Decision entitled 'Ability to pay and other factors', the Commission, at first, rejected SGL's and the applicants! arguments seeking to prove their inability to pay a fine in the present case (recitals 340 to 357 of the Decision).

308 Subsequently, the Commission recalled that it has, recently, already imposed significant fines on SGL for its participation in other cartel activities, namely EUR 80.2

million in the graphite electrodes cartel and two fines totalling EUR 27.75 million for its participation in the isostatic graphite cartel and the extruded graphite cartel, in the speciality graphite case (recital 358 of the Decision). Taking account of SGL's serious financial difficulties, the recent fines imposed on it and the fact that the various cartel activities being punished occurred at the same time, the Commission held that, in those particular circumstances, it was not necessary to impose the full amount of the fine to ensure effective deterrence and thus reduced the fine by 33%, lowering it to EUR 23.64 million (recital 360 of the Decision).

309 Holding, by contrast, that the applicant's situation was very different from that of SGL, the Commission did not grant any reduction in the amount of the fine to the applicant on the basis of 'other factors'. The Commission stated, in that regard, that the total amount of the fines imposed, hitherto, on SGL for simultaneous cartel activities reached nearly 10% of SGL's worldwide turnover in 2002, while that figure was only 1% for the applicant, which had a fine of EUR 6.97 million imposed on it for its participation in the isostatic graphite cartel. The Commission contends also that, on the basis of a comparative analysis of financial indicators, SGL's financial situation is much worse than the applicant's current situation (recitals 361 and 362 of the Decision).

310 The applicant claims that, in so doing, the Commission breached the principle of equal treatment.

311 It should be observed that the line of reasoning developed by the applicant in support of that plea is based on the premiss that the Commission was not entitled, having regard to the case-law and according to the very wording of the Decision, to take account, alone and together with other factors, of SGL's financial situation. Since the Commission was bound, according to the applicant, to ignore the financial capacity of SGL when setting the fine, the reduction in the amount of the fine cannot be based on the recent penalties imposed on that undertaking.

312 That reasoning enables the applicant to exclude the financial situation of SGL from the comparative analysis of the way that undertaking was treated, so that only the existence of the fines (those which were imposed on it in the speciality graphite case, in the United States and in the present Decision, totalling EUR 50.02 million) should be taken into account and to claim, by applying the principle of equal treatment, a matching and proportional reduction in the amount of its fine.

313 It must be stated that that line of reasoning from the applicant is based on a false premiss and must therefore be rejected.

314 According to settled case-law, the Commission is not required, when determining the amount of the fine, to take account of an undertaking's financial losses since recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings least well adapted to the conditions of the market (see *Tokai I*, cited in paragraph 146, paragraph 370, and the case-law cited), which does not mean that it is prohibited from so doing. That is also the sense of recitals 349 and 356 of the Decision which, in practically identical terms, repeat the case-law cited.

315 In the present case, the Commission reduced the amount of the fine imposed on SGL on account of its serious financial difficulties combined with two recent fines imposed on that undertaking for infringements of competition law committed at the same time.

316 The applicant neither clearly alleges nor, in any event, does it prove that it was in a comparable situation to that of SGL, particularly on the level of financial health, and whether the comparison with SGL is in relation to the position of SGL in the context of the proceeding in the speciality graphite case, or in the present proceeding.

317 In those circumstances, the objective difference in the situations of SGL and the applicant explains and justifies the difference in treatment to which they were subjected, and no breach of the principle of equal treatment, or even of proportionality, can be sustained against the Commission in the present case.

318 It follows from all of the foregoing considerations that all the pleas in law submitted by the applicant must be rejected and the action brought by the applicant must be dismissed.

Costs

319 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. As 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 Le Carbone-Lorraine to pay the costs.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 8 October 2008.

Registrar President

E. Coulon M. Vilaras

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