OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 19 January 2006 [1]

1. In the present appeal, the Commission is seeking 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 and Others* v *Commission* (hereinafter 'the judgment under appeal') set aside in part. The appeal is limited to Case T-239/01. [2]

2. In the action before the Court of First Instance, the Court reduced the fine which the Commission had imposed on SGL in 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). [3]

3. The Commission's pleas concern certain elements of cooperation of undertakings with the Commission in the context of the Commission's investigatory power under Regulation No 17 as opposed to voluntarily cooperation under the Leniency Notice.

I — Relevant provisions

Regulation No 17

4. Article 15 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty [4] (hereinafter 'Regulation No 17') provides:

'1. The Commission may by decision impose on undertakings or associations of under-

1 — Original language: English.
2 — [2004] ECR II-1181.
3 — OJ 2002 L 100, p. 1.
4 — OJ, English Special Edition 1959-62, p. 87.

takings fines of from 100 to 5 000 units of account where, intentionally or negligently:

...

(b) they supply incorrect information in response to a request made pursuant to Article 11(3) or (5) ...

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

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

...

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

The Guidelines

5. 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'[5] ('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.'

5 — OJ 1998 C 9, p. 3.

Leniency Notice

6. In its Notice on the non-imposition or reduction of fines in cartel cases [6] ('the Leniency Notice'), the Commission defined the conditions under which an undertaking which cooperates with the Commission during its investigation may be exempted from a fine or be granted a reduction in the amount of the fine which would otherwise have been imposed on it, as indicated in Section A, paragraph 3, of that notice.

7. Section A, paragraph 5, of the Leniency Notice provides:

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

8. Section D reads as follows:

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

2. Such cases may include the following:

— before a statement of objections is sent, an [undertaking] provides the Commission with information, documents or other evidence which 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.'

II — The facts and the background to the adoption of the contested decision

9. 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

6 — OJ 1996 C 207, p. 4.

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 SGL ... . All the accused pleaded guilty to the charges and agreed to pay fines, which were set at USD 135 million for SGL ...

...

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

11. In Canada ... In July 2000, SGL pleaded guilty and agreed to pay a fine of CAD 12.5 million for the same offence. Civil proceedings were instituted by purchasers of steel in Canada in June 1998 against SGL ... 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: UCAR and SGL were responsible for the United States; in addition, UCAR was responsible for certain parts of Europe and SGL for the rest of Europe; ...

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: SGL: EUR 80.2 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.'

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

10. SGL, by application lodged at the Registry of the Court of First Instance on 20 October 2001, and certain other undertakings to whom the contested decision was addressed brought actions against that decision.

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

'...

(2) In case T-239/01 *SGL Carbon* v *Commission* [the Court]:

— sets the amount of fine imposed on the applicant by Article 3 of Decision 2002/271 at EUR 69 114 000;

— dismisses the remainder of the application;

...'

12. In paragraphs 401 to 412, the Court of First Instance held that SGL was not obliged to answer to certain questions put by the Commission or to produce certain documents. The fact that SGL none the less provided the information requested must be regarded as voluntary collaboration and rewarded under point D, paragraph 2, first indent, of the Leniency Notice.

IV — The appeal

13. The Commission claims that the Court should:

— set aside the judgment under appeal in regard to paragraph 2 of its operative part;

— order SGL to pay the costs.

14. SGL contends that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

V — Pleas in law and main arguments

15. The Commission submits that certain findings of the Court of First Instance in paragraphs 401 to 412 violate Community law, in particular Article 15 read together with Article 11 of Regulation No 17 and the Leniency Notice. Furthermore, the contested part of the judgment contains errors on the part of the Court of First Instance in the grounds of the judgment too.

16. The Commission puts forward one plea, divided into two parts, and one alternative plea.

17. The main plea, in which the Commission questions whether certain answers to a request for information must in principle lead to a reduction in the fine, relates to:

(1) the request for information of 31 March 1999 (paragraphs 407 to 409 and the first three sentences of paragraph 410 of the judgment under appeal);

(2) the request for information of 30 June 1997 (paragraph 412 of the judgment under appeal).

18. The second, alternative, plea relates to the scope of the reduction in the fine in the event of contributions following a prior request for information (paragraph 410).

19. In short, the following arguments are submitted.

20. As regards the first part of the main plea, relating to documents, the Commission argues that it is always entitled to request production of documents and that such a request does not infringe the rights of the defence. It does not deal with questions which might involve an admission of the existence of an infringement. Thus, in paragraphs 408 and 409 of the judgment under appeal the Court of First Instance went against settled caselaw. Moreover, this approach is inconsistent with paragraphs 403, 406 and 407, in which the Court of First Instance referred to that case-law.

21. Furthermore, the Court of First Instance should have ascertained the extent to which SGL actually responded to the Commission's request to produce the documents so requested. The wording of the response, dated 8 June 1999, indicates that that is not the case. SGL replied that it did not have all the documents requested. Therefore, there is no reason for a higher reduction than that already granted. Despite the absence of documents, SGL made an effort to explain the facts. The Commission took that co-operation into account. The only answers

which the Commission did not take into account, for leniency purpose, were answers constituting a response to the formal request for information. Information which went beyond the obligation to cooperate has been taken into account.

22. SGL submits that the whole of its statements in the memorandum of 8 June 1999 as well as the responses to the request for information of 30 June 1997 should be qualified in full as cooperative, since no distinction can be drawn between an explicit admission of an infringement and elements or production of documents containing evidence. In its view there is an absolute right to remain silent.

23. In case the Court should not follow this point of view, SGL argues that the judgment under appeal is consistent with the case-law in any event.

24. As regards the second part of the plea, concerning the request for information of 30 June 1997, the Commission submits that paragraph 412 of the judgment contains a number of errors too. The Court of First Instance appears to attribute to the Commission a view which it has never itself expressed. The Commission emphasised that it did not reward SGL less because SGL had failed to name all the companies it had warned, but rather that it did not reward SGL more, because the answer actually given by SGL did not go beyond SGL's obligation to cooperate under Article 11 of Regulation No 17. Furthermore, only contributions which enabled the Commission to establish the infringement with less difficulty may lead to a reduction in the fine.

25. SGL agrees with the findings of the Court of First Instance. In its submission, there is no legal basis for a request for information given the fact that warnings to other cartel members are not constitutive elements of an infringement of Article 81(1) EC. Article 11 of Regulation No 17 does not confer on the Commission the power to put such questions. In the event that warning other cartel members may qualify as an aggravating circumstance, the admission on its part must be qualified as cooperative. In any event, the Court of First Instance correctly held that it was not obliged to answer.

26. Finally, the Commission contends that the Court of First Instance held that a contribution in response to a request for information gives rise to the same reduction as a spontaneous contribution. In that regard, according to the Commission, the Court of First Instance denied that a reduction of the fine can be granted only in respect of a contribution which made the Commission's task easier. It is evident that that

applies a fortiori if the contribution is spontaneous, because it occurs at an early stage and therefore saves the Commission from taking certain investigative measures, such as drafting a request for information.

27. The comparison made by the Court of First Instance with point C of the Leniency Notice does not support the opinion of the Court of First Instance, but that of the Commission. The view that a contribution in response to a request for information should be rewarded in the same way as a spontaneous contribution is incompatible with this Notice. If the Court of First Instance considers that both situations should be treated in the same way, it infringed Article 15 of Regulation No 17 in conjunction with the Leniency Notice.

VI — The relevant parts of the judgment

28. In the first part the Court of First Instance began as follows:

— it pointed out that the absolute right to silence could not be recognised, that that would be to go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance of the Commission's performance of its duty to ensure that the rules on competition within the common market are observed. Furthermore it recalled that a right to silence can be recognised only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (paragraph 402);

— it recalled the case-law in which it is said that in order to ensure the effectiveness of Article 11 of Regulation No 17, the Commission is entitled to compel the undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, even if the latter may be used to establish the existence of anti-competitive conduct and that this power of the Commission to obtain information does not fall foul of either Article 6 of the European Convention on Human Rights (hereinafter 'ECHR') or the case-law of the European Court of Human Rights (paragraphs 403 and 404);

— it then remarked that although the Court of Justice had held in *Limburgse*

Vinyl Maatschappij and Others [7] that after the judgment in Case 374/87 *Orkem* v *Commission* [8], the case-law of the European Court of Human Rights had gone through new developments with the *Funke* judgment, the *Saunders* v *United Kingdom* judgment and the *J.B.* v *Switzerland* judgment, the Court of Justice did not reverse its previous case-law in *LVM* (paragraph 405);

— finally, it concluded that the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its request for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to a fair legal process, which offer, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 of the Convention (paragraph 406).

29. It continued as follows:

— to the extent to which SGL was required to reply, in accordance with the case-law referred to above, to the request for information of 31 March 1999, it must be observed that, in addition to the purely factual questions and the requests to produce documents already in existence, the Commission had requested SGL to describe the object of and what occurred at a number of meetings in which SGL had participated and also the results/conclusions of those meetings, when it was clear that the Commission suspected that the object of the meetings was to restrict competition. It followed that a request of that nature was of such a kind as to require SGL to admit its participation in an infringement of the Community competition rules (paragraph 407).

30. In the following paragraphs, however, which form the object of the present appeal, the Court of First Instance said:

'408 The same applies to the requests for the protocols of those meetings, the working documents and the preparatory documents concerning them, the handwritten notes relating to them, the notes and the conclusions pertaining to the meetings, the planning and discussion documents and also the implementing projects concerning the price increases put into effect between 1992 and 1998.

409 As SGL was not required to answer questions of that type in the request for

7 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375.

8 — [1998] ECR 3283.

information of 31 March 1999, the fact that it none the less provided information on those points must be regarded as voluntary collaboration on the part of the undertaking apt to justify a reduction in the fine under the Leniency Notice.

410 That conclusion cannot be affected by the Commission's argument that the information in question was not provided voluntarily but in reply to a request for information. Point D, paragraph 2, first indent, of the Leniency Notice does not require a voluntary act taken solely on the initiative of the undertaking concerned, but merely requires information which contributes to establishing the existence of the infringement. Even point C, moreover, which relates to a more substantial reduction in the fine than that referred to in point D, makes it possible to reward cooperation provided "after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel". Accordingly, the fact that a request for information was sent to SGL under Article 11(1) of Regulation No 17 cannot minimise the cooperation provided by that undertaking under point D, paragraph 2, first indent, of the Leniency Notice, especially not as a request for information is a less coercive measure than an investigation ordered by decision.

411 It follows that the Commission failed to appreciate the importance of SGL's cooperation in that context.'

31. So far as the request for information related to the warning calls is concerned, the Court of First Instance held:

'412 In so far as the Commission criticises SGL for having given an incomplete answer to the question as to which undertakings SGL had informed of the forthcoming investigations by the Commission in June 1997, it is true that, by letter of 30 July 1997, SGL admitted only to having informed VAW and another undertaking and failed to state that it had also informed UCAR. However, the Commission itself stated that SGL's warning increased the gravity of the infringement, gave rise to a fine whose deterrent effect was greater than normal and justified being regarded as an aggravating circumstance, as SGL's conduct had created the conditions necessary to keep the cartel active and to prolong its injurious effects. Consequently, SGL was not required to inform the Commission that it had warned other undertakings. That information was likely to increase the penalty which the Commission would impose on SGL. On this point too, therefore, the Commission failed to appreciate SGL's conduct by criticising it for having provided an incomplete reply.'

VII — Legal analysis

32. As stated above, the Commission's appeal relates in particular to paragraphs 408, 409, 410 and 412.

33. In its decision the Commission granted SGL a reduction of 30%, on the basis of the first indent of Section D(2) of the Leniency Notice, in the fine that it would otherwise have imposed on SGL. As mentioned in the judgment under appeal, it is the Commission's view that 'an undertaking deserves a reduction in its fine only if the cooperation is "voluntary" and is outside the exercise of "any investigatory power": the Commission considered that a substantial part of the information provided by SGL in fact constituted SGL's reply to the Commission's formal request for information and that SGL's statement would be regarded as a voluntary contribution within the meaning of the Leniency Notice only where the information provided went beyond that requested under Article 11'. Furthermore, SGL sent its statement of 8 June 1999 only after it had received a reminder in which the Commission reserved the right to adopt a formal decision under Article 11(5). [9]

34. In the procedure before the Court of First Instance, SGL claimed that the Commission undervalued its cooperation in the context of the Leniency Notice. It submitted that it was not required to reply to certain questions in the Commission's request for information as it would otherwise have had to incriminate itself. It argued that in the light of the case-law of the European Court of Human Rights it was even entitled to object to any contribution to the establishment of its own guilt.

35. The Court of First Instance held that the Commission had failed, on a number of points, to appreciate the significance of the cooperation provided by SGL and it therefore reduced the fine.

36. After recalling settled case-law (paragraphs 402, 403 and 404), the Court of First Instance first dealt with the request for information of 31 March 1999 (paragraphs 407, 408 and 409) and then with the request for information of 30 June 1997 (paragraph 412).

37. The request for information of 31 March 1999 concerned questions about meetings held among competitors in the graphite electrodes sector. The Commission asked, inter alia, for a description of the object of and what had occurred at a number of meetings in which SGL had participated and the results/conclusions of those meetings.

9 — See recital 173 of the Commission Decision, quoted in part in paragraph 401 of the judgment.

Furthermore, it asked for the production of certain documents, inter alia, copies of the convocations, agenda, lists of participants, handwritten notes, working documents, preparatory documents, planning documents, implementing documents concerning price increases during a given period. [10]

38. In its request for information of 30 June 1997, the Commission, after stating that it had gathered from another company that that company had been warned by SGL about possible forthcoming investigations, asked whether SGL had received this information from a company active in the sector concerned, and if so, the name of that company. By its second question, the Commission asked for the names of the companies to whom SGL had given this warning. [11]

The request of 31 March 1999

39. In the procedure before the Court of First Instance the Commission accepted that the question relating to the object and what had occurred at a number of meetings went beyond what it was entitled to ask on the basis of Article 11 of Regulation No 17. This finding does not form part of the present appeal.

40. Thus, the Court of First Instance found in paragraphs 407 to 409 and in paragraph 412 of the judgment under appeal that SGL's responses to the requests for information addressed to it pursuant to Article 11(2) of Regulation No 17 entitled that company – contrary to the view expressed by the Commission in the Decision — to a reduction in its fine, in accordance with the Leniency Notice.

41. Furthermore, the Court of First Instance rejected the Commission's argument that any reduction because of SGL's replies would in any event have to be smaller than would have been the case had the undertaking itself made a voluntary disclosure (see paragraph 410).

42. The Commission submits that the passages cited are defective in law and that the judgment is to that extent at variance with Article 15 in conjunction with Article 11 of Regulation No 17 and with the Leniency Notice. Furthermore, the grounds are defective as well (self-contradictory) and as such constitute a further error in law.

10 — SGL replied by letter of 25 May 1999 (answering questions 8 to 10, relating to turnover figures and sales figures) and by a statement of 8 June 1999 (indicating that it was not obliged to answer questions 1 to 5 and 7 in part and that it should therefore be regarded as acting voluntarily. In the statement a description of the meetings is given and attached to it are those documents which were existing and in its possession).

11 — SGL answered by letter of 30 July 1997. Before answering the second question, it contested the legal basis and referred to its rights of defence.

43. Although this plea is submitted in the context of the application of the Leniency Notice, it concerns in particular the findings of the Court of First Instance regarding the extent of the right of undertakings not to incriminate themselves.

44. It is well known that it is the Commission's task to investigate and punish infringements of the competition rules of the EC Treaty. It order to carry out its task, the Commission may, according to Article 11(1) of Regulation No 17, require all necessary information. First it has to ask for that information by means of a simple formal request for information (Article 11(2)), and where an undertaking does not comply with this request by means of a formal decision (Article 11(5)). [12]

45. In the well-known *Orkem* case, [13] in which the Court of Justice had to appraise the Commission's investigatory powers in the light of the rights of defence, the Court established that companies have an obligation to cooperate actively with the investigative measures.

46. The duty actively to cooperate with the Commission, however, does not mean that the undertaking must incriminate itself by admitting to infringements of the competition rules.

47. In that regard, the Court of Justice drew a distinction between providing answers to questions on the one hand and producing documents on the other hand. As to the former, the Court of Justice drew a further distinction. It held that the Commission has a power to compel an undertaking to answer questions of a factual nature, but that it does not have the power to compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement. It is the latter aspect against which an undertaking can invoke its right to remain silent as part of its rights of defence. As regards documents, the Court of Justice did not limit the Commission's investigatory power. The undertaking concerned must disclose documents that already exist and relate to the subject-matter of the investigation, even if these documents may be used to establish the existence of an infringement, if requested to do so. [14]

48. Next, in order to detect some of the most serious cartels the Commission developed a leniency policy. This policy is laid

12 — This two-stage process is abandoned in Regulation No 1/2003. Under Article 18 of that regulation the Commission can choose at the outset to demand information from undertakings by decision.

13 — Cited above; see paragraphs 22 and 27.

14 — See paragraphs 34 and 35.

down in the so-called Leniency Notice. In exchange for cooperation (providing relevant information, evidence) a reduction in the fine — depending on the degree of leniency — may be granted.

49. It must be noted that the leniency policy does not involve any compulsion. On the contrary, it is based on voluntary cooperation. Therefore, a reduction in the fine in return for cooperation is compatible with the rights of the defence and in particular with the right not to incriminate oneself. [15]

50. Furthermore, a reduction in the fine will be granted for a contribution during the administrative procedure only if that contribution enabled the Commission to establish an infringement with less difficulty and, where appropriate, to put an end to that infringement. [16]

51. In the present appeal the Commission claims that the information requested on the basis of Article 11(2) of Regulation No 17 fulfilled the *Orkem* criteria and could not be regarded as cooperation in the sense of the Leniency Notice.

52. Thus, the question of law is whether SGL's reaction to the Commission's request should be qualified as voluntary cooperation or as complying with an obligation. [17] Therefore, the first step is to examine the nature of the questions put by the Commission. In other words, could the Commission have obtained the requested information on the basis of Article 11(5) of Regulation No 17? If the answer is in the affirmative, the information given by the undertaking concerned simply corresponds with a duty to comply with its obligations under Article 11 of Regulation No 17. Such 'cooperation' does not amount to cooperation in the sense of the Leniency Notice. If, however, the answer to this question is in the negative, and the undertaking concerned none the less provides the information, its conduct should be regarded as cooperation in the sense of the Leniency Notice.

53. As a side step, I remark that in the event that an undertaking contacted the Commission expressing its willingness to cooperate, it might be the case that the Commission needs further information over and above that already provided by the undertaking concerned. The Commission may obtain that

15 — Case C-57/02 P *Acerinox* [2005] ECR I-6689, paragraphs 87 to 89.

16 — See Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36. See in the context of the Leniency Notice the judgment of 28 June 2005 in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri* [2005] ECR I-5425, paragraphs 395 and 396.

17 — Legally speaking, an undertaking is not obliged to answer an Article 11(2) request. However if an undertaking refuses to answer, the Commission is by an Article 11(5) decision to require the information to be supplied. There are penalties for non-compliance. Thus, the end result is an obligation to comply with the Commission's request.

information by means of a written request. It is self-evident that such requests and the replies thereto should be taken into account in the overall appreciation of the cooperative attitude of the undertaking concerned under the Leniency Notice.

54. In order to evaluate whether a reduction in the fine was conceivable, the Court of First Instance carried out the abovementioned test. It examined whether SGL was obliged to produce the documents requested.

55. In examining whether the request for information contains questions which the Commission was not entitled to demand on the basis of Article 11(5) of Regulation No 17, the Court of First Instance correctly observed that the question concerning the object and result of certain meetings was inadmissible. A reply to such questions would inevitably amount to self-incrimination. As stated above, the Commission acknowledged that before the Court of First Instance. That finding does not form part of the present appeal.

56. The Court of First Instance then went on to observe that the same holds true for specific documents. It considered that the request to produce those documents was of such a kind as to require SGL to admit its participation in an infringement of the Community competition rules. Thus, it appears to have drawn a distinction between 'admissible' and 'non-admissible' documents. In other words, because the Commission could not compel SGL to answer the questions on the object and results/outcome of those meetings, it could not ask for the documents relating to them either.

57. In my view this assessment is wrong, or at least defective, for three different reasons.

58. First, as the information dealt with in paragraphs 408 and 409 concerns 'documents' and not a request for 'answers', the Court of First Instance failed to establish the distinction drawn in the case-law between documents on the one hand and answers to questions on the other. At least, it did not apply the principles laid down in that case-law to the facts of the case.

59. Second, as the Commission rightly pointed out, the reasoning of the Court of First Instance is inherently contradictory. In the first place, the Court of First Instance explicitly restated the principles laid down in *Orkem* and its own judgment in *Mannesmannröhren-Werke*. [18] Thus, in para-

18 — Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729.

graphs 403, 406 and 407 it refers to settled case-law, but then, in paragraph 408 it goes against that case-law. That case-law has been confirmed many times, most recently in the so-called '*alloy surcharge*' cases. [19]

60. The Court of Justice, indeed, observed in *Limburgse Vinyl Maatschappij and Others*, also known as *PVC II* [20], that after the judgment in *Orkem* the case-law of the European Court of Human Rights had further evolved with the *Funke* judgment, the *Saunders* v *United Kingdom* judgment and the *J.B.* v *Switzerland* judgment. It none the less saw no reason to reverse its previous case-law, as the Court of Instance itself observed. [21] Therefore, the findings of the Court of First Instance are clearly inconsistent with the existing case-law. Moreover, for this fact, which is remarkable in itself, one looks in vain for any special reasoning in the relevant paragraphs of the judgment.

61. Thus, although the Court of First Instance concluded that there was no reversal of established case-law in *LVM*, it none the less arrived at a different result. No ground for that is to be found in the judgment under appeal. As stated above, it is also contradictory. On those grounds alone, the finding of the Court of First Instance in paragraph 408 should be set aside.

62. The Court of Justice attaches great value to the case-law of the European Court of Human Rights. It is also true that, given the ground of appeal alleging infringement of the privilege against self-incrimination, the Court of Justice did not really have to deal with this issue in that case. [22] In a more general way, it might be asked whether there are reasons at all to change the case-law established in *Orkem* and hitherto followed in the light of the more recent case-law of the European Court of Human Rights. I shall explain that, in my view, there are no cogent reasons.

63. First, it must be borne in mind that that case-law concerned natural persons in the context of 'classical' criminal procedures. Competition law concerns undertakings. The Commission is only allowed to impose fines on undertakings and associations of undertakings for violations of Articles 81 EC and 82 EC. It is not possible simply to transpose the findings of the European Court of Human Rights without more to legal persons or undertakings. [23] In that regard, I would refer to other jurisdictions in which the right not to incriminate oneself is

19 — *Acerinox*, paragraph 86, Joined Cases 65/02 P and C-73/02 P *ThyssenKrupp* v *Commission* [2005] ECR I-6773, paragraph 49.

20 — Cited in footnote 7.

21 — See paragraph 405.

22 — LVM, paragraphs 274 to 276.

23 — In some Member States, the authorities may according to their national law also impose other types of sanctions, such as imprisonment for directors or managers responsible for their companies' violation of Articles 81 EC and 82 EC. It can be expected that corresponding stronger procedural rights and guarantees will exist.

reserved solely to natural person and cannot be invoked by legal persons. [24] Thus, in the United States companies cannot invoke the Fifth Amendment to the United States Constitution. The Fifth Amendment clause states that 'no person shall be compelled to be a witness against himself in any criminal case'. This right or privilege against self-incrimination is a personal one. It applies to individual human beings only. A corporation cannot plead the Fifth Amendment in order to keep silent. In other words, a corporation has to produce documents if requested to do so.

64. Second, there is no dispute that the European Court of Human Rights extended certain rights and freedoms to companies and other corporate entities. The same is true under Community law and under the Charter of Fundamental Rights of the European Union. That being said, the European Court of Human Rights also makes a distinction between the level of protection conferred on natural persons on the one hand and legal persons on the other. That may be inferred from other fundamental rights in the Convention, such as Article 8. For example in *Niemietz* [25] the European Court of Human Rights indicated that the protection of business premises may be less than is the case for private homes. The Court ruled that 'home' may extend to a professional person's office and that such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to interfere to the extent permitted by paragraph 2 of Article 8. That judgment is later confirmed in *Colas Est.* [26] In that judgment, the European Court of Human Rights held, as in *Niemietz*, that in certain circumstances the rights guaranteed by Article 8 may be construed as including the right to respect for a company's registered office, branches or other business premises. Consequently, in accordance with that case-law, the Court of Justice held in *Roquette Frères* [27] that '[F]or the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises [reference to *Colas Est*, § 41] and, second, the right of interference established by Article 8(2) of the ECHR might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case [reference to *Niemietz*, § 31]'.

65. Third, what is decisive, however, so far as Article 6 of the Convention is concerned, is

24 — Supreme Court United States v Whit 322 U.S 694(1944).

25 — Judgment of 16 December 1992, Series A no. 251-B.

26 — Judgment of 16 April 2002 *Colas Est and Others* v *France*, No 37971/97 ECHR 2002-III.

27 — Case C-94/00 *Roquette Frères* [2002] ECR I-9011, see paragraph 29.

that a request for documents is not contrary to the right to remain silent. The European Court of Human Rights did not recognise an absolute right to remain silent. It held in *Saunders* that '[t]he right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, *documents* acquired pursuant to a warrant, breath, blood and urine samples and bodily tissues for the purpose of DNA testing.'[28] That finding has been recently confirmed in *J.B.* v *Switzerland.*

66. Thus, the right not to make self-incriminating statements does not extend to information which exists independently of the will of the suspect such as, inter alia, documents. The production of those documents may be requested and they may be used as evidence. In that regard, I would refer in particular to documented information relating to and used in the internal processing and decision-making of an undertaking, such as, for example, marketing or pricing strategies. Such information, available for internal use, may be requested. Possibly, it may reveal the likelihood of a cartel or concerted practice, but that as such is not self-incriminating. It is still possible to rebut that likelihood. To go further would be to take away the objective element of the Courts' case-law, which would disturb the balance of enforcement.

67. Lastly, it must be said that the interplay between the fundamental rights of legal persons and competition enforcement remains a balancing exercise: at stake are the protection of fundamental rights versus effective enforcement of Community competition law. As the Court of Justice held in *Eco Swiss*,[29] Article 81 EC is a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. Article 81 EC forms part of public policy. If the Commission is no longer empowered to request the production of documents its enforcement of competition law in the Community legal order will become heavily dependent on either voluntary cooperation or on the use of other means of coercion as for example dawn raids. It is self-evident that the effective enforcement with reasonable means of the basic tenets of the Community public legal order should remain possible, just as it is evident that the rights of the defence should be respected too. In my view, the latter is the case. As case-law now stands, a defendant is still able, either during the

28 — § 69 (emphasis added).

29 — See Case C-126/97 *Eco Swiss China Time and Benetton International* [1999] ECR I-3055.

administrative procedure or in the proceedings before the Community courts, to contend that the documents produced have a different meaning from that ascribed to them by the Commission.

Request for information of 30 June 1997

70. So far as the request for information of 30 June 1997 is concerned, that is to say the second question in which SGL is requested to name the undertakings it had warned, the following remarks may be useful.

68. In the present case, the documents concerned were existing documents which, ultimately, could be requested by means of an Article 11(5) decision and which an undertaking was required to produce if they were in its possession.

71. The Commission submits that, according to paragraph 412 of the judgment under appeal, it seems that the Court of First Instance was of the opinion that the Commission's objective was to secure an admission of an infringement and therefore, in accordance with *Orkem*, SGL was covered by the rights of defence and consequently, on the basis of the Leniency Notice, it was entitled to a reduction in its fine.

69. Thus, in my view, as the Court of First Instance erred in law, there is no reason for a reduction under the Leniency Notice either. As the Commission stated in the contested decision, it did not make recompense for the information which it considered that SGL was required to provide in reply to a request for information. It took account of the information provided by SGL which went beyond what was requested on the basis of Article 11(2) of Regulation No 17. However, in reducing SGL's fine, the Court of First Instance took also into account the question concerning the request to describe the object and results of a number of meetings. Since the Commission admitted that that part of the request was inadmissible, it never could have taken that part into account when setting the fine.

72. The Commission contends that the question which it asked did not go beyond its investigatory power, and thus that the reply given did not go beyond that requested under Article 11 of Regulation No 17. Consequently, there was no reason for a reduction under the Leniency Notice. Furthermore, a second reason not to give a reduction pursuant to the Leniency Notice is that the SGL's answer was incomplete and misleading.

73. The Commission submits that the question at issue is not a question resulting in an admission of an infringement. In that regard, the Commission observes that the Court of First Instance itself held that the warnings given did not constitute an infringement of Article 81 EC. According to the Commission, the question is whether the answer would lead to the conclusion that there was an infringement in such a way that the undertaking was exposed to a sanction solely on the ground of this answer. In the Commission's view the answer is in the negative. The fact that the warnings are regarded as an aggravating circumstance does not effect that conclusion. In order to draw that conclusion, the Commission must first of all establish that there is an infringement. The information concerning the warnings cannot replace that.

74. Furthermore, still according to the Commission, the Court of First Instance made an error in logic. The fact that the Commission regarded the warnings as an aggravating circumstance is not part of the establishment of the constitutive elements, but the exercise of the Commission's discretionary power in its fining policy. If the logic of the Court of First Instance were to be followed, the result would be that if the Commission had decided not to adjust the fine on account of an aggravating circumstance, it would have been able to put the question.

75. As I have already explained in my opinion in Case C-308/04 P, the Court of First Instance correctly concluded that the fact that SGL had warned other undertakings of the forthcoming investigations did not constitute a specific and autonomous infringement, but conduct which added to the gravity of the initial infringements and therefore might be taken into account as an aggravating circumstance when setting the fine.

76. Thus, it is true that that conduct does not constitute in itself an infringement and it is true that before the Commission can take it into account as an aggravating circumstance it first has to prove the initial infringement. However, that conduct is still an element which may lead to an increase in the fine and the Commission must therefore make a reasonable case for it. The fact that the Commission has a discretionary power in setting the fine makes no difference. It has that discretion in relation to the initial infringement too, but this does not alter the issue whether a certain question invites a response of a self-incriminating character.

77. Consequently, as the Court of First Instance correctly observed in point 412 of the judgment, SGL was not required to inform the Commission that it had warned other undertakings. While the Commission may put a question concerning these warnings, the Commission could never have

compelled SGL to answer it. Contrary to the Commission's contention, this question does not concern facts of an objective kind.

78. However, it should be remarked that, although SGL was not obliged to answer this question, it did answer it, but in an incomplete and misleading way. It cannot be said that that conduct reveals a spirit of cooperation and the judgment contains an error on that point. In that regard, I simply refer to recent case-law in which the Court of Justice held that a reduction under the Leniency Notice can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate genuine cooperation on its part and that it is clear from the very concept of cooperation, as described in the Leniency Notice, and in particular in the introduction to section D, point 1, that it is only where the conduct of the undertaking concerned reveals such a spirit of cooperation that a reduction may be granted on the basis of that notice. [30]

79. For that reason there is no ground for a reduction on the basis of Section D, point 1, of the Leniency Notice.

Final remarks and solution

80. As regards the relationship between 'cooperation' under Regulation No 17 and voluntarily cooperation under the Leniency Notice, as well as the consequences on the fine, it follows from the remarks I made in that regard and from the case-law that:

— in principle an undertaking has a duty to cooperate with the Commission under Regulation No 17 (see *Orkem*);

— where an undertaking limits its cooperation to that which it is required to provide under Regulation No 17 (now Regulation No 1/2003), that limitation can never amount to an aggravating circumstance and thus constitute a ground for an upward adjustment of the fine; [31]

— where an undertaking replies to a request for information pursuant to Article 11 of Regulation No 17 which

30 — See in that regard the judgment in *Dansk Rørindustri*, cited in footnote 16, paragraphs 388 to 403.

31 — See *Dansk Rørindustri*, cited in footnote 16, paragraph 352.

goes beyond the Commission's investigatory powers (where the questions are such that the Commission cannot compel the undertaking to answer them), that reply may be regarded as cooperation under the Leniency Notice;

— an undertaking may receive favourable treatment under the Leniency Notice if it reveals a spirit of cooperation and if that cooperation allowed the Commission to establish an infringement with less difficulty, and where appropriate to put an end to it.

81. It is clear from the foregoing considerations that the judgment under appeal is vitiated by errors of law. Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may itself then give final judgment in a matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

82. In my view the conditions in order to give a final judgment are fulfilled. Basically, the Court of First Instance awarded SGL an extra reduction of 10% under the first and second indents of Section D(2) of the Leniency Notice, as it did in the case of certain other members of the cartel, [32] but subsequently reduced it by 2% to 8%, due to SGL's attitude. [33] Thus, as part of the 10% must be ascribed to the second indent of point D(2), it follows from the judgment that reducing the reduction by 2% is connected with that part too. The other part of the reduction was intended to reward SGL's replies to the question put by the Commission, which was held to have gone beyond the Commission's competence and therefore qualified by the Court of First Instance as cooperative conduct under the Leniency Notice. In fact, as explained before, see point 69 above, only a minor part of the question put by the Commission went beyond what it could have compelled the undertaking concerned to answer. That amounts to roughly 1/5 of the information requested and at issue. Therefore, it seems to me that a total reduction of 4% in addition to the 30% granted by the Commission is justified. That means that the fine must be set at EUR 75.7 million.

32 — According to the Commission Decision (see recital 41), none of the members of the cartel substantially contested the facts on which the Commission based its Statement of Objection. The reduction granted to SGL, UCAR, C/G and VAW, however, was only based on the first indent of Section D(2). The Commission argued before the Court of First Instance, although it admitted it erroneously did not mention the second indent of that Section, that the reduction it granted covered both indents of Section D(2). The Court of First Instance held that it should have been mentioned in the decision (see paragraph 415 of the judgment). Consequently, the Court of First Instance granted further reductions of 10%, 10% and 20% respectively (VAW did not appeal) covering a correction under both the first and second indent of Section D(2) of the Leniency Notice: a re-appreciation of cooperative conduct under the first indent and an appreciation for not contesting the facts under the second indent.

33 — See paragraph 418 of the judgment under appeal.

VIII — Conclusion

83. In the light of the foregoing observations, I propose that the Court should rule as follows:

— the judgment of the Court of First Instance of 29 April 2004 in Case T-239/01 is set aside;

— the amount of the fine is set at EUR 75.7 million

— SGL is ordered to pay the costs.