

COMMISSION

COMMISSION DECISION

of 17 December 2002

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement against SGL Carbon AG, Le Carbone-Lorraine SA, Ibiden Co. Ltd, Tokai Carbon Co. Ltd, Toyo Tanso Co. Ltd, GrafTech International Ltd, NSCC Techno Carbon Co. Ltd, Nippon Steel Chemical Co. Ltd, Intech EDM BV and Intech EDM AG

(Case C.37.667 — Specialty Graphite)

(notified under document number C(2002) 5083)

(Only the English, French, German and Dutch versions are authentic)

(2006/460/EC)

On 17 December 2002, the Commission adopted a decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the decision, having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the full text of the decision can be found in the authentic languages of the case and in the Commission's working languages on the Competition Directorate-General website (http://ec.europa.eu.int/comm/competition/index_en.html)

1. SUMMARY OF THE INFRINGEMENT

1.1. Addressees

- (1) This decision is addressed to the following undertakings:

on account of the cartel affecting the isostatic specialty graphite market:

- GrafTech International Ltd,
- SGL Carbon AG,
- Le Carbone-Lorraine SA,
- Ibiden Co. Ltd,
- Tokai Carbon Co. Ltd,
- Toyo Tanso Co. Ltd,
- Nippon Steel Chemical Co., Ltd/NSCC Techno Carbon Co. Ltd,
- Intech EDM BV/Intech EDM AG;

on account of the cartel affecting the extruded specialty graphite market:

- SGL Carbon AG,
- GrafTech International Ltd.

1.2. Nature of the infringement

- (2) The case concerns two hard-core cartels between the producers of isostatic and extruded specialty graphite, respectively. The Commission has gathered evidence that from July 1993 to February 1998 in the isostatic cartel, and from February 1993 to November 1996 in the extruded one, the cartel participants agreed on price targets for the product and exchanged sales volume and other commercial information. The two cartels covered the whole world. The Decision deals with infringements in the Community, as well as in the EEA since 1 January 1994.
- (3) Both infringements consists on the participation of the abovementioned addressees in continuing agreements and/or concerted actions contrary to Article 81(1) of the EC Treaty (from February 1986) and Article 53 of the EEA Agreement (from January 1994) covering the whole of the EEA, by which they agreed on price targets for the product; agreed on price increases; exchanged sales volume and other commercial information and monitored and enforced their agreements. The arrangements on the isostatic market also concerned the agreement of trading conditions and, notably at local level, occasional repartition of customers.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

1.3. Product

- (4) 'Specialty graphites' is the general term widely used in the industry to describe a group of graphite products for diverse applications. Specialty graphite products are often categorised by the way the graphite is produced: isostatic graphite (produced through isostatic moulding), used in EDM electrodes, continuous-casting dies, hot-press moulds, semiconductor applications; and extruded graphite (produced through extrusion), used in electrolytic anodes and cathodes, boats, sintering trays, crucibles. The present proceedings concern isostatic and extruded specialty graphite in blocks and cut blocks.

1.4. Origin and procedural steps taken

- (5) Beginning in June 1997, the Commission carried out an investigation on the graphite electrodes market. In the course of that investigation, UCAR approached the Commission in order to submit an application under the 'Leniency notice'. The submission took place on the 13 April 1999, and concerned alleged anticompetitive practices in a market, specialty graphite, related to the market on graphite electrodes.
- (6) On the basis of the documents submitted by UCAR, the Commission addressed requests for information pursuant to Article 11 of Regulation No 17 ⁽¹⁾. Requests were sent in March 2000 to SGL, Intech, POCO, LCL, Nippon Steel Corporation, Ibsiden, Tokai and Toyo Tanso, requiring detailed explanations concerning contacts with competitors, evolution of prices and relevant turnover. A second set of letters was sent in July 2000 to Nippon Carbon, NSCC and Schunk. The companies replied to those requests for information during the months of May to November 2000.
- (7) The Commission addressed a further set of requests to the addressees of the Statement of Objections (SO) in September and October 2001. The replies were received between the end of October and the beginning of December 2001.
- (8) Upon reception of those responses, the Commission sent a final request for information to the same undertakings on 22 November 2001, to which they replied in December 2001.
- (9) On 17 May 2002, the Commission sent a SO to the addressees of this Decision. All parties submitted written observations in response to the Commission's SO. Nippon Steel Chemical Co., Ltd and NSCC Techno Carbon Co., Ltd submitted a joint response. Similarly,

Intech EDM BV and Intech EDM AG also replied jointly to the Commission's objections.

- (10) Replies to the SO were received between 19 and 25 July 2002. All the companies but Intech EDM AG and Intech EDM BV recognised the infringement. None of the companies substantially contested the facts. An oral hearing was held on 10 September 2002, during which all parties had the opportunity to be heard.

2. FINES

2.1. Basic amount

- (11) In fixing the amount of any fine, the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation 17.

2.1.1. Gravity

- (12) According to the Guidelines, the Commission must take account of (i) the nature of the infringement, (ii) its actual impact on the market, and (iii) the size of the relevant geographic market.
- (13) The present infringements consist mainly of price-fixing practices and the exchange of commercial information, which are by their very nature very serious violations of Article 81(1) EC and Article 53(1) EEA.
- (14) The cartel agreements were carefully implemented by producers which, for the relevant period, covered the vast majority of the worldwide market for isostatic and extruded specialty graphite. They must therefore have had an actual impact on both markets in the EEA.
- (15) The cartels covered the whole of the common market and, following its creation, the whole of the EEA. Every part of the common market, and later that of the territory covered by the EEA, was under their influence.
- (16) Taking into account the nature of the behaviour under scrutiny, the actual impact on the isostatic and extruded markets, and the fact that they covered the whole of the common market and, following its creation, the whole of the EEA, the Commission considers that the addressees of the present draft Decision committed, in both cases, a very serious infringement of Article 81(1) EC and Article 53(1) EEA.

⁽¹⁾ OJ L13, 21.2.1962, p. 204/62.

2.1.2. Differential treatment

- (17) Within the category of very serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition and to set the fine at a level which ensures it has sufficient deterrent effect.
- (18) In the circumstances of this case, which involves several undertakings, it will be necessary in setting the basic amount of the fines to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition.
- (19) For the purposes of calculating the fine on account of the isostatic cartel, we propose to divide the companies into five categories on the basis of their worldwide product turnover. The first category includes SGL; the second Toyo Tanso; in the third are placed LCL and Tokai; in the fourth Ibiden and NSC/NSCC; and in the fifth UCAR and Intech.
- (20) As for the cartel in the extruded specialty market, UCAR and SGL had a similar presence in the worldwide market for this product. They are therefore placed in a single category.

2.1.3. Duration

2.1.3.1. Isostatic specialty graphite

- (21) SGL, LCL, Ibiden, Tokai, Toyo Tanso and NSC/NSCC infringed Article 81(1) of the Treaty from July 1993 until February 1998 and Article 53(1) of the EEA Agreement from 1 January 1994 until February 1998. UCAR committed the same infringement from February 1996 to May 1997, and Intech from February 1994 to May 1997.
- (22) Consequently, SGL, LCL, Ibiden, Tokai, Toyo Tanso and NSC/NSCC have committed an infringement of four years and six months, i.e. of medium duration. The starting amounts of the fines, determined by their gravity, are therefore increased by 45 %.
- (23) Intech committed an infringement, of medium duration, of three years and two months. The starting amount of

the fine determined for gravity is therefore increased by 30 %.

- (24) UCAR committed an infringement of medium duration of one year and two months. The starting amount of the fine determined for gravity is therefore increased by 10 %.

2.1.3.2. Extruded specialty graphite

- (25) SGL and UCAR have infringed Article 81(1) of the Treaty from February 1993 to November 1996 and Article 53(1) of the EEA Agreement from 1 January 1994 until November 1996, or three years and eight months, i.e. of medium duration. The starting amounts of the fines, determined by their gravity, are therefore increased by 35 % for each company.

2.2. Aggravating circumstances (role of leader in the infringement)

- (26) SGL was the leader and instigator of the infringement in the isostatic specialty market. SGL has not contested the Commission's finding in this regard. This aggravating circumstance justifies an increase of 50 % in the basic amount of the fines to be imposed on SGL for its infringements affecting the isostatic specialty market.

- (27) The Commission also considers that no specific ring-leader can be identified for the infringement affecting the extruded specialty market.

2.3. Attenuating circumstances

- (28) The Commission considers that there is only an attenuating circumstance to be applied to Intech, in the isostatic cartel, on account of some specific circumstances that only concern this undertaking. The involvement of Intech in the isostatic cartel was particular in that it was, to a considerable extent, under instructions from Ibiden, in order to implement by its participation in the European and local meetings, as Ibiden's distributor, the decisions of principle taken at higher level (where Ibiden participated, but not Intech). The Commission considers that those specific circumstances justify a reduction of 40 % in the basic amount of the fine to be imposed on Intech for its participation in the infringement affecting the isostatic market

2.4. Application of the Leniency Notice

(29) The addressees of the Decision have cooperated with the Commission at different stages of the investigation for the purpose of receiving favourable treatment set out in the Commission's Leniency Notice. In the draft Decision it is proposed to apply the Leniency Notice as follows:

2.4.1. Non-imposition of a fine or a very substantial reduction of its amount (Section B: reduction from of 75 to 100 %)

(30) The Commission accepts that UCAR was the first undertaking to submit decisive evidence on the existence of an international cartel affecting the EEA in the isostatic and extruded specialty graphite industries. The Commission also acknowledges that, when it was approached by UCAR, it had not undertaken investigations, nor had it sufficient information to establish the existence of the infringements. UCAR had also put an end to its involvement at the time at which it disclosed the cartels and did not compel other enterprises to take part in those cartels. UCAR therefore fulfils, for both infringements, the conditions set out in Section B of the Leniency Notice. The Commission accordingly grants UCAR a 100 % reduction of the fine that would otherwise have been imposed on account of the each infringement.

2.4.2. Substantial reduction in a fine (Section C: reduction from 50 to 75 %)

(31) Neither SGL, LCL, Toyo Tanso, Tokai, Ibiden, NSC/NSCC or Intech were the first to provide the Commission with decisive information on the isostatic or extruded specialty cartels, as required under point (a) of Section C of the Leniency Notice. Consequently none of the above undertakings meet the conditions as set out in this section C.

2.4.3. Significant reduction of a fine (Section D: reduction from 10 to 50 %)

(32) Before the Commission adopted its SO, SGL, LCL, Ibiden, Tokai, Toyo Tanso and NSC/NSCC provided the Commission with information and documents which materially contributed to establishing the existence of the infringements. None of them substantially contests the facts on which the Commission based its SO. The information and documents provided allowed the Commission to confirm and identify the functioning of the cartels and certain elements thereof.

(33) Given that any cooperation under the Leniency Notice must be voluntary and in particular outside the exercise

of any investigatory power, the Commission considers that part of the information provided by these undertakings was, in fact, an integral part of their replies to the Commission's formal requests for information. The information provided by the undertakings is therefore regarded as a voluntary contribution within the meaning of the Leniency Notice only where it went beyond that requested pursuant to Article 11 of Regulation No 17.

(34) The Commission concludes that the documents referred to above provided detailed evidence of the organisational structure of the cartel arrangements affecting the two markets and contributed decisively to establishing and/or confirming essential aspects of these infringements. Together with UCAR's statement, these documents constitute the main source of evidence used by the Commission in preparing the present Decision.

(35) Furthermore, the Commission considers that it is not possible to make a distinction as to the value added, that those submissions provided, to the investigation in the isostatic market, since they all took place, with short differences in time, in reaction to the Commission's formal request for information, and they all provided evidence of similar quality. Moreover, none of the submissions was on its own essential for the Commission to keep the substance of its objections in the infringement, since they substantially overlapped each other as to the evidence provided.

(36) Intech did not provide any documentary evidence on meetings in its reply to the Commission's request for information. However, it did not substantially contest the facts on which the Commission bases its allegations in the SO.

(37) SGL, LCL, Ibiden, Tokai, Toyo Tanso and NSC/NSCC therefore fulfil the conditions set out in section D(2), first and second indent, of the Leniency Notice and are granted a 35 % reduction of the fine. Intech fulfils the conditions set out in section D(2), second indent, of the Leniency Notice and is granted a 10 % reduction of fine.

2.5. Point 5(b) of the Guidelines on fines

(38) According to point 5(b) of the Guidelines on fines, the Commission should take certain objective factors into account, depending on the circumstances of a given case, when fixing fines.

2.5.1. *Ability to pay*

- (39) SGL and NSC have presented arguments relating to their ability to pay. In particular, both companies have highlighted [...] (*).
- (40) In order to consider this argument, the Commission requested detailed information on the companies' financial positions. After examining the companies' replies of 20 November 2002, as well as SGL's further submission made on 8 November 2002, the Commission concludes that it is not appropriate to adjust the amount of the fines in this case. Although the financial data provided by the two undertakings show that both SGL and NSC are [...], to take account of the mere fact of the undertakings [...], mainly due to general market conditions, would be tantamount to conferring an unjustified competitive advantage on them.

2.5.2. *Other factors*

- (41) SGL is [...].
- (42) On 18 July 2001 the Commission imposed on SGL a fine of EUR 80,2 million for violation of Article 81 of the Treaty, as a result of the undertaking's involvement in the graphite electrodes cartel.
- (43) It follows that SGL is both in [...] and has relatively recently been imposed a significant fine by the Commission. The Commission considers that, in these particular circumstances, imposing the full amount of the fine does not appear necessary in order to ensure effective deterrence.
- (44) In view of these two factors, the Commission considers that, in this specific case, the fine should be reduced by 33 %.

3. **DECISION**

- (45) The following undertakings have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices affecting the Community and EEA markets for isostatic specialty graphite:
1. GrafTech International Ltd, from February 1996 to May 1997;
 2. SGL Carbon AG, from July 1993 to February 1998;
 3. Le Carbone-Lorraine SA, from July 1993 to February 1998;
 4. Ibiden Co., Ltd, from July 1993 to February 1998;
 5. Tokai Carbon Co. Ltd, from July 1993 to February 1998;

6. Toyo Tanso Co. Ltd, from July 1993 to February 1998;
7. Nippon Steel Chemical Co. Ltd and NSCC Techno Carbon Co. Ltd, jointly and severally liable, from July 1993 to February 1998;
8. Intech EDM BV and Intech EDM AG, jointly and severally liable, from February 1994 to May 1997.

(46) The following undertakings have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices affecting the Community and EEA markets for extruded specialty graphite:

1. SGL Carbon AG, from February 1993 to November 1996;
2. GrafTech International, Ltd, from February 1993 to November 1996.

(47) The undertakings listed above shall immediately bring to an end the infringements referred to in that Article, in so far as they have not already done so. They shall refrain from repeating any act or conduct referred to above, and from any act or conduct having the same or equivalent object or effect.

(48) For the infringements referred to above, the following fines are imposed on the following undertakings:

- (a) GrafTech International, Ltd
 - Isostatic specialty graphite: EUR 0,
 - Extruded specialty graphite: EUR 0;
- (b) SGL Carbon AG
 - Isostatic specialty graphite: EUR 18 940 000,
 - Extruded specialty graphite: EUR 8 810 000;
- (c) Le Carbone-Lorraine SA: EUR 6 970 000;
- (d) Ibiden Co. Ltd: EUR 3 580 000;
- (e) Tokai Carbon Co. Ltd: EUR 6 970 000;
- (f) Toyo Tanso Co. Ltd: EUR 10 790 000;
- (g) Nippon Steel Chemical Co., Ltd and NSCC Techno Carbon Co. Ltd, jointly and severally liable: EUR 3 580 000;
- (h) Intech EDM BV and Intech EDM AG, jointly and severally liable: EUR 980 000.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets.