OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 19 January 2006 [1]

I — Introduction

1. By its appeal, Showa Denko KK ('SDK' or 'the appellant') seeks to have the judgment of the Court of First Instance of 29 April 2004 in Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd* v *Commission* [2004] ECR II-1181 ('the judgment under appeal') set aside in part, in so far as it does not fully eliminate the 'deterrence multiplier' which the Commission applied to the fine imposed on the appellant.

2. In the judgment under appeal, the Court of First Instance reduced the fine imposed on the appellant by Commission Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement – Case COMP/E-1/36.490 — Graphite electrodes [2] ('the contested decision').

II — Relevant provisions

Regulation No 17

3. Article 15(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty [3] ('Regulation No 17') provides:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringe-

1 — Original language: English.

2 — OJ 2002 L 100, p. 1.

3 — OJ, English Special Edition 1959-62, p. 87.

ment where, either intentionally or negligently:

(a) they infringe Article [81(1)] or Article [82] of the Treaty, ...

...

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement ...'

Fining Guidelines

4. The Commission Notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3) ('the Guidelines'), states in its preamble:

'The principles outlined ... should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.'

III — Facts and background to the adoption of the contested decision

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

'1. By Decision 2002/271 ... the Commission found that various undertakings had participated in a series of agreements and concerted practices within

the meaning of Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area ("the EEA Agreement") in the graphite electrodes sector.

2. Graphite electrodes are used primarily in the production of steel in electric arc furnaces. Electric arc furnace steelmaking is essentially a recycling process whereby scrap steel is converted into new steel, as opposed to the "traditional" blast furnace/oxygen process of production from iron ore. Nine electrodes, joined in columns of three, are used in the electric arc furnace to melt scrap steel. Because of the intensity of the melting process, one electrode is consumed approximately every eight hours. The processing time for an electrode is approximately two months. There are no product substitutes for graphite electrodes in this production process.

3. The demand for graphite electrodes is directly linked to the production of steel in electric arc furnaces. The customers are principally steel producers, which account for approximately 85% of demand. In 1998, world crude steel production was 800 million tonnes, of which 280 million tonnes was produced in electric arc furnaces ...

...

5. During the 1980s, technological improvements led to a substantial decline in the specific consumption of electrodes per tonne of steel produced. The steel industry was also undergoing major restructuring in that period. The fall in demand for electrodes led to the restructuring of the world electrodes industry, with a number of factories being closed.

6. In 2001, nine Western producers supplied the European market with graphite electrodes: ...

7. On 5 June 1997, acting under Article 14(3) of Council Regulation No 17 ..., Commission officials carried out simultaneous and unannounced investigations ...

8. On the same date, Federal Bureau of Investigation (FBI) agents executed judicial search warrants at the premises of a number of producers. These investigations led to criminal proceedings for conspiracy being brought against ... SDK ... . All the accused pleaded guilty to the charges and agreed to pay fines, which were set at ... USD 32.5 million for SDK ...

...

10. Civil proceedings were filed in the United States on behalf of a class of purchasers claiming triple damages against ... SDK.

11. ... Civil proceedings were instituted by purchasers of steel in Canada in June 1998 against ... SDK for conspiracy.

12. On 24 January 2000, the Commission sent a statement of objections to the undertakings concerned. The administrative procedure culminated in the adoption, on 18 July 2001, of the Decision, in which the applicant undertakings ... are found to have been involved, on a worldwide scale, in price fixing and also in sharing the national and regional markets in the product in question according to the "home producer" principle: ... SDK ... [was] responsible for Japan and for certain parts of the Far East ...

13. Still according to the Decision, the basic principles of the cartel were as follows:

— prices for graphite electrodes should be set on a global basis;

— decisions on each company's pricing had to be taken by the Chairman/General Manager only;

— the "home producer" was to establish the market price in its home area and the other producers would "follow" it;

— for "non-home" markets, i.e. markets where there was no "home"

producer, prices would be decided by consensus;

— non-home producers should not compete aggressively and would withdraw from the other producers' home markets;

— there was to be no expansion of capacity (the Japanese were supposed to reduce their capacity);

— there should be no transfer of technology outside the circle of producers participating in the cartel.

14. The Decision goes on to state that those basic principles were implemented by meetings of the cartel, held at a number of levels: "Top Guy" meetings, "Working Level" meetings, "European group" meetings (without the Japanese undertakings), national or regional meetings dedicated to specific markets and bilateral contacts between undertakings.

...

16. On the basis of the findings of fact and the legal assessments made in the Decision, the Commission imposed on the undertakings concerned fines set according to the methodology described in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty and the Notice on the non-imposition or reduction of fines in cartel cases.

17. Article 3 of the operative part of the Decision imposes the following fines:

...

SDK: EUR 17.4 million;

...

18. In Article 4 of the operative part, the undertakings concerned are ordered to pay the fines within three months of the date of notification of the Decision, failing which interest of 8.04% will be payable.'

IV — Proceedings before the Court of First Instance and the judgment under appeal

6. Showa Denko, by application lodged at the Registry of the Court of First Instance on 4 October 2001, and other undertakings to whom the contested decision was addressed brought actions against that decision.

7. By the judgment under appeal, the Court of First Instance held, inter alia, as follows:

'...

(4) In Case T-245/01 *Showa Denko* v *Commission* [the Court]:

— sets the amount of the fine imposed on the applicant by Article 3 of Decision 2002/271 at EUR 10 440 000;

— dismisses the remainder of the application;

...'

V — The appeal

8. Showa Denko claims that the Court should:

— set aside in part the judgment of the Court of First Instance in Case T-245/01;

— reduce the amount of the appellant's fine to EUR 6 960 000 or by such amount as the Court may deem appropriate in the exercise of its discretion;

— take any other measure that the Court of Justice may deem appropriate;

— order the Commission to pay the costs.

9. The Commission contends that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

VI — The pleas in law

10. In support of its appeal, SDK puts forward four pleas in law, some of which may be further subdivided. It describes the pleas as follows: the Court of First Instance erred in law, violated the principles of non-discrimination and proportionality, and failed to give adequate reasoning, by not eliminating the arbitrary 'deterrence factor' applied to the appellant, by basing the 'deterrence factor' on the applicant's conglomerate worldwide turnover in unaffected markets, and by basing the 'basic fine' on worldwide market share and turnover, without adjusting the fine to take account of fines and liabilities in the United States.

11. The pleas are as follows:

— The first plea in law alleges error in law and failure to state reasons inasmuch as the Court of First Instance recognised that, in principle, a 'deterrence' factor, based on worldwide turnover, could be applied to the appellant.

— The second plea concerns an error in law and failure of the Court of First Instance to state reasons regarding the 'deterrence' factor applied to the appellant.

— The third plea relates to an error in law and failure to state reasons inasmuch as the Court of First Instance rejected the argument that, in calculating the 'basic' fine, the Commission was not required to take into account fines and obligations imposed on the appellant in the United States.

— The fourth plea concerns an infringement of the appellant's fundamental rights to due process.

VII — Analysis

Preliminary remarks

12. In the Opinion which I have delivered today in Case C-308/04, I have already mentioned that deterrence, as an element of gravity, is one of the factors to take into account when fixing the amount of the fine.

13. It is settled case-law [4] that fines for infringements of Article 81 EC as provided for in Article 15(2) of Regulation No 17, and now Article 23(2) of Regulation No 1/2003, [5] have as their object to punish the illegal conduct of the undertakings concerned as well as to deter both the undertakings concerned and others from violations of European competition rules in the future.

14. Today, the fact that the Commission should take account of the deterrent aspect of a fine is expressly reflected in the Guidelines too.

15. In the present case, SDK does not contend that the Commission is not entitled to ensure that fines have a deterrent effect, but it advocates certain principles, which should lead to another conclusion in its case.

16. Before dealing with the individual pleas, I shall outline the way in which the Commission fixed the fines of those participating in this cartel.

17. In the present case, the Commission fixed the fine according to the calculation method set out in the Guidelines. As is known, this encompasses several steps.

18. First, the Commission sets the basic fine. The basic fine is determined according to a combination of the gravity of the infringement and its duration. The Commission first assesses the gravity, then the duration.

19. Second, this initial amount is then modified by reference to any aggravating and attenuating circumstances applicable to each individual undertaking.

20. Third, where the ceiling of 10% of the worldwide turnover of the undertaking concerned is exceeded, the Commission brings the amount of the fine as thus calculated back within that ceiling.

21. Fourth, where the undertaking concerned qualifies for the application of the Leniency Notice, [6] the Commission will adjust the fine downwards, according to the degree of leniency.

22. For the sake of completeness, the fine may also be adjusted, depending on the

4 — Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 and 106.

5 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1, p. 1

6 — OJ 1996 C 207, p. 4.

circumstances, for reasons such as, for example, the undertaking's reduced ability to pay or the economic or financial benefit derived by the offenders (see point 5(b) of the Guidelines).

23. As regards the first step, in particular as regards gravity, the Commission considered the infringement to be a very serious one. Although in the case of a collective infringement like a cartel, where the gravity is thus similar for each participant, it is arguable that a common starting amount should be set for all the undertakings involved in the cartel, the Guidelines acknowledge that the Commission may apply differential treatment to the members of the cartel in order to take account of the effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensures that it has sufficient deterrent effect.

24. In the present case, the Commission considered it necessary to take account of the specific weight and therefore the real impact of the offending conduct, given the considerable disparity in size between the undertakings. It therefore divided the members of the cartel into three different groups in order to decide the appropriate starting amount for each group. It did so on the basis of worldwide product turnover and market share. The Commission calculated the basic fine by adding increments of EUR [x] for each [y]% increment of worldwide market. That resulted in a starting amount of the fine of EUR 40 million for the top group, EUR 16 million for the middle group and EUR 8 million for the lower group.

25. SDK was placed in the middle group. In order to ensure that the fine would have sufficiently deterrent effect, the Commission considered that the starting amount needed to be further adjusted upwards and increased it by a factor of 2.5 ('the deterrence multiplier') to EUR 40 million. That amount was increased by 45% to reflect the duration of SDK's participation in the cartel, which resulted in a basic amount of EUR 58 million. No aggravating or attenuating circumstances were found in SDK's case. After application of the Leniency Notice, the final amount of the fine was set at EUR 17.4 million.

26. The amount of the fine thus set was adjusted by the Court of First Instance. The Court of First Instance held, with regard to the weighting of 2.5 applied by the Commission to SDK's fine in order to ensure that it would have a sufficiently deterrent effect, that the Commission Decision contained no finding other than those pertaining to the undertaking's size and global resources which would justify the application to SDK of a multiplier greater than 1.5. In particular, it held that the Commission did not explain

why the circumstances of the case would require the application to SDK of a multiplier six times higher than that applied to VAW, [7] although SDK's relevant turnover for the purposes of the operation concerned was only twice VAW's. The Court of First Instance therefore applied a weighting of 1.5 instead, giving a reduced starting amount of EUR 24 million. [8]

27. The present appeal relates only to the deterrence multiplier. In essence, SDK claims that there is no justification for singling out SDK and imposing a special deterrence factor on it. It claims that conglomerate size and finances are not relevant for the calculation of any increase which is needed for deterrence.

A — *First plea in law*

28. By this plea, SDK claims that the size of the undertaking and its worldwide turnover, not the turnover attributable to the products affected by the agreement, had already been taken into account when the Commission used them as the basis for separating the basic fines into three bands. SDK claims that those factors cannot therefore justify a selective further increase. In its view the 'deterrence multiplier' can be imposed only for reasons of deterrence, and not for 'real impact'.

29. SDK maintains that in paragraphs 241, 242 and 370 of the judgment under appeal the Court of First Instance adds a number of considerations which are not mentioned in the Guidelines and none of which relates to the deterrence factor. In that regard, SDK argues, inter alia, that access to funds is unrelated to deterrence, that the Commission should not increase the fine simply on the ground that SDK has funds to pay the fine, and where some companies have difficulties raising funds to pay the fine, that could not justify a selective increase of the fine for others.

30. The Commission claims that the Court of First Instance was entitled to hold that the fine imposed on SDK could be based on its worldwide turnover.

Assessment

31. As already explained in the preliminary remarks, in order to raise awareness of the

7 — In VAW's case, too (VAW is another member of the cartel), the Commission considered it necessary to adjust the fine upwards for deterrence. VAW did not appeal against the contested decision.

8 — See paragraphs 247 to 249 of the judgment.

consequences stemming from conduct contrary to Community competition law, deterrence is an important aspect in the Commission's fining practice. Therefore, the Commission is entitled to set the basic amount of a fine at a sufficiently deterrent level.

32. Deterrence relates to the gravity of the infringement. The present case represents a very serious infringement and the Commission had set the starting amount of the fine accordingly. The Commission applied differential treatment. It divided the offenders in three groups in order to make a ranking according to real impact. Such a categorisation does not mean that full account has been taken as regards a sufficient deterrent level. For two out of eight offenders that was not the case, owing to their size and overall resources.

33. SDK claims that size relates to real impact and not to deterrence and that the Commission already took account of its size and total turnover when fixing the three categories. That however is not correct.

34. As stated above, the Commission looked at worldwide product turnover and market share for the purpose of differentiation and it looked at overall worldwide turnover as a basis for the deterrence multiplier. For the purpose of differentiation, it took the worldwide product turnover into account because product turnover better reflects the capacity of the offender to cause harm and facilitates the assessment of the impact of the conduct on competition. It took worldwide turnover as a proxy for size in order to ensure sufficient deterrence. Thus, SDK is wrong to claim that overall worldwide turnover or size had already been taken into account.

35. SDK's claim that the Commission cannot take worldwide turnover into account when assessing the deterrent effect cannot be upheld.

36. As the Court of First Instance recalled, [9] it is settled case-law that the Commission, when calculating the fine, may take into account, inter alia, the size and economic power of the undertaking concerned. The case-law has also recognised the relevance of worldwide turnover for the purpose of measuring the financial capacity of the members of the cartel. Thus, overall worldwide turnover figures may give an indication of the size and overall resources of the various undertakings participating in the cartel. [10]

9 — See paragraph 239 of the judgment under appeal.

10 — Musique diffusion française, paragraphs 119 and 121.

37. Next, it is common sense that a large undertaking with diversified resources will be in a different position from a small undertaking which relies for its existence on a single product. For a large, diversified undertaking any fine which related only to the affected market would be smaller by reference to its overall resources than would a fine for an undertaking whose products are all concerned by the cartel agreement. Thus, a like fine for the same infringement does not have the same deterrent effect.

38. The Court of First Instance acknowledged, in paragraph 241, that different financial resources may require different fines where it said that, owing to its enormous worldwide turnover by comparison with the turnovers of the other members of the cartel, SDK could more readily raise the necessary funds to pay its fine. Thus, the ability to raise funds, which differs according to the size and economic power of an undertaking concerned, may be taken into account when assessing the appropriate deterrence. The Court of First Instance did not contradict itself in the next paragraph, where is said that the mere size of an undertaking is not automatically synonymous with financial power. Indeed, larger companies too may be financially unhealthy or have a negative cash flow. The Court of First Instance concluded, however, that SDK had not indicated that it would be in such a situation; and SDK has not clearly indicated where the Court of First Instance erred in law.

39. So far as the other arguments advanced by SDK and referred to in paragraph 28 above are concerned, there is nothing in the decision or the judgment to indicate that the Commission raised SDK's fine because of the financial difficulties of certain other members of the cartel. Indeed, that would not have justified an increase in SDK's fine. Furthermore, it is not the case that because the Commission is not required to take into account reduced ability to pay, which may be taken into consideration at the end of the fine-setting procedure, the same holds true for ability to pay (the ability to raise funds), which is taken into account in the first step of the fine-setting procedure.

40. SDK also made reference to the judgment in *Parker Pen*, [11] in which the Court of First Instance said that 'an appropriate fine cannot be fixed merely by a simple calculation on the total amount'. That judgment warned against over-reliance on total turnover, as was the case in *Musique diffusion française*. However, in *Parker Pen* it was the final amount that was at stake, while what is in issue in the present case is the starting amount determined in the light of the gravity of the infringement. As the Court of First Instance said, [12] in the present case the Commission did not base the final amount of the fines on worldwide turnover alone, but took into account a whole series of factors other than turnover.

11 — Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II 549, paragraph 94.

12 — See paragraph 202 of the judgement under appeal.

B — *Second plea*

41. SDK observes that the Court of First Instance did not state any relevant criterion which could justify imposing a deterrence multiplier on SDK. In fact, the Court of First Instance failed to have regard to a number of relevant general principles which were applicable. In that regard, SDK divides its arguments into four limbs.

42. In the first limb, SDK claims that fines should be increased for deterrence only with moderation and only for specific relevant reasons which support that increase, in particular because deterrence is not mentioned in Regulation No 17. SDK notes that the Court of First Instance failed to provide a statement of reasons or explanation in that regard.

43. In the second limb, SDK claims that the multiplier is justified only in the light of a company's actual or proven attitude, not size. SDK states that no circumstances were identified as providing a reason for it to be singled out for an increased fine for the purpose of deterrence.

44. In the third limb of this plea in law, SDK observes that the economic analyses of deterrence confirm that the deterrence multiplier is arbitrary and unjustified.

45. According to SDK, if an increased fine is justified in order to deter, the fine to achieve a deterrent effect cannot be fixed arbitrarily, but should be calculated by reference to: (i) the benefits or profits that the firm could expect to obtain from the infringement if the illegal conduct remains undetected (which depends on the company's turnover affected by the infringement); and (ii) the probability of detection.

46. SDK contends that by rejecting its submission to that effect the Court of First Instance, in paragraph 242, failed to have regard to the fact that large multi-product companies – with or without 'financial' power — are not less sensitive to fines than single product companies. Economic theory indicates that large undertakings are at least as attentive to minimising legal liabilities and other costs as smaller ones.

47. SDK states that the judgment is inconsistent with the Commission's approach in other cases, where it established the amount of 'additional profits' and took them into account when setting the fine.

48. SDK also claims that it is wrong to include an increase for deterrence and later to increase the sum thus increased by reference to duration, aggravating circumstances, or anything else. In its view, the question whether deterrence is needed should be decided at the end of the calculation.

49. Finally, in the fourth limb, SDK claims that the amount of the increase was disproportionate. In that regard, it refers to its weak market share in the EEA. It further states that an analysis of the adjusted fine reveals that the fine imposed on SDK is disproportionate by comparison with that imposed on the other participants.

Assessment

50. In essence, SDK is claiming that singling out an undertaking just because of its size is irrelevant. SDK recalls that the purpose of general deterrence is to ensure that the costs and the fine are sufficiently high to discourage an infringement of the law. It argues that companies will make a rational choice, in effect carry out a balancing exercise, when breaking the law. In other words, what are the costs and profits, what are the chances of being caught? The best way to measure the profit a company can expect is to look to the size of the market (how much money is available as a result of increasing the price level in the market) and the size of its share on that market (how much money the individual company can expect). Other activities, outside the relevant market, do not form part of that analysis. Those activities do not result in extra revenues and therefore there is no need to offset those revenues in the fine. Furthermore, SDK does not agree with the alleged underlying rationale of the Commission's thinking and that of the Court of First Instance, namely that larger companies feel less and therefore should be punished harder. SDK submits that companies with a lot of different activities cannot be indifferent, because all small risks in the different activities would add up to large amounts of money.

51. In fact, SDK also contends that there are circumstances in which a large group of companies should receive a smaller fine for deterrence than a smaller company, because, for example, a large company is more likely to be sued for compensation than a small company and therefore needs less deterrence.

52. That last argument must be rejected at the outset. Even assuming that large companies will be more readily sued than smaller companies, this is an additional risk which

they run for not complying with competition rules and as such unrelated with the obligation to comply with these rules.

53. Furthermore, in relation to the first limb, SDK seems to draw a distinction between 'general deterrence' (defined by SDK as an action to discourage all companies in general, including third parties and potential infringers, from engaging in the violation in question) and 'specific deterrence' (to dissuade the specific defendant from infringing the rules again in the future) and seems to contend that only specific deterrence can justify a multiplier. However, no such distinction is made, either in the contested decision or in the judgment. SDK is not singled out because of specific deterrence. The Commission applied a multiplier to SDK and to one other member taking part in the infringement in order to express the principle that different financial resources require different fines if they are to have an equivalent deterrent effect.

54. Fines, as mentioned before, are an important tool in the hands of the Commission when it enforces competition policy. A fine has not only a retributive but also a deterrent aspect. The underlying idea is to prevent (all) undertakings from infringing the competition rules in the future.

55. Thus, the deterrent effect of the fine cannot be assessed solely by reference to the particular situations of the undertaking sanctioned.

56. That brings me to the aspect of the size of a company and deterrence.

57. It may be correct, in economic theory, that for optimal deterrence, the harm caused or the gain obtained are the relevant determinant factors, together with the chance of being caught. The fact is, however, that in reality the economic theory of optimal deterrence is hard to apply, both for the offenders as well as for the Commission in its daily practice. First of all, the calculation of the fine based on the 'gain obtained' can have a deterrent effect only if it can be assessed with absolute precision. The Commission simply lacks the necessary information to calculate the fine in that regard. The same holds true for the probability of detection and prosecution. As the Commission said, it will also be extremely difficult for a member of a cartel to express the probability of detection in quantitative terms. The calculations of (expected) gains and losses when an undertaking considers joining a cartel can be only approximations.

58. Furthermore, even if a more precise calculation is possible, it will only constitute a floor below which fines can certainly not have a deterrent effect. Thus, an upward adjustment, a safety margin, is likely to be necessary in order to avoid the risk of under-deterrence.

59. Moreover, the present cartel is not only about price-fixing, but deals with market-sharing and other forms of collusion as well (see point 13 of the judgment under appeal). That can make an assessment of the expected gain and detection even more complicated.

60. As a side issue, I observe that the very few decisions in which the Commission has referred to the 'gain obtained' by the offender highlight the difficulties in that regard. Looking at the Guidelines, it seems clear that the 'gain obtained' is not an element of the starting amount. According to the Guidelines, the Commission may take it into account as an aggravating circumstance (the 'need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement when it is objectively possible to estimate that amount' [13]) as well as a possible factor to take into account for the final adjustment of the calculation of the fine (the 'economic or financial benefit derived by the offenders' [14]). It does not do so when fixing the starting amount.

61. Second, the theory referred to by SDK [15] applies to a single offender; one offender calculating the costs, the benefits and the risk of a fine or other sanctions. As the Commission pointed out at the hearing, that theory does not take into account the complex process in the event of a collective infringement. The group dynamics requires a different approach to deterrence. For example, it may be sufficient to deter just one of the (bigger) players in order to deter the cartel. Furthermore, in the event of a collective infringement like a cartel as opposed to an infringement by a single offender, the Commission must also consider the subsequent effects of the fines and take into account the size of a given company. [16]

62. Finally, as regards the argument that larger companies do not care less about small amounts than small companies, that

13 — Section 2, fifth indent, of the Guidelines.

14 — See section 5, point (b), of the Guidelines.

15 — SDK refers to the economic theories of crime and punishment developed by G.S. Becker.

16 — The example given by the Commission is a cartel consisting of one big player and several small players. The big player cooperated with the Commission and receives immunity under the Leniency Notice. In such a case very high fines could have put the smaller players out of business, in which case the Commission's intervention would have resulted in a monopoly.

assumes, in the first place, perfect information and perfect rationality. That is hard for an individual calculating the risk involved in an offence and it is hard for the undertakings involved in a cartel too. Furthermore, it cannot be denied that there is a difference between small and large companies, in the sense that a small fine may escape the attention of the board of the parent company of the group, while a huge amount will not. A huge fine is likely to attract the attention of the board and therefore is likely to stimulate compliance with the competition rules with regard to future behaviour.

63. To conclude, the Court of First Instance did not make an error when it said, in paragraph 242 of the judgment, that 'in claiming that a just fine can seek only to make good the harm caused to the free play of competition and that it is necessary, to that effect, to evaluate the likelihood that the cartel will be discovered and also the profits reckoned on by the members of the cartel, SDK is referring to hypothetical parameters that are too uncertain for an evaluation of an undertaking's actual financial resources'.

64. As stated above, it is settled case-law that the Commission may take into consideration the size and economic power of an undertaking and that worldwide turnover figures may give an indication of the size and overall resources of the various undertakings taking part in the cartel. The Court of First Instance therefore did not err either when it said that, in order to give the fine a sufficiently deterrent effect, the Commission was entitled to apply a multiplier.

65. SDK also claims that a multiplier is justified only in the light of the company's actual and proven attitude. It was not a ringleader, it did not exert pressure on others to participate in the agreement, it had no strategy to eliminate any competition, it did not make efforts to conceal the agreements, and so on. These arguments are not relevant in this context, because such an attitude will be taken into account as an aggravating circumstance, at a later stage in the fine-setting procedure. It is not relevant to the assessment of gravity.

66. In so far as SDK claims that the fine must be increased first for reasons of duration, aggravating circumstances, or anything else and that it is only then that the fine can be increased to ensure that it has sufficient deterrent effect, that claim must be dismissed in accordance with Article 113(2) of the Rules of Procedure. It did not form part of the proceedings before the Court of First Instance.

67. In the fourth limb, SDK states that the amount of the increase was disproportionate in the light of its small market share in the EEA. It further submits that an analysis of the basic fine as adjusted reveals that the fine imposed on SDK is disproportionate by comparison with that imposed on the other participants in the agreement.

C — *Third plea*

68. As the Commission also states, that assertion is based on a comparison with the adjusted fines of the other participants and with SDK's annual turnover in the EEA. These comparisons are irrelevant. The calculations put forward are based entirely on the false premiss that SDK's economic power should have been assessed on the basis of its EEA turnover in the relevant product market.

69. In that regard, as the Court of First Instance observed, if the Commission had calculated the starting amount on the basis of SDK's low turnover in the EEA for the relevant product, it would have rewarded the Japanese producers, including SDK, for having complied with one of the basic principles of the cartel and for having agreed not to compete on the EEA market, while their conduct in accordance with that principle of the cartel enabled the home producers in Europe to fix prices in the EEA unilaterally. In doing so, the Japanese applicants, including SDK, impeded competition in the EEA regardless of their actual turnover. [17]

70. SDK claims that the Court of First Instance was not justified in holding that the Commission could, first, rely upon worldwide turnover to calculate the basic fine and the deterrence factor and, secondly, not take into account the fact that SDK had already faced proceedings in the United States, Canada and Japan and that those countries had already imposed fines on it.

71. In its view, if worldwide turnover were relevant for deterrence, a consistent application would require that fines and costs imposed in other countries be taken into account for the purpose of determining what additional fine is necessary to achieve adequate deterrence. Deterrence depends

17 — See paragraph 198 of the judgment under appeal.

on the total cost of the illegal conduct, which includes not only the fines imposed in the EEA, but also fines imposed elsewhere.

72. By ignoring fines and damages payments which the applicant had to pay in the United States and at the same time basing the deterrence factor on worldwide turnover, the Court of First Instance imposed a fine that involves double counting and is disproportionate to any justifiable deterrent effect.

73. The Commission contends that there is no infringement of the principle *ne bis in idem*.

Assessment

74. As I have already explained in my Opinion in Case C-308/04, fines imposed by authorities of third countries are imposed in respect of violations of their competition law and fines imposed by the Commission are imposed in respect of violations of Community competition law. There is no overlap with regard to jurisdiction.

75. Thus, the Commission is not required to take into account fines already imposed in third countries from the aspect of the deterrent element of the fine either.

D — *Fourth plea: fundamental rights to due process*

76. In this plea, Showa Denka submits that the Court of First Instance, in paragraph 240 of the judgment under appeal, wrongly rejected the applicant's argument relating to the chance to be heard by the Commission regarding its intention to single out SDK and to apply a deterrence multiplier. Moreover, the Court of First Instance did not provide any reasoning or explanation in that regard.

77. The Commission contends that the Court of First Instance did not fail to have regard to the applicant's rights of defence and that it gave adequate reasons for applying the multiplier to the fine.

Assessment

78. In the paragraph of the contested judgment to which SDK refers, the Court of First

Instance rejected SDK's complaint because the Commission had stated before that it proposed to 'set fines at a level sufficient to ensure deterrence', that SDK was 'plainly aware of ... Article 15(2) of Regulation No 17 and of its high worldwide turnover' and that SDK 'could infer from [the ABB decision of 21 October 1998], in which a multiplier of precisely 2.5 had been applied to [ABB], that it was not precluded that the Commission would also apply to it a multiplier of that order'. The Court of First Instance concluded that there was therefore nothing to prevent SDK from referring, during the administrative procedure, to its size and its financial resources or from expressing its views on the deterrent effect of the penalty that the Commission would take against it.

79. To my mind, it is clear that to take into account deterrence, and as the case may be to apply a multiplier in order to arrive at a fine with sufficient deterrent effect, cannot as such be considered to be a new policy. The Court of First Instance correctly referred to the wording of Article 15(2) of Regulation No 17. That implies a reference to the case law with regard to that provision as well. Since the judgment in *Musique diffusion française* it has been accepted that the Commission is required at any time to adjust the level of fines to the needs of implementation of Community competition rules within the limits laid down in Regulation No 17.

80. As may be inferred derived from the judgment of the Court of First Instance, SDK was aware that the Commission had indicated in its Statement of Objections that it proposed to set a fine at a level sufficient to ensure deterrence. That indication as such is sufficient, since it would have been inappropriate for the Commission to have given an indication of the precise amount of the fine which it proposed to fix. [18]

81. Furthermore, the Guidelines themselves stress the importance of the deterrent effect of the fine, as does the case-law of the Community Courts.

82. Therefore, the Court of First Instance did not violate SDK's rights of defence by rejecting its complaint.

18 — Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 19. See also *Musique diffusion française*.

VIII — Conclusion

83. In the light of the foregoing considerations, I propose that the Court should:

— dismiss the appeal;

— order SDK to pay the costs.