JUDGMENT OF THE COURT (Second Chamber)

29 June 2006 *

In Case C-289/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice lodged on 30 June 2004,

Showa Denko KK, established in Tokyo (Japan), represented by M. Dolmans and P. Werdmuller, advocaten, and J. Temple-Lang, Solicitor,

appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by P. Hellström and H. Gading, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

Tokai Carbon Co. Ltd, established in Tokyo,

SGL Carbon AG, established in Wiesbaden (Germany),

Nippon Carbon Co. Ltd, established in Tokyo,

GrafTech International Ltd, formerly UCAR International Inc., established in Wilmington (United States),

SEC Corp., established in Amagasaki (Japan),

The Carbide/Graphite Group Inc., established in Pittsburgh (United States),

applicants at first instance,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), P. Kūris, G. Arestis and J. Klučka, Judges,

Advocate General: L.A. Geelhoed,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 15 September 2005,

after hearing the Opinion of the Advocate General at the sitting on 19 January 2006,

gives the following

Judgment

1 By its appeal, Showa Denko KK ('SDK') applies for the judgment of the Court of First Instance of the European Communities 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 and Others* v *Commission* [2004] ECR II-1181 ('the judgment under appeal') to be set aside in part, inasmuch as it sets the amount of 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 (OJ 2002 L 100, p. 1) ('the contested decision') at EUR 10 440 000.

Legal context

Regulation No 17

2 Article 15 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provides:

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

3 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.'

European Convention for the Protection of Human Rights and Fundamental Freedoms

4 Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, provides as follows:

'Right not to be tried or punished twice

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

No derogation from this Article shall be made under Article 15 of the Convention.'

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/EC ... 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 [of 2 May 1992 (OJ 1994 L 1, p. 3) ("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 at the premises of [certain graphite electrode producers].

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 [contested] [d]ecision, 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 [contested] [d]ecision, 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 [contested] [d]ecision 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 [contested] [d]ecision, 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 [contested] [d]ecision 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 [contested] [d] ecision, failing which interest of 8.04% will be payable.'

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

6 SDK and other undertakings to which the contested decision was addressed brought actions for annulment of that decision before the Court of First Instance.

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;

...'

Forms of order sought before the Court

8 SDK claims that the Court should:

— set aside in part the judgment under appeal;

— 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.

The appeal

10 SDK puts forward four pleas in support of its appeal, namely that the Court of First Instance (i) was wrong to apply a 'deterrence multiplier' based on worldwide turnover; (ii) misapplied the criteria for determining the 'deterrence multiplier'; (iii) erred in law and failed to state the grounds for taking into account fines and obligations imposed on the appellant in non-member States; and (iv) infringed the appellant's fundamental rights to due process.

First plea: application of a 'deterrence multiplier' based on worldwide turnover

Arguments of the parties

11 SDK claims that the size of the undertaking and its worldwide turnover, not the turnover attributable to the products affected by the agreements between the parties to the cartel, had already been taken into account by the Commission when it established three categories of basic fines which it intended to impose on the different undertakings in question. Those factors cannot therefore justify a selective further increase in the fine. Moreover, the 'deterrence multiplier' can be imposed only for reasons of deterrence.

12 SDK takes the view that in paragraphs 241, 242 and 370 of the judgment under appeal the Court of First Instance failed to set out the theory that the worldwide turnover of the group and not that affected by the agreements between undertakings

must be taken into account in calculating the 'deterrence multiplier'. The Court set out a number of considerations which are not mentioned in the Guidelines and none of which relates to the deterrence factor.

13 The Commission claims that the Court correctly held, in paragraphs 241 and 242 of the judgment under appeal, that the fine imposed on the appellant could be based on its worldwide turnover.

14 The Commission notes that the Court held that large undertakings generally have greater financial resources and better knowledge of competition law than smaller undertakings. The Court therefore relied on the rule that an infringement committed by an undertaking with vast financial resources may, in principle, be sanctioned by a fine proportionately higher than that imposed on an undertaking committing the same infringement without such resources.

Findings of the Court

15 It should be stated as a preliminary point that, as the Advocate General noted in paragraphs 24 and 34 of his Opinion, the worldwide turnover was taken into account by the Commission only for the purposes of fixing the 'deterrence multiplier'. On the other hand, to fix the basic amount of the fine, the Commission took account only of worldwide turnover in respect of the products covered by the cartel.

16 It should be noted that 'deterrence' is one of the factors to be taken into account in calculating the amount of the fine. It is settled case-law (see, in particular, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 105 and 106) that the fines imposed for infringements of Article 81 EC and laid down in Article 15(2) of Regulation No 17 are designed to punish the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other operators from infringing the rules of Community competition law in future. Accordingly, when the Commission calculates the amount of the fine it may take into consideration, inter alia, the size and the economic power of the undertaking concerned (see *Musique Diffusion française and Others* v *Commission*, paragraphs 119 to 121).

17 It should be added that, as the Court of First Instance noted in paragraph 239 of the judgment under appeal, the Court of Justice has recognised in particular the relevance of taking into account the overall turnover of each undertaking participating in a cartel in fixing the amount of the fine (see, to that effect, Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 85 and 86, and Case C-57/02 P *Acerinox* v *Commission* [2005] ECR I-6689, paragraphs 74 and 75).

18 In those circumstances, the Court of First Instance was justified in taking the view, in paragraph 241 of the judgment under appeal, that, owing to its 'enormous' worldwide turnover by comparison with the turnovers of the other members of the cartel, the appellant could more readily raise the necessary funds to pay its fine, which, if the fine was to have a sufficiently deterrent effect, justified the application of a multiplier.

19 SDK's first plea must therefore be rejected.

Second plea: application of the 'deterrence multiplier'

20 SDK submits that the Court of First Instance did not state any relevant criterion which could justify the manner in which the 'deterrence multiplier' was applied to it. That second plea is divided into four limbs.

First limb: criteria for the increase in fines

— Arguments of the parties

21 SDK claims that the fines should have been increased for deterrence only with moderation and only for relevant reasons. In the present case, there are particular circumstances justifying a lower fine than that which was imposed.

22 The Commission emphasises that the deterrent effect of a fine and the application of a multiplier are intended, in particular, to prevent other undertakings from infringing Community competition rules in future. Thus the deterrent effect of a fine cannot be assessed by reference solely to the particular situation of the undertaking concerned.

— Findings of the Court

23 As is apparent from settled case-law and the Opinion of the Advocate General (see points 53 to 55 thereof), the fine imposed on an undertaking may be calculated by including a deterrence factor and that factor is assessed by taking into account a large number of factors and not merely the particular situation of the undertaking concerned.

24 Accordingly, in paragraphs 241 to 243 of the judgment under appeal, the Court of First Instance did not err in law when it evaluated the criteria on the basis of which the Commission determined the 'deterrence multiplier' with which the fine imposed on the appellant was adjusted.

25 The first limb of the plea cannot therefore be accepted.

Second limb: singling out an undertaking for 'deterrence'

— Arguments of the parties

26 SDK submits that the Court of First Instance did not identify the circumstances enabling the appellant to be singled out for the imposition of an increased fine for the purposes of deterrence. The need to single out an undertaking for those purposes must be assessed in the light of the specific attitude of that company, not of its size.

27 The Commission contends that the Court properly took into account the appellant's circumstances, which were used to set the amount of the fine for the purposes of deterrence. In this case, the size and power of the undertaking concerned are relevant factors to be taken into account.

— Findings of the Court

28 It should first of all be noted that it is apparent, to the requisite legal standard, from paragraphs 241 to 247 of the judgment under appeal that the Commission took into account the appellant's circumstances in its assessment of the increase in the fine for the purposes of deterrence.

29 In addition, as follows from the case-law of the Court of Justice, the size of the undertaking concerned is one of the factors which may be taken into account for the purpose of calculating the fine and, therefore, setting the 'deterrence multiplier' (see, in particular, *Musique Diffusion française and Others* v *Commission* and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 242 and 243).

30 Accordingly, the Court of First Instance did not err in law by holding, in paragraph 242 of the judgment under appeal, that the appellant had relied on hypothetical parameters that were too uncertain for an evaluation of an undertaking's actual financial resources 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.

31 The second limb of the second plea must therefore also be rejected.

Third limb: the 'deterrence multiplier' is arbitrary and unjustified in this case

— Arguments of the parties

32 SDK observes that the economic analysis of deterrence confirms that the 'deterrence multiplier' is arbitrary and unjustified. If an increased fine is justified in order to deter, the fine to achieve a deterrent effect should be calculated by reference to the benefits or profits that the undertaking concerned could expect to obtain from the infringement if the illegal conduct had remained undetected and the probability of detection.

33 SDK takes the view that the Court of First Instance failed to have regard to the fact that large multiproduct 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. A 'deterrence multiplier' can therefore be justified only in the light of the actual and proven attitude of the undertaking in question. However, SDK did not actively participate in the cartel and did not adopt any strategy for eliminating competition in the sector concerned.

34 The Commission contends that the appellant's arguments are not relevant and that the conduct of an undertaking is to be taken into account at a later stage in the fine-setting process as an aggravating or attenuating circumstance.

35 The Commission maintains that the Court rightly showed that the expected gains from an infringement and the probability of detection are far too vague and speculative to constitute the basis for setting the 'deterrence multiplier'.

— Findings of the Court

36 In accordance with settled case-law, the Commission has a particularly wide discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of fines, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account (see, inter alia, the order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33).

37 As regards, further, the appellant's argument that the application of a 'deterrence multiplier' is not justified as it did not actively participate in the cartel, it should be observed, as the Advocate General rightly pointed out in point 65 of his Opinion, that such a circumstance — assuming it is proven — will be taken into account only at a later stage in the fine-setting procedure but, in itself, has no bearing on the assessment of the actual gravity of the cartel.

38 It follows that the Court of First Instance did not err in law in its assessment of the appellant's situation set out in paragraphs 242 and 243 of the judgment under appeal.

39 The third limb of the second plea must therefore be rejected.

Fourth limb: the increase in the fine was disproportionate

— Arguments of the parties

40 SDK states that the amount of the increase in the fine was disproportionate in the light of its weak market share in the EEA. Furthermore, an analysis of the adjusted basic fine reveals that the fine imposed on SDK is disproportionate to that imposed on the other participants in the cartel.

41 The Commission states that the appellant's argument is based on a comparison of the adjusted basic fine with the fines of the other participants and with the appellant's annual turnover in the EEA. However, those comparisons are irrelevant, given that the calculations put forward are based entirely on the false premiss that the economic power of the appellant should have been assessed on the basis of the EEA turnover in the relevant product market.

— Findings of the Court

42 As the Advocate General rightly noted in point 68 of his Opinion, the appellant's arguments are based on the false premiss that the 'deterrence multiplier' cannot be based on the worldwide turnover of the undertaking in question.

43 It should be added, as the Court of First Instance rightly held in paragraph 198 of the judgment under appeal, that the appellant would have been rewarded if the Commission had calculated the basic amount of the fine on the basis of SDK's low turnover in the EEA, since that undertaking had agreed not to compete on the EEA market in accordance with the cartel at issue, thus enabling other producers to agree on their prices on that market.

44 Accordingly, the fourth limb of this plea must also be rejected.

45 The second plea must therefore be rejected in its entirety.

Third plea: error of law and failure to state the grounds for taking into account fines and obligations imposed on the appellant in non-member States

Arguments of the parties

46 SDK claims that the Court of First Instance erred in law in holding that the Commission could, first, rely upon worldwide turnover to calculate the basic fine and the 'deterrence multiplier' and, secondly, not take into account the fact that the appellant had already been subject to proceedings in the United States, Canada and Japan and that those States had already imposed fines on it.

47 According to the appellant, if worldwide turnover was relevant for deterrence, fines which had to be paid in other States should have been taken into account to determine the amount of the additional EC fine necessary to achieve adequate deterrence. Deterrence depends on the total cost of the illegal conduct, which includes not only the fines imposed in the EEA, but also fines imposed elsewhere.

48 SDK submits, therefore, that the Court of First Instance erred in law by confirming a fine that involves double-counting and is disproportionate to any justifiable deterrent effect.

49 The Commission observes that the principle of *non bis in idem* was not infringed by the Court. It notes that the fines imposed by the authorities of non-member States are in respect of violations of their competition law and there is no overlap with the jurisdiction of the Commission to impose fines on undertakings for restrictions of competition in the common market. The Commission and the Court of First Instance rule only on those restrictions, and activities relating to non-member States are outside the scope of Community law.

Findings of the Court

50 It should be noted, first of all, that the principle of *non bis in idem*, also enshrined in Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitutes a fundamental principle of Community law the observance of which is guaranteed by the judicature (see, inter alia, Joined Cases 18/65 and 35/65 *Gutmann* v *Commission of the EAEC* [1966] ECR 103, 119, and 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, paragraph 59).

51 With regard to examining the substance of the plea regarding infringement of that principle, it should also be noted, as the Court of First Instance rightly held in paragraph 140 of the judgment under appeal, that the Court of Justice has not yet decided the question whether the Commission is required to set off a penalty imposed by the authorities of a non-member State where the facts with which the Commission and those authorities charge an undertaking are the same, but it has made the identical nature of the facts alleged by the Commission and the authorities of a non-member State a precondition of doing so.

52 As regards the scope of application of the principle of *non bis in idem* in situations in which the authorities of a non-member State have taken action pursuant to their power to impose penalties in the field of competition law applicable in that State, it should be borne in mind that the context of the cartel at issue is an international one, characterised in particular by action of legal systems of non-member States within their respective territories.

53 In that regard, the exercise of powers by the authorities of those States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States. The elements forming the basis of other States' legal systems in the field of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules.

54 On the other hand, the legal situation is completely different where an undertaking is caught exclusively — in competition matters — by the application of Community law and the law of one or more Member States on competition, that is to say, where a cartel is confined exclusively to the territorial scope of application of the legal system of the European Community.

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

56 Accordingly, the Court of First Instance was fully entitled to hold in paragraph 134 of the judgment under appeal that the principle of *non bis in idem* does not apply to situations in which the legal systems and competition authorities of non-member States intervene within their own jurisdiction.

57 Moreover, the Court of First Instance was also fully entitled to hold that there is no other principle of law obliging the Commission to take account of proceedings and penalties to which the appellant has been subject in non-member States.

58 In that respect, it should be stated, as the Court of First Instance correctly observed in paragraph 136 of the judgment under appeal, that there is no principle of public international law that prevents the public authorities, including the courts, of different States from trying and convicting the same natural or legal person on the basis of the same facts as those for which that person has already been tried in another State. In addition, there is no public international law convention under which the Commission could be obliged, upon setting a fine under Article 15(2) of Regulation No 17, to take account of fines imposed by the authorities of non-member States pursuant to their competition law powers.

59 It should be added that the agreements between the European Communities and the Government of the United States of America of 23 September 1991 and 4 June 1998 on the application of positive comity principles in the enforcement of their competition laws (OJ 1995 L 95, p. 47, and OJ 1998 L 173, p. 28) are confined to practical procedural questions like the exchange of information and cooperation between competition authorities and are not in the least related to the offsetting or taking into account of penalties imposed by one of the parties to those agreements.

60 Finally, as regards failure by the Court of First Instance to have regard to the principles of proportionality and equity, pleaded in the alternative by the appellant, it should be observed that any consideration concerning the existence of fines imposed by the authorities of a non-member State can be taken into account only under the Commission's discretion in setting fines for infringements of Community competition law. Accordingly, although it cannot be ruled out that the Commission may take into account fines imposed previously by the authorities of non-member States, it cannot be required to do so.

61 The objective of deterrence which the Commission is entitled to pursue when setting the amount of a fine is to ensure compliance by undertakings with the competition rules laid down by the EC Treaty for the conduct of their activities within the common market (see, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 173 to 176). Consequently, when assessing the deterrent nature of a fine to be imposed for infringement of those rules, the Commission is not required to take into account any penalties imposed on an undertaking for infringement of the competition rules of non-member States.

62 Accordingly, the Court of First Instance did not err in law by holding, in paragraphs 144 to 148 of the judgment under appeal, that the setting of the fine imposed was lawful.

63 In the light of all the foregoing considerations, the third plea must be rejected in its entirety.

Fourth plea: infringement of the appellant's fundamental rights to due process

Arguments of the parties

64 SDK submits that the Court of First Instance wrongly rejected, without reasoning or explanation, its argument relating to the appropriateness of its being heard by the Commission on the setting of a 'deterrence multiplier'.

65 The Commission states that the Court of First Instance did not fail to have regard to the appellant's rights of defence and gave adequate reasoning for applying the 'deterrence multiplier' to the fine.

66 It maintains that the upward adjustment of the fine to ensure equivalent deterrence is not the result of a new policy. It is accepted that the effective application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy within the limits imposed by Regulation No 17.

67 The Commission agrees with the view of the Court of First Instance that the appellant had the chance to provide all relevant information on the size and financial resources of the undertaking to be taken into account when assessing the deterrent effect of the fine. The appellant had sufficient information to enable it to see that the basic amount of the fine might be adjusted upwards, in accordance with the Guidelines.

Findings of the Court

68 Observance of the right to be heard in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed constitutes a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings (see Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9).

69 It should be added in that regard that the obligation to hear undertakings subject to proceedings under Article 81 EC is fulfilled when the Commission states, in the statement of objections, that it will examine whether fines should be imposed on the undertakings considered and when it indicates the main matters of fact and of law which may result in the imposition of a fine, such as the duration and gravity of the infringement involved (see, in particular, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraphs 19 and 20).

70 As the Court of First Instance stated, the Commission defined in the statement of objections the matters of fact and of law which it was going to take as a basis for the purposes of determining the amount of the fines. The Commission thereby observed the right of the undertakings concerned to be heard not only on the principle of the penalty but also on each of the matters which it proposed to take into account in setting the fines.

71 In paragraph 240 of the judgment under appeal the Court of First Instance, in rejecting the plea concerning the rights of defence, held that there was therefore nothing to prevent the appellant 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.

72 It should also be noted that the fact that the Commission might find it necessary to take deterrence into account in setting the fine cannot be considered a fact which can justify the adoption of special measures during the administrative procedure before the Commission.

73 Further, as is apparent from the findings of the Court of First Instance, the appellant was aware of the fact that the Commission had indicated, in its statement of objections and in accordance with the Guidelines, that it proposed to set the fines at a level sufficient to ensure appropriate deterrence.

74 It follows from the foregoing that the Court of First Instance did not infringe the appellant's rights of defence by rejecting its plea relating thereto.

75 SDK's fourth plea cannot therefore be accepted.

76 It follows from the foregoing considerations that SDK's appeal must be dismissed in its entirety.

Costs

77 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against SDK and SDK has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders Showa Denko KK to pay the costs.

[Signatures]