JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

8 October 2008 *

In Case T-69/04,

Schunk GmbH, established in Thale (Germany),

Schunk Kohlenstoff-Technik GmbH, established in Heuchelheim (Germany),

represented by R. Bechtold and S. Hirsbrunner, and subsequently by R. Bechtold, S. Hirsbrunner and A. Schädle, lawyers

applicants,

v

Commission of the European Communities, represented initially by F. Castillo de la Torre and H. Gading, and subsequently by F. Castillo de la Torre and M. Kellerbauer, acting as Agents,

defendant,

* Language of the case: German.

APPLICATION for the annulment of Commission Decision 2004/420/EC of 3 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case No C.38.359 — Electrical and mechanical carbon and graphite products) and, in the alternative, for the reduction of the fine imposed on the applicants in that decision, and a counterclaim of the Commission seeking to have that fine increased,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President, M. Prek and V. Ciucă, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2008,

gives the following

Judgment

Facts at the origin of the dispute

1 Schunk Kohlenstoff-Technik GmbH ('SKT') is a German undertaking which manufactures carbon and graphite products for use in the electrical and mechanical

sectors. SKT is a subsidiary of Schunk GmbH (together referred to as 'Schunk' or 'the applicants').

2 On 18 September 2001, the representatives of Morgan Crucible Company plc ('Morgan') met with the Commission's agents in order to propose their cooperation in establishing the existence of a cartel on the European market for electrical and mechanical carbon products and to request the benefit of the leniency measures laid down in Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice').

3 On 2 August 2002 the Commission, pursuant to Article 11 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959–1962, p. 17), sent requests for information concerning their conduct on the market at issue to C. Conradty Nürnberg GmbH ('Conradty'), Le Carbone-Lorraine ('LCL'), SGL Carbon AG ('SGL'), SKT, Eurocarbo SpA, Luckerath BV and Gerken Europe SA. The letter which was sent to SKT also concerned the activities of Hoffmann & Co. Elektrokohle AG ('Hoffmann'), taken over by Schunk on 28 October 1999.

4 By letter of 2 September 2002, SKT informed the Commission of its intention to cooperate with it in the administrative procedure and to check whether, in addition to the requests for information, it was in a position to send it other useful information, in the light of the evidence which the Commission already had at its disposal.

5 After receiving, on 5 October 2002, a German version of the request for information, SKT replied to that request by letter of 25 October 2002.

6 On 23 May 2003, on the basis of the information which had been sent to it, the Commission sent a statement of objections to the applicants and the other undertakings concerned, namely Morgan, Conradty, LCL, SGL and Hoffmann.

7 After hearing the undertakings concerned, with the exception of Morgan and Conradty, the Commission adopted Decision 2004/420/EC of 3 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case No C.38.359 — Electrical and mechanical carbon and graphite products) ('the Decision'). A summary of the Decision was published in the Official Journal on 28 April 2004 (OJ 2004 L 125, p. 45).

8 The Commission stated in the Decision that the undertakings to which the Decision was addressed participated in a single and continuous infringement of Article 81(1) EC and, since 1 January 1994, Article 53(1) of the Agreement on the European Economic Area (EEA), consisting of fixing, directly or indirectly, sales prices and other trading conditions applicable to customers, sharing markets, in particular by allocating customers, and engaging in coordinated actions (quantity restrictions, price increases and boycotts) against competitors which were not members of the cartel (recital 2 in the preamble to the Decision).

9 The Decision contains the following provisions:

'Article 1

The following undertakings have infringed Article 81(1) [EC] and — from 1 January 1994 — Article 53(1) of the EEA Agreement by participating, for the periods

indicated, in a complex of agreements and concerted practices in the sector of electrical and mechanical carbon and graphite products:

— [Conradty], from October 1988 to December 1999;

— [Hoffmann], from September 1994 to October 1999;

— [LCL], from October 1988 to June 1999;

— [Morgan], from October 1988 to December 1999;

— [Schunk], from October 1988 to December 1999;

— [SGL], from October 1988 to December 1999.

Article 2

For the infringements referred to in Article 1, the following fines are imposed:

— [Conradty]: EUR 1 060 000;

— [Hoffmann]: EUR 2 820 000;

— [LCL]: EUR 43 050 000;

— [Morgan]: EUR 0;

— [Schunk]: EUR 30 870 000;

— [SGL]: EUR 23 640 000.

The fines shall be paid, within three months of the date of the notification of this Decision …

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision was adopted, plus 3.5 percentage points.'

10 As regards the method of setting fines, the Commission classed the infringement as very serious in the light of its nature, its impact on the EEA market for the goods concerned, even though it could not be measured precisely, and the scope of the geographic market concerned (recital 288 of the Decision).

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

12 Consequently, LCL and Morgan, regarded as being the two largest operators with market shares of more than 20%, were placed in the first category. Schunk and SGL, which are medium-sized operators with market shares of between 10 and 20%, were placed in the second category. Hoffmann and Conradty, regarded as being small operators by reason of their market shares of less than 10%, were grouped together in the third category (recitals 37 and 297 of the Decision).

13 On the basis of the foregoing considerations, the Commission set starting amounts, determined on the basis of the gravity of the infringement, of EUR 35 million for LCL and Morgan, EUR 21 million for SGL and the applicants, and EUR 6 million for Hoffmann and Conradty (recital 298 of the Decision).

14 As regards the duration of the infringement, the Commission considered that all the undertakings concerned had committed an infringement of long duration. On account of an infringement which lasted 11 years and two months, the Commission increased the starting amount which it set for the applicant, Morgan, SGL and Conradty by 110%. In respect of LCL, the Commission found that the infringement lasted for ten years and eight months and increased the starting amount by 105%. As regards Hoffmann, the starting amount was increased by 50% as the duration of the infringement was found to be five years and one month (recitals 299 and 300 of the Decision).

15 The basic amount of the fine, determined in accordance with the gravity and the duration of the infringement, was thus set at EUR 73.5 million in relation to Morgan, EUR 71.75 million for LCL, EUR 44.1 million for the applicants and SGL, EUR 12.6 million for Conradty and EUR 9 million for Hoffmann (recital 301 of the Decision).

16 The Commission did not conclude there to have been any aggravating or attenuating circumstances for or against the undertakings concerned (recital 316 of the Decision), and rejected the applicants' request that the fine imposed be limited, pursuant to Article 15(2) of Regulation No 17, to 10% of SKT's global turnover (recital 318 of the Decision).

17 As regards the application of the Leniency Notice, Morgan benefited from an immunity from the fine imposed for having been the first undertaking to bring the existence of the cartel to the Commission's attention (recitals 319 to 321 of the Decision).

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

Procedure and forms of order sought by the parties

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

20 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned, as President, to the Fifth Chamber, and this case was therefore also assigned to it.

21 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and answered the questions put by the Court at the hearing on 27 February 2008.

22 The applicants claim that the Court should:

— annul the decision;

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

— order the Commission to pay the costs.

23 The Commission contends that the Court should:

— dismiss the action;

— increase the amount of the fine imposed on the applicants;

— order the applicants to pay the costs.

Law

The application for annulment of the Decision

24 Although the action brought by the applicants has a double objective, namely, an application for annulment of the Decision, and, in the alternative, an application for the reduction of the amount of the fine, the various complaints of the applicants in their pleadings were none the less raised without distinction. When invited by the Court, at the hearing, to submit their observations on the precise scope of their arguments, the applicants essentially stated that they wished to leave the assessment to the discretion of the Court.

25 It must be pointed out, in that regard, that the plea of illegality in Article 15(2) of Regulation No 17 and the challenging of the joint and several liability of Schunk GmbH and SKT clearly fall within the application for annulment of the Decision.

26 The applicants also accuse the Commission of having infringed the principle of proportionality and the principle of equal treatment in setting the amount of the fine, which, at first sight, forms part of the application to have the fine reduced. However, the arguments raised in support of that claim contain objections to the infringement found by the Commission and the question therefore arises of the liability of the undertakings at issue, as defined in Article 1 of the Decision. Those objections must therefore be examined in the context of the application for annulment of the Decision in its entirety, including Article 1 thereof.

The plea of illegality of Article 15(2) of Regulation No 17

27 The applicants submit that Article 15(2) of Regulation No 17 grants the Commission almost unlimited discretion as regards the setting of the fine, which is contrary to the principle of legality, set out in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, as interpreted by the Community judicature.

28 It is clear from the case-law of the Court of Justice that the principle that penalties must have a proper legal basis is a corollary of the principle of legal certainty, which constitutes a general principle of Community law and requires, inter alia, that any Community legislation, in particular when it imposes or permits the imposition of sanctions, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly (see, to that effect, Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931, paragraph 17; Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; Case C-143/93 *van Es Douane Agenten* [1996] ECR I-431, paragraph 27; and Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25).

29 That principle, which forms part of the constitutional traditions common to the Member States and which has been enshrined in various international treaties, in particular in Article 7 of the ECHR, must be observed in regard both to provisions of a criminal nature and to specific administrative instruments imposing or permitting the imposition of administrative sanctions (see, to that effect, *Maizena*, paragraph 28 above, paragraphs 14 and 15, and the case-law cited). It applies not only to the provisions which establish the elements of an offence, but also to those which define the consequences of contravening them (see, to that effect, *X*, paragraph 28 above, paragraphs 22 and 25).

30 In addition, it is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Court ensures (Opinion 2/94 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14). For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and *Kremzow*, paragraph 14). Furthermore, Article 6(2) EU states that 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law' (Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraphs 23 and 24, and Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraph 60).

31 In that connection, regard must be had to the wording of Article 7(1) of the ECHR:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

32 According to the European Court of Human Rights ('the Eur. Court H. R.'), it follows from that provision that offences and the relevant penalties must be clearly defined by law. That requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see Eur. Court H. R. *Coëme and Others* v *Belgium*, judgment of 22 June 2000, *Reports of Judgments and Decisions* 2000-VII, p. 1, § 145).

33 In addition, Article 7(1) of the ECHR does not require the wording of the provisions pursuant to which those sanctions are imposed to be so precise that the consequences which may flow from an infringement of those provisions are foreseeable with absolute certainty. According to the case-law of the Eur. Court H. R., the existence of vague terms in the provision does not necessarily entail an infringement of Article 7 of the ECHR and the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see Eur. Court H. R, *Margareta and Roger Andersson* v *Sweden*, judgment of 25 February 1992, Series A no. 226, § 75). In that connection, apart from the text of the law itself, the Eur. Court H.R. takes account of whether the indeterminate notions used have been defined by consistent and published case-law (see Eur. Court H.R., *G.* v *France*, judgment of 27 September 1995, Series A no. 325-B, § 25).

34 With regard to the constitutional traditions common to the Member States, there is nothing which would justify the Court of First Instance giving a different interpretation of the principle of legality, which is a general principle of Community law, from that resulting from the considerations set out above. The applicants state merely, without further information, that at national level there is no comparable measure that empowers an authority to impose almost unlimited fines.

35 In the present case, as regards the validity of Article 15(2) of Regulation No 17 in the light of the principle that penalties must have a proper legal basis, as that principle has been recognised by the Community judicature in accordance with the guidance provided by the ECHR and the constitutional traditions of the Member States, it must be held that, contrary to what the applicants maintain, the Commission does not have unlimited discretion in setting fines for infringements of the competition rules.

36 Article 15(2) of Regulation No 17 itself limits the Commission's discretion. Firstly, by specifying that 'the Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR] 1 000 to 1 000 000 …, 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', it provides for a ceiling on fines, based on the turnover of the undertakings concerned, that is to say, based on an objective criterion. Thus, although, there is no absolute ceiling applicable to all infringements of the competition rules, the fine which may be imposed is nevertheless subject to a quantifiable and absolute ceiling calculated by reference to each undertaking in respect of each infringement, so that the maximum amount of the fine which may be imposed on a given undertaking is determinable in advance. Secondly, that provision requires the Commission to fix fines in each individual case having 'regard … both to the gravity and to the duration of the infringement'.

37 While it is true that those two criteria leave the Commission wide discretion, the fact remains that they are criteria which have been adopted by other legislatures for similar provisions, allowing the Commission to adopt sanctions taking account of the degree of illegality of the conduct in question.

38 It must be held that, in providing for fines for infringing the competition rules of from EUR 1 000 to 10% of the turnover of the undertaking concerned, the Council did not leave the Commission excessive latitude. In particular, the Court considers that the ceiling of 10% of the turnover of the undertaking concerned is reasonable, having regard to the interests defended by the Commission in taking proceedings against and fining such infringements.

39 In that connection, it must be observed that the penalties laid down in Article 15(2) of Regulation No 17 in the event of infringement of Articles 81 EC and 82 EC are a key instrument available to the Commission for ensuring that 'a system ensuring

that competition in the internal market is not distorted' (Article 3(1)(g) EC) is established within the Community. That system enables the Community to fulfil its task which consists, by means of the establishment of a common market, in promoting throughout the Community a harmonious, balanced and sustainable development of economic activities and a high degree of competitiveness (Article 2 EC). Furthermore, that system is necessary for the adoption, within the Community, of an economic policy conducted in accordance with the principle of an open market economy with free competition (Article 4(1) and (2) EC). Accordingly, Article 15(2) of Regulation No 17 permits the establishment of a system which fits the fundamental tasks of the Community.

40 It must therefore be held that Article 15(2) of Regulation No 17, while leaving the Commission a certain discretion, lays down the criteria and limits to which it is subject in the exercise of its power to impose fines.

41 In addition, it must be pointed out that, in setting fines pursuant to Article 15(2) of Regulation No 17, the Commission is required to comply with the general principles of law, in particular the principles of equal treatment and proportionality, as developed by the case-law of the Court of Justice and the Court of First Instance. It should also be added that, under Article 229 EC and Article 17 of Regulation No 17, those two courts have unlimited jurisdiction in advance brought against decisions whereby the Commission has fixed fines and may thus not only annul the decisions taken by the Commission but also cancel, reduce or increase the fines imposed. Thus, the Commission's administrative practice is subject to unlimited review by the Community judicature. Contrary to the applicants' assertions, that review does not lead the Community judicature, to which the task of the legislature has allegedly been delegated, to exceed the limits of its powers in breach of Article 7(1) EC, since such a review is expressly prescribed by the aforementioned provisions, the validity of which is not disputed, and, moreover, the Community judicature carries it out in accordance with the criteria referred to in Article 15(2) of Regulation No 17.

42 Moreover, on the basis of the criteria used in Article 15(2) of Regulation No 17 and clarified in the case-law of the Court of Justice and the Court of First Instance, the Commission itself has developed a well-known and accessible administrative practice. Although the Commission's previous practice in taking decisions does not in itself serve as a legal framework for fines in competition matters (Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraphs 201 and 205, and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 60), the fact remains that, under the principle of equal treatment, which is a general principle of law which the Commission must observe, the Commission must not treat comparable situations differently and different situations in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309).

43 It is settled case-law that the Commission may at any time adjust the level of fines if the proper application of the Community competition rules so requires (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 237), since such an alteration of an administrative practice may then be regarded as objectively justified by the objective of general prevention of infringements of the Community competition rules. The recent increase in the level of fines, alleged and challenged by the applicant, cannot therefore, in itself, be regarded as unlawful under the principle that penalties must have a proper legal basis, provided that it remains within the statutory limits laid down by Article 15(2) of Regulation No 17, as interpreted by the Community Courts.

44 It must also be borne in mind that, with a view to transparency and to increasing legal certainty for the undertakings concerned, the Commission has published guidelines for the calculation of fines imposed under Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the Guidelines'), setting out the calculation method which it imposes on itself in each particular case. In that regard, the Court of Justice has also held that, in adopting such rules of conduct and, by publishing them, announcing that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart

from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. In addition, even though the Guidelines do not constitute the legal basis of the Decision, they determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of fines imposed by that Decision and, consequently, ensure legal certainty on the part of the undertakings (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, paragraph 211 and 213). It follows that the adoption by the Commission of the Guidelines, in so far as it fell within the statutory limits laid down by Article 15(2) of Regulation No 17, merely contributed to defining the limits of the exercise of the discretion which the Commission already had under that provision, and it cannot be inferred from their adoption that the limits of the Commission's competence in the area at issue were initially not sufficiently determined by the Community legislature.

45 Consequently, in view of the various considerations set out above, a prudent trader, if need be by taking legal advice, can foresee in a sufficiently precise manner the method and order of magnitude of the fines which he incurs for a given line of conduct. The fact that that trader cannot know in advance precisely the level of the fines which the Commission will impose in each individual case cannot constitute a breach of the principle that penalties must have a proper legal basis, because, owing to the gravity of the infringements which the Commission is required to penalise, the objectives of punishment and deterrence justify preventing undertakings from being in a position to assess the benefits which they would derive from their participation in an infringement by taking account, in advance, of the amount of the fine which would be imposed on them for that unlawful conduct.

46 In that regard, even if undertakings are not able, in advance, to know precisely the level of fines that the Commission will adopt in each individual case, it should be noted that under Article 253 EC the Commission is required, despite the generally known context of the decision, to provide a statement of reasons in the decision imposing a fine, inter alia for the amount of the fine imposed and for the method chosen in that regard. That statement of reasons must show clearly and unequivocally the reasoning followed by the Commission so as to enable those concerned to

know the grounds justifying the measure taken in order that they may assess whether it is appropriate to bring the matter before the Community judicature and, if they do so, to enable the Court to carry out its review.

47 Finally, there is no basis for the argument that, by establishing the framework of the fine through the adoption of Article 15(2) of Regulation No 17, the Council infringed its obligation to indicate clearly the limits of the power conferred on the Commission and, in breach of Articles 83 EC and 229 EC, in fact transferred to the Commission a power appertaining to it by virtue of the Treaty.

48 Firstly, as observed above, although Article 15(2) of Regulation No 17 leaves the Commission a wide discretion, it limits its exercise by laying down objective criteria by which the Commission must abide. Secondly, it should be noted that Regulation No 17 was adopted on the basis of Article 83(1) EC which provides that '[t]he appropriate regulations or directives to give effect to the principles set out in Articles 81 [EC] and 82 [EC] shall be laid down by the Council … on a proposal from the Commission and after consulting the European Parliament'. The purpose of those regulations or directives, as stated in Article 83(2)(a) and (d) EC respectively, is to 'ensure compliance with the prohibitions laid down in Article 81(1) [EC] and in Article 82 [EC] by making provision for fines and periodic penalty payments' and to 'define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph'. It should be noted, moreover, that, under the first indent of Article 211 EC, the Commission is to 'ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied' and that, under the third indent of that article, it is to have 'its own power of decision'.

49 It follows that the power to impose fines for infringements of Articles 81 EC and 82 EC cannot be regarded as belonging originally to the Council, which has transferred it or delegated its exercise to the Commission, as provided for in the third

indent of Article 202 EC. Under the provisions of the Treaty cited above, that power is part of the Commission's role of ensuring the application of Community law, that role having been defined, framed and formalised, as regards the application of Articles 81 EC and 82 EC, by Regulation No 17. The power to impose fines which that regulation confers on the Commission therefore stems from the provisions of the Treaty itself and is intended to facilitate the effective application of the prohibitions laid down in those articles (see, to that effect, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2000] ECR II-2035, paragraph 133). The applicants' argument must therefore be rejected.

50 It follows from all those considerations that the plea of illegality raised with regard to Article 15(2) of Regulation No 17 must be rejected as unfounded (see, to that effect, Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 69 to 92, and Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraphs 66 to 68).

51 Finally, it should also be pointed out that the applicants' assert, 'in the alternative', that Article 15(2) of Regulation No 17 could be regarded as compatible with the principle of legality if the Commission were to interpret it restrictively, which it is not prepared to do.

52 It should be noted, in that regard, that the applicants merely make general observations on the way in which the Commission should, generally speaking, modify its policy in relation to fines by developing a transparent and coherent practice in taking decisions, but they do not make any specific objection to the Decision.

The joint and several liability of Schunk GmbH and SKT

53 As a preliminary point, it should be noted that, contrary to what the applicants claim, the conditions under which Schunk GmbH was made an addressee of the Decision are clearly stated in that decision.

54 It is apparent from recital 257 of the Decision that the Commission considered that 'although [SKT] was the legal entity that directly participated in the cartel, as a 100% parent company, Schunk GmbH was able to exercise decisive influence on the commercial policy of [SKT] at the time of the infringement and, it may be presumed, [that it did so as regards] the latter's participation in the cartel'. The Commission thus found that the two undertakings 'form[ed] the economic unit that is responsible for the sale and production of electrical and mechanical carbon and graphite products in the EEA and which participated in the cartel' and that they thus had to be held jointly and severally liable for the infringement committed.

55 In that regard, it should be pointed out that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27, and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 44 above, paragraph 117). Thus, the conduct of a subsidiary may be attributed to the parent company where the subsidiary does not decide independently upon its own conduct in the market but carries out, in all material respects, the instructions given to it by the parent company, since those two undertakings form an economic unit (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 133 and 134).

56 In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary (see, to that effect, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 50, and Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraphs 961 and 984; '*PVC II*'), and that they therefore constitute a single undertaking within the meaning of Article 81 EC (Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 59; '*Tokai II*'). It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; see also, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 29; '*Stora*').

57 In that regard, it must be noted that, while it is true that at paragraphs 28 and 29 of *Stora*, paragraph 56 above, the Court of Justice referred not only to the fact that the parent company owned 100% of the capital of the subsidiary but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. Accordingly, the fact that the Court of Justice upheld the findings of the Court of First Instance in that case cannot modify the principle laid down in paragraph 50 of *AEG* v *Commission*, paragraph 56 above. It must be added that the Court expressly stated, in paragraph 29 of *Stora*, paragraph 56 above, that 'as that subsidiary was wholly owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary's conduct', and that, in those circumstances, it was for the appellant to reverse that 'presumption' by adducing sufficient evidence.

58 In the present case, Schunk GmbH confirmed expressly, at the hearing and in response to a question put by the Court, that it controlled 100% of SKT at the time of the infringement; it must, therefore, be presumed that it in fact exercised decisive influence over its subsidiary's conduct. It was then for Schunk GmbH to reverse that presumption by adducing sufficient evidence of SKT's independence.

59 It is apparent from Schunk GmbH's pleadings that its arguments on the independence of SKT are essentially based solely on the alleged particular nature of SKT, namely that of a holding company. From that, Schunk GmbH infers the functional autonomy of SKT and pleads, in addition, that SKT is an independent body, which contradicts the Commission's statement that Schunk GmbH and SKT constitute an economic unity and acted, in the present case, as an undertaking within the meaning of Article 81 EC.

60 The notion of holding company covers various situations but, generally speaking, can be defined as a company which has shareholdings in one or more companies with a view to controlling them.

61 In recital 260 of the Decision, the Commission refers to the wording of Article 3 of the statutes of Schunk GmbH, according to which 'the object of the enterprise is the acquisition, the sale, the administration, in particular the strategic management of industrial participations'.

62 Although that definition of Schunk GmbH's corporate object supports its statement that it is only a financial holding company which does not exercise any industrial or commercial activity, the expression 'strategic management of industrial participations' is broad enough to encompass and permit, in practice, the management and

running of its subsidiaries. It should be noted that Article 3 of the statutes of Schunk GmbH also provides that '[t]he company is competent to take all actions that are appropriate to serve, directly or indirectly, the above-mentioned purpose.'

63 In addition, in the context of a group of companies, as in the present case, a holding is a company which seeks to regroup shareholdings in various companies and whose function is to ensure that they are run as one. It is apparent from recital 30 of the Decision that Schunk GmbH is the main parent company in the Schunk group, which comprises more than 80 subsidiaries and that it is 'responsible for, inter alia, the Group's Graphite and Ceramics Division, within which electrical and mechanical carbon and graphite products fall'.

64 That the unit is run and coordinated as one is demonstrated by the circumstances in which SKT defined and presented its turnover for 1998 to the Commission, stating that it had the right to exclude from its turnover the value of brushes built into brush holders.

65 In recital 262 of the Decision, the Commission states the following:

'[T]hose brush holders are produced by Schunk Metall- und Kunststofftechnik GmbH, another subsidiary in the Schunk Group. If [SKT] had truly conducted an autonomous commercial policy, it would as a matter of course have included the sales of those brushes to Schunk Metall- und Kunststofftechnik GmbH in its turnover figures. The fact that it proposed not to do so indicates that it considers that these were transfer sales to another group company, subject to the control of higher-placed legal entities in the Schunk Group, not autonomous sales to an independent buyer.

In fact, [SKT] has described those sales to Schunk Metall- und Kunststofftechnik GmbH as "internal turnover" and "own use".'

66 The situation thus described undeniably reveals that the interests of the group were taken into account and goes against the claim that SKT is totally independent. The importance of the SKT subsidiary for the Schunk group and, Schunk GmbH, in particular, as its only shareholder should also be pointed out. Whereas in 2002 the group had a consolidated turnover of EUR 584 million, in that same year, SKT had a total turnover of EUR 113.6 million.

67 In addition to the wording of Article 3 of the statutes of Schunk GmbH, the Commission refers to SKT's specific legal form, which was established as a limited liability company (Gesellschaft mit beschränkter Haftung, GmbH). Schunk GmbH has not disputed the wording of recital 259 of the Decision, which states the following:

'Under German corporate law, the [shareholders] of a [limited liability company] (GmbH) exert a strong control over the management of the GmbH. Among other things, they appoint and dismiss the managing directors of the GmbH. They also take the necessary measures to examine and supervise the way the GmbH is managed. Moreover, the managing directors of the GmbH have the obligation, at the request of any [shareholder], to immediately provide information about the affairs of the company and to allow access to its books and documents.'

68 At the organisational level, Schunk GmbH asserts that there is no overlapping of staff between the two companies in the sense of 'staff structures common to several companies such as, for example, one person exercising the functions of the supervisory board in several companies at the same time and for a relatively long period of

time or reciprocal nominations to the executive board of directors or management board'.

69 It must be noted, however, that Schunk GmbH does not provide any documentary evidence in support of its claims, even though such evidence could be produced in the form of the list of names of the members of the statutory organs of the two undertakings at the time of the infringement.

70 Accordingly, the fact that Schunk GmbH's corporate objects enables the conclusion that it constituted a holding whose role under its statutes was to manage its shareholdings in the capital of other companies is not sufficient, in itself, to reverse the presumption arising from the fact that it holds the entire company capital of SKT.

71 That conclusion makes it unnecessary to examine the probative force of an item of evidence referred to in recital 261 of the Decision, which is said to prove that the management of Schunk GmbH could not have been unaware of SKT's participation in the agreements which were restrictive of competition, namely the role played by Mr F, whose name featured in the address book of a representative of Morgan and who, subsequently, became Director General of Schunk GmbH.

72 In addition, it should be pointed out that the parallel drawn by Schunk GmbH with the situation of Hoffmann and the individual treatment which the Commission accorded to it is irrelevant, as the Commission found that company to be specifically liable in respect of the period from September 1994 to October 1999, namely prior to its takeover by Schunk GmbH.

73 Finally, Schunk GmbH claims that, before a finding can be made that a parent company is liable for an infringement committed by its subsidiary, it must have been established that the parent company has itself committed an infringement of the competition rules, and that the imputation to a person of an infringement committed by another infringes the principle of individual responsibility, which requires that a legal entity can be fined only where it is found to have committed an infringement personally.

74 It is sufficient to note that Schunk GmbH's arguments are based on an erroneous premise, namely that no infringement was found to have been committed by it. To the contrary, it is clear from recital 257 and Article 1 of the Decision that Schunk GmbH was held individually liable for an infringement which it is deemed to have committed itself on account of its legal and economic links with SKT, by which it was able to determine SKT's conduct on the market (see, to that effect, *Metsä-Serla and Others* v *Commission*, paragraph 55 above, paragraph 34).

75 It follows from the above findings that Schunk GmbH has not shown that the Commission wrongly declared it jointly and severally liable with SKT for the payment of the fine of EUR 30.87 million.

76 Consequently, the claim that the Commission wrongly applied Article 15(2) of Regulation No 17 by taking account of the global turnover of Schunk GmbH, wrongly considered to be jointly and severally liable with SKT, must be rejected as founded on an erroneous premiss.

The challenges to the finding of an infringement

— Preliminary considerations

77 As has been stated, the applicants' arguments raised in support of the complaint alleging an infringement by the Commission of the principles of proportionality and equal treatment when setting the amount of the fine contain objections to the infringement found by the Commission and thus raise the question of the liability of the undertakings concerned.

78 Thus, the applicants submit that the Commission was wrong in finding that:

— the undertakings involved in the cartel had agreed a ban on advertising and on participation in sales exhibitions;

— SKT had participated in agreements to prohibit the delivery of blocks of carbon to cutters;

— the products and the customers in the automobile and consumer goods sectors had been the subject of anti-competitive agreements;

— the undertakings concerned had followed a 'common plan which sought to bring about a lasting change in the structure of competition on the market by means of take-overs', since such a plan never existed or could have been conceived and implemented only by SGL and Morgan, without the applicants' knowledge;

— the undertakings concerned had operated a highly refined machinery to monitor and enforce their agreements.

79 In reaction to those claims, the Commission contends that the applicants did not dispute, in their reply to the statement of objections, the correctness of certain facts in that statement, which are being disputed for the first time in the action for annulment brought before the Court. According to the case-law, facts admitted during the administrative procedure must be regarded as established and cannot be disputed before the Court.

80 In that regard, it should be pointed out that the statement of objections, whose aim is to ensure that the rights of the defence of the undertakings to which it is addressed may be exercised effectively, delimits the scope of the administrative procedure initiated against an undertaking, in so far as it establishes the Commission's position vis-à-vis that undertaking and the Commission cannot set out in its decision complaints which are not contained in the statement of objections (see, to that effect, Case 54/69 *Francolor* v *Commission* [1972] ECR 851, paragraph 12, 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 86).

81 It is on the basis of the replies by the undertakings to which the statement of objections is addressed, in particular, that the Commission has to adopt its position regarding the future course of the administrative procedure.

82 First, the Commission has the right and possibly the duty to institute fresh inquiries during the administrative procedure if it becomes apparent in the course of that procedure that additional investigations are necessary (Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 14) and they may lead the Commission to send the undertakings concerned an additional statement of objections.

83 Second, it may consider, in the light of the answers to the statement of objections and, more specifically, of an admission by the undertakings concerned of the facts found against them, and the information found during the investigation, that it is in a position to adopt a definitive decision marking the end of the administrative procedure and its task of determining and proving the facts at the origin of the infringements at issue. In that decision, the Commission defines the responsibilities of the undertakings concerned and sets the amount of the fines to be imposed on them, where appropriate.

84 It is in that context that the Court found, in paragraph 37 of the judgment in Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, that, where the undertaking involved does not expressly acknowledge the facts, the Commission will have to prove those facts and the undertaking is free to put forward, at the appropriate time and in particular in the procedure before the Court, any plea in its defence which it deems appropriate. However, it follows that this cannot be the case where the undertaking at issue acknowledges the facts (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 227; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181; '*Tokai I*', paragraph 108; see also, to that effect, *Tokai II*, paragraph 56 above, paragraphs 324 and 326).

85 That case-law does not seek to restrict the bringing of actions by an undertaking sanctioned by the Commission, but to clarify the scope of the challenge which may be brought before the Court, in order to prevent the determination of the facts at the

origin of the infringement concerned from being shifted from the Commission to the Court. When an action under Article 230 EC is brought before the Court, it has jurisdiction to review the legality of the decision imposing the fine and to alter it, where necessary, by virtue of its unlimited jurisdiction (order in Case T-252/03 *FNICGV* v *Commission* [2004] ECR II-3795, paragraph 24).

86 In the present case, the Commission sent, on 23 May 2003, a statement of objections to the applicants giving them a period of eight weeks to acquaint themselves with it and to formulate a response. During that period, the applicants, assisted by their legal representatives, were able to analyse the complaints made against them by the Commission and to decide, with knowledge of the facts and on the basis of the terms of the Leniency Notice, the position which they should adopt.

87 In its reply to the statement of objections, Schunk GmbH states that it does not dispute the correctness of the facts nor their legal classification as a prohibited agreement and/or a concerted practice, but that it objects to the fact that an infringement of Community law committed by SKT is attributed to it. Schunk GmbH's reply is thus dedicated to challenging its joint and several liability with SKT.

88 As regards SKT, its reply is set out in a specific way in that it contains an introductory part in which the following is stated in an general terms:

'[SKT] does not substantially contest the facts … It also does not contest the legal classification of those facts as a prohibited agreement and/or a concerted practice. In

these observations, [SKT] merely contests certain findings of fact and the Commission's legal conclusions. We shall therefore supplement the statement of facts in respect of certain issues.'

89 The wording chosen shows an express overall acceptance not only of the facts found but also of the legal classification of those facts in the statement of objections, with a reservation, however, concerning certain facts and legal conclusions which the Commission was able to draw from them.

90 In that regard, it should be pointed out that the Commission granted Schunk a 10% reduction of the fine, the amount of which was specified at the hearing, pursuant to Section D, paragraph 2, indent 2, of the Leniency Notice, which provides for such a reduction if 'after receiving a statement of objections, [the] enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations'.

91 It must therefore be ascertained whether the challenges referred to in paragraph 78 above cover the reservations expressed by SKT in its reply to the statement of objections.

— The ban on advertising

92 The Commission submits that in the application the applicants dispute for the first time the existence of an agreement on advertising and on participation in sales exhibitions expressly referred to in the statement of objections, whereas the

applicants claim that they never acknowledged the accuracy of that fact during the administrative procedure.

93 It must be held that the issue of the ban on advertising is clearly referred to in paragraphs 106 and 107 of the statement of objections. The Commission points out that the members of the cartel were invited to refrain from advertising and from participating in sales exhibitions (paragraph 106) and refers to the fact that, at its meeting of 3 April 1998, the Technical Committee found, under the heading of 'Advertising rules' that 'Morgan Cupex and Pantrak advertised for carbon brushes, which is not allowed' (paragraph 107).

94 It should be pointed out that, in their replies to the statement of objections, SKT and Schunk GmbH stated that they do not substantially contest the facts or the legal classification of those facts as a prohibited agreement and/or a concerted practice, with the exception, on the part of SKT, of certain findings and conclusions of the Commission raised in paragraphs 3 to 33 of its reply. Those paragraphs in no way refer to the findings and conclusions of the Commission in relation to the ban on advertising.

95 Accordingly, it must be found that the applicants clearly recognised the existence of an anti-competitive agreement on the ban on advertising, which cannot be challenged for the first time before the Court.

— The delivery of blocks of carbon

96 SKT submits that, contrary to the Commission's assertions, it did not participate in agreements prohibiting the delivery of blocks of carbon to cutters.

97 It is apparent from the Decision that this complaint results from an incomplete and erroneous reading of that decision and can thus not be analysed as an actual late challenge to the facts alleged.

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

99 It is apparent from recitals 154 to 166 of the Decision that the policy of the cartel was to limit competition from cutters for the finished products made out of those blocks, and they sought to do that by refusing to supply them or, when they did supply them, by fixing high prices for the blocks of carbon which they delivered.

100 In recital 161 of the Decision, the Commission clearly accuses Schunk of having supplied the cutters upon pre-determined prices agreed with the other members of the cartel, which the applicants do not dispute in their written pleadings. The applicants' claim that they did not participate in the agreements banning the delivery of blocks of carbon is therefore irrelevant.

101 It follows that the Commission was right in finding that the applicants had infringed Article 81 EC by participating in a series of anti-competitive agreements including, inter alia, the agreements on the prices of blocks of carbon for cutters.

— The anti-competitive practices concerning the automobile suppliers and producers of consumer products

102 According to the applicants, it is apparent from the procedural file and the Decision itself that the products and customers in the sectors of activity concerning the automobile suppliers and the consumer products were not concerned by the anti-competitive agreements. In addition, they did not acknowledge the existence of such agreements, in relation to the sectors concerned, in the administrative procedure.

103 The Commission submits that the two sectors of activity concerned were clearly described in point 11 of the statement of objections, and the infringement regarding those sectors does not involve the application of the system of targeted prices, but meetings between the members of the cartel to agree on arguments for resisting price reductions requested by the operators in those sectors, which was already apparent from points 91 and 94 of the statement of objections.

104 The Commission adds that SKT acknowledged those facts in paragraph 24 of its reply to the statement of objections which stated the following:

'In the field of carbon brushes and modules for the automobile industrial sector and the manufacturers of domestic appliances and machine tools, the producers were faced with large customers with purchasing power and which were in a position to play the producers off against each other. Those customers were never the subject of a generalised agreement at meetings of the cartel at the European level. Admittedly, discussions did take place. However, they were carried out exclusively with the aim of enabling producers to exchange arguments mutually in order to be able to oppose the arguments of large customers demanding lower prices.'

105 It is thus evident that, although SKT denies the existence of a price agreement, it admits unlawful concerted action among the undertakings involved in the cartel targeting the price levels of the products aimed at automobile suppliers and producers of consumer products, which also cannot be challenged for the first time before the Court.

106 However, the applicants dispute that the statements in paragraph 24 of SKT's reply to the statement of objections may be understood and classed as an express admission of an infringement of Article 81 EC.

107 Assuming that, in the light of some imprecision in the statement of objections as to the nature and exact legal classification of the alleged unlawful conduct, it is possible for the statements referred to above not to be regarded as an express recognition of the facts alleged, the applicants' complaint alleging that no infringement occurred in the automobile suppliers and producers of consumer products sector would have to be considered to be admissible but would, none the less, have to be rejected as unfounded.

108 It should be pointed out that it is apparent from the Decision that the Commission considered that the conduct of the various undertakings involved in the cartel constituted a single continuous infringement, which progressively took shape through agreements and/or concerted practices.

109 Thus, Article 1 of the Decision states that the undertakings concerned, including the applicants, infringed Article 81(1) EC by participating 'in a complex of agreements and concerted practices' in the sector of electrical and mechanical carbon and graphite products. The Court points out that, in the context of a complex infringement which involves many producers seeking over a number of years to regulate the

market between them, the Commission cannot be expected to classify the infringement precisely, as an agreement or concerted practice for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article 81 EC (*PVC II*, paragraph 56 above, paragraph 696).

110 As regards the unlawful activities concerning the automobile suppliers and producers of consumer products, the Commission points out, in recital 40 of the Decision, that those suppliers and producers form part of the first category of 'large customers' for electrical products and are characterised by their small number, the fact that they buy in large volumes, and their strong negotiating power.

111 On the basis of the statements made by LCL, the Commission states that 'the only type of clients which seem to have been excluded from the calculation of bareme prices levels are automobile suppliers, and possibly producers of consumer products' (recital 120 of the Decision), but that direct contacts between potential suppliers took place prior to the annual negotiations with the operators concerned. The object of those contracts was not so much to agree prices as to agree on arguments for resisting price reductions requested by those large customers (recital 124 of the Decision).

112 The applicants assert that the document from LCL, on which the Commission's findings are based, do not contain any evidence enabling the conclusion that the exchange of arguments at issue concerned the automobile suppliers and producers of consumer products sectors and that that exchange does not constitute conduct which is prohibited by Article 81 EC.

113 First, it should be noted that the document at issue relates to the 'method of calculation of the prices of brushes for electric motors' and that the first part concerns 'automobile brushes' and 'FHP brushes'. After describing the context of the demand for those two products, in terms similar to those referred to in paragraph 110 above, LCL states the following:

'In such a context, the concertations between competitors during the infringement period had the sole objective of trying to resist a very uneven balance of power in favour of the customers.

…

The prices of 'automobile brushes' and 'FHP brushes' have never been the subject of discussions in the technical meetings [of the European Carbon and Graphite Association]. They have never been fixed on the basis of methods or scales common to the various competitors.

During the period of the cartel, which ended in 1999, the competitiors engaged in concerted action at the annual negotiations with the customers to exchange information and accounts which each competitor then tried to use to resist pressure exerted by customers and their constant demands for lower prices.

…

Conclusion

During the infringement period there was concerted action between competitors for 'automobile brushes' and 'FHP brushes' with the aim of helping competitiors learn how to best resist strong pressure and repeated demands from customers to lower prices.'

114 Given the nature of the products referred to in the document at issue, there is no doubt that the concerted action concerned the automobile suppliers and producers of consumer products sectors. It is established that the electrical carbon and graphite products serve primarily to conduct electricity. Among those products figure the graphite brushes which include 'automobile brushes', which are mounted on electric motors for equipping automobiles and 'FHP brushes', which are mounted on electric motors for domestic appliances and portable tools.

115 In addition, in paragraph 24 of its reply to the statement of objections, SKT clearly placed the concerted actions at issue 'in the field of carbon brushes and modules for the automobile industrial sector and the manufacturers of domestic appliances and machine tools'.

116 Second, it should be pointed out that a 'concerted practice' constitutes a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition (*ICI* v *Commission*, paragraph 55 above, paragraph 64). The criteria of coordination and cooperation, far from requiring the elaboration of an actual 'plan', must be understood in the light of the concept inherent in the Treaty provisions relating to competition, according

to which each economic operator must determine independently the policy which he intends to adopt on the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators with the object or effect either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 173 and 174, and *PVC II*, paragraph 56 above, paragraph 720).

117 Clearly, the object of the direct contact which took place between the members of the cartel, as reported by LCL and SKT, indicates unlawful concerted action within the meaning of the case-law referred to above. By exchanging information with the aim of maintaining certain price levels of the products intended for automobile suppliers and producers of consumer products, the undertakings at issue adopted collusive practices which facilitated the coordination of their commercial conduct, manifestly contrary to the requirement that each economic operator must determine autonomously the policy which it intends to follow on the market.

118 In the judgment in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, the Court of Justice stated that, as is clear from the very terms of Article 81(1) EC, a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices and a relationship of cause and effect between the two (paragraph 118). The Court also held that, subject to proof to the contrary, which it is for the operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market (*Commission* v *Anic Partecipazioni*, paragraph 121).

119 In the present case, in the absence of evidence to the contrary which it was for SKT to adduce, it must be held that SKT, which remained active on the market in question throughout the duration of the infringement, took account of the unlawful concerted action, in which it participated, when determining its own conduct on that market (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 118 above, paragraph 121).

120 It follows that the Commission was right in finding that the applicants had infringed Article 81 EC in participating in a complex of agreements and concerted practices concerning, inter alia, products for automobile suppliers and producers of consumer products and that it is therefore necessary to reject the applicants' claims, based on the incorrect premiss that those products were not concerned by the cartel, that the turnover in those sectors should not be taken into account.

— No overall plan to bring about a lasting change in the structure of competition on the market by means of take-overs

121 In their observations on the gravity of the infringement, the applicants state that, as regards takeovers which took place in the past, the Commission notes in recital 173 of the Decision, at least in the German version, that 'these different actions took care of virtually all of the "outsiders" active in the EEA market'.

122 Schunk states that, in so doing, the Commission assumes that the undertakings concerned followed an overall plan which sought to bring about a lasting change in

the structure of competition on the market by means of take-overs and claims that such a plan never existed or that it could have been conceived and implemented only by SGL and Morgan, without the applicants' knowledge.

123 In so far as those claims may be understood as an objection by the applicants to the infringement which they were declared responsible for, as described in recital 2 of the Decision, in must be found that they manifestly misinterpret the Decision and must be dismissed as irrelevant.

124 In that regard, it must be pointed out that recital 173 of the Decision is a concluding sentence which does not refer exclusively to the takeovers of competitiors by certain members of the cartel.

125 The expression 'these different actions' refers to all of the anti-competitive actions described in 167 of the Decision, seeking to lure competitors into cooperation, to pressure competitors into cooperation, to drive competitors out of business in a coordinated fashion or at least teach them a serious lesson not to cross the cartel, and to buy up competitors. The recital in question thus contains no statement or supposition of the Commission regarding the existence of an 'overall plan to bring about a lasting change in the structure of competition on the market by means of take-overs'.

126 In addition, it should be observed that neither in the statement of objections nor in the Decision did the Commission attribute takeovers of competitor undertakings to the applicants and that the applicants do not dispute the reality of the anti-competitive actions imputed to the members of the cartel concerning competitor

undertakings, with the exception of the takeover measures such as described in recitals 168 to 171 of the Decision.

— Existence of a highly refined machinery to monitor and enforce their agreements

127 It is apparent from recitals 2 and 219 of the Decision that the Commission considered that the undertakings to which that decision was addressed participated in a single and continuous infringement of Article 81(1) EC and, since 1 January 1994, of Article 53(1) of the EEA Agreement, and in the context of which those undertakings operated, inter alia, 'a highly refined machinery to monitor and enforce their agreements'.

128 The applicants claim that such machinery never existed and that the Decision does not state what it consisted of.

129 However, it should be pointed out that the Decision contains two recitals relating to 'ensuring compliance with the rules of the cartel'.

130 Recital 89 thus states the following:

'The 1937 agreement establishing a European Association of the Producers of Carbon Brushes had provided for an official arbitration procedure to settle disputes among the cartel members regarding alleged non-compliance with the rules of the

cartel. Such formal procedures to ensure compliance were no longer possible in the operation of the cartel after the entry into force of the Community competition rules. Instead, cartel members closely monitored each other's price quotations to clients and insisted in meetings and other contacts on compliance with the agreed rules and prices of the cartel. Examples are:

From a Technical Committee meeting on 16 April 1993:

"G [Schunk] requests that:

1. quotation to Burgmann [a customer] at price 25–30% below bareme must be withdrawn in writing,

2. no further quotes at this price level are submitted".

From a local meeting in the Netherlands on 27 October 1994:

"Morganite — Belgium problems with the colleagues. No price increase applied in summer".'

131 On the basis of numerous documents, the Commission adds, in recital 90 of the Decision, that '[i]nstances of too low prices were discussed at meetings of the cartel and could lead to claims for compensation'.

132 In its pleadings the Commission submits that the applicants dispute for the first time before the Court the facts referred to above, which were in fact set out in point 62 of the statement of objections.

133 It should be pointed out that the reservations and critical observations expressed by SKT in its reply to the statement of objections, seeking to qualify the scope of the initial statement of principle substantially accepting the facts and their legal classification, do not concern the question of the supervision of the implementation of the agreements, which can thus not be disputed by the applicants for the first time before the Court.

134 Even if the objection raised by the applicants were to be regarded as admissible in the light of the fact that in the Decision the Commission uses the expression 'highly refined machinery' for the first time, it must still be rejected as unfounded. It is sufficient to note that the applicants have not provided any information making it possible to contradict the findings made by the Commission in recitals 89 and 90 of the Decision, as regards, more specifically, the existence of machinery to supervise the pricing policies of the members of the cartel including compensation from undertakings offering prices which were too low.

135 Finally, it should be noted that in a part of the application dedicated to 'Schunk's contribution to the infringement' and the alleged overestimination by the Commission of that contribution, the applicants criticise the Commission's position set out in recital 178 of the Decision which qualifies as 'unusual' the fact that, already at the founding meeting of the European Carbon and Graphite Association (ECGA) on 1 March 1995, certain members identified the need for a special graphite committee, without, however, being able at that time to indicate what legitimate issues that committee should discuss.

136 Quite apart from the summary and obscure nature of the applicants' arguments, it is evident that the Commission's statements referred to above form part of the assessment of the role in the cartel played the professional associations and more specifically by the ECGA. In those circumstances, the applicants' arguments are no more capable of calling into question the Commission's assessment of the applicants' liability than those relating to the gravity of the infringement.

137 It follows from all of the above considerations that the Commission rightly found that the applicants had committed an infringement of Article 81 EC, as described in recital 2 of the Decision, by participating in a complex of agreements and concerted practices in the sector of electrical and mechanical carbon and graphite products.

The application to have the fine reduced

138 The applicants complain that the Commission infringed the principles of proportionality and equal treatment in setting the amount of the fine.

139 It is apparent from the Decision that the fines were imposed pursuant to Article 15(2) of Regulation No 17 and that the Commission — even though the Decision does not refer explicitly to the Guidelines — determined the amount of the fines by applying the method defined in the Guidelines.

Overestimation by the Commission of the gravity of the infringement in the light of its nature and effects

140 According to the method laid down by the Guidelines, the Commission takes as the starting point for calculating the amount of the fines to be imposed on the undertakings concerned an amount determined by reference to the gravity of the infringement. In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market (Section 1 A, first paragraph). Within that context, infringements are put into one of three categories, namely 'minor infringements', for which the likely fine will be between EUR 1 000 and EUR 1 000 000, 'serious infringements', for which the likely fine will be between EUR 1 000 000 and EUR 20 000 000, and 'very serious infringements', for which the likely fine will be above EUR 20 000 000 (Section 1 A, second paragraph, first to third indents).

141 In the Decision, the Commission made the following three points:

— the infringement consisted essentially in the direct and indirect fixing of selling prices and other trading conditions to customers, the sharing of markets, in particular through customer allocation, and in coordinated actions against competitors not members of the cartel. Such practices are by their very nature the worst kinds of violations of Article 81(1) EC and Article 53(1) of the EEA Agreement (recital 278 of the Decision);

— the cartel agreements were implemented and did have an impact on the EEA market for the product concerned, but that this impact could not be precisely measured (recital 286 of the Decision);

— the cartel covered the whole of the common market and, following its creation, the whole of the EEA (recital 287 of the Decision).

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

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

143 The applicants' state that the Commission overestimated the gravity of the infringement and raise various arguments, which relate essentially to the analysis of the nature of the infringement. They also criticise the Commission's assessment of the effects of that infringement.

— The nature of the infringement

144 At the outset, it should be noted that the Commission's reasoning as regards the nature of the infringement is in two parts: the first relates to the taking into account of the very substance of the anti-competitive activities at issue (recital 278 of the Decision), and the second relates to elements that are extrinsic but linked with the assessment of the nature of the infringement (recital 279 of the Decision).

145 In the first part, the Commission stated that the infringement at issue 'essentially' consisted of fixing, directly or indirectly, sales prices and other trading conditions applicable to customers, sharing markets, in particular by allocating customers, and engaging in coordinated actions against competitors which were not members of the cartel.

146 The applicants' claims that there was no anti-competitive agreement placing a ban on advertising, no common plan which sought to bring about a lasting change in the structure of competition on the market by means of take-overs, and no highly refined machinery to monitor and enforce their agreements, set out in the part of their pleadings formally dedicated to challenging the Commission's assessment of the gravity of the infringement, have been dismissed for the reasons given above.

147 In addition, it is apparent from the wording of recital 278 of the Decision that, when assessing the gravity of the infringement, the Commission gave a different weighting to the anti-competitive activities of the undertakings involved in the cartel, and that it did not even mention the ban on advertising and the operation of a highly refined machinery to monitor and enforce their agreements, in view of the less important and purely complementary nature of those practices.

148 Accordingly, and even supposing that the applicants' findings regarding the ban on advertising and the machinery referred to above could be considered to be founded, they do not make it possible to call into question the Commission's assessment regarding the gravity of the infringement.

149 In the second part of the reasoning on the assessment of the gravity of the infringement (recital 279 of the Decision), the Commission states the following:

> 'For the sake of completeness, it may also be noted that the cartel arrangements involved all of the main operators in the EEA, controlling together more than 90% of the EEA market. Those arrangements were directed or at least knowingly tolerated by very high levels of management within the undertakings concerned. The cartel members had taken extensive precautions to avoid detection, thereby leaving no doubt that they were fully aware of the illegal nature of their activities. The cartel had achieved a high level of institutionalisation and compliance, and cartel members had frequent and regular meetings and other contacts. The cartel operated entirely for the benefit of the participating companies and to the detriment of their customers and ultimately the general public.'

150 In support of the claim that the gravity of the infringement was misassessed, the applicants claim that the Commission was mistaken in stating in footnote 4 of the Decision that '[f]or purposes of price agreements', the cartel split the electrical products it covered into several broad categories, and that the Commission's claim that the agreements were implemented thanks to a system organised in a restrictive manner is based, 'as a result', on a misinterpretation of the facts.

151 Quite apart from the obvious lack of a logical link between the two propositions stated above, it is sufficient to note that the applicants' claims are in no way related to the Commission's assessment of the gravity of the infringement in the Decision and that they therefore lack any relevance to the claim that that gravity was overestimated.

152 The applicants also submit that neither the secret nature of the cartel, nor the harm suffered by the general public, should have been taken into consideration in

the Decision (recital 279) as aggravating circumstances, since they are inherent in any cartel and have already been taken into account by the legislature when determining the imposable fines. In addition, the Commission does not furnish any proof in support of its claim that the members of the cartel methodically endeavoured to conceal their unlawful acts.

153 It must be observed that, in line with the settled case-law, the gravity of an infringement is assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, in respect of which the Commission has a margin of discretion (*Dansk Rørindustri and Others* v *Commission*, paragraph 44 above, paragraph 241, and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 43).

154 In that context, when determining the gravity of the infringement, the Commission was legitimately able to take into consideration the fact that the undertakings took many precautions to prevent the cartel from being exposed and also the harm incurred by the general public. Those two factors do not, strictly speaking, constitute 'aggravating circumstances' as claimed by the applicants.

155 Contrary to the applicants' claims, in recitals 81 to 87 of the Decision the Commission provided a detailed description of the precautions taken to conceal their meetings and contacts, supported by documentary evidence which the applicants do not dispute.

156 In addition, as pointed out by the Commission, all infringements of competition law do not harm competition and consumers in the same way. This taking into account of the harm suffered by the public is different from the taking into account of the economic capacity of a member of the cartel to cause harm to competition and to consumers, which takes place at the stage of calculating the amount of the fine laid down in the Guidelines and seeks to distinguish between undertakings in cases where, as in the present case, the infringement involves several undertakings.

157 Finally, it should be pointed out that the wording of recital 279 of the Decision shows that the elements mentioned there were subsidiary to those listed in recital 278 of the Decision. Accordingly, even supposing that the applicants' objection to the taking

into account of the secret nature of the cartel and of the harm suffered by the public could be regarded as founded, that would not call into question the Commission's assessment of the nature of the infringement, as it results from the relevant and sufficient reasons contained in recital 278 of the Decision.

— The effects of the infringement

158 In the context of their complaint alleging overestimation of the gravity of the infringement, the applicants claim that the Commission committed a double error in assessing the effects of the infringement.

159 First, they submit that the Commission wrongly determined the size of the market concerned in considering that the cartel included concerted agreements concerning the automobile suppliers and producers of consumer products, the existence of which they have never acknowledged.

160 As stated above, those arguments dispute the infringement found by the Commission in the Decision, and it has been found, contrary to the applicants' claims, that the anti-competitive practices of the cartel concerned both automobile suppliers and producers of consumer products. In addition, those arguments are irrelevant as regards the examination of the correctness of the assessment of the effects of the cartel, which, contrary to the applicants' claims, is independent of the turnover made by the undertakings with the products concerned.

161 Second, the applicants submit that the Commission erred in its assessment of the implementation of the agreements and claim both that the Commission did not furnish any proof of an actual impact of the cartel, contrary to the requirements of its own Guidelines, and did not take sufficient account of the fact that the agreements were implemented only in part.

162 In recital 281 of the Decision, the Commission finds the existence of real anti-competitive effects resulting, in the present case, from the implementation of collusive agreements, even if it is not possible to quantify them precisely. That finding follows the description of the nature of the infringement and precedes the determination of the geographic area thereof. The wording of recital 288 of the Decision and, more specifically, the use of the expression '[t]aking all those factors into account', enables the conclusion that the Commission did take the concrete impact of the cartel on the market into consideration to classify the infringement as 'very serious', even though it added that that classification is justified regardless of whether the impact can be measured precisely or not.

163 Thus, it follows from recitals 244 to 248 and 280 to 286 of the Decision that the Commission clearly deduced from the implementation of the cartel that it did have a concrete impact on the sector at issue.

164 In that regard, the Commission states that '[t]he general percentage price increases agreed were implemented by each cartel member issuing new price lists …, by public transport companies awarding tenders to the company whose bid had been pre-arranged to be slightly less high than the bids of other cartel members, by private customers having no choice but to purchase from a particular pre-arranged supplier at a particular pre-arranged price, without effective competition being allowed to play a role and by cutters being unable to purchase blocks or only at artificially high prices, so that they were unable to offer effective competition on the market for finished products'. In the light of the length of the period of infringement and the fact that the undertakings in question together controlled more than 90% of the

EEA market, there is no doubt, in the Commission's view, that the cartel had real anti-competitive effects on that market (recitals 245 and 281 of the Decision).

165 It must be pointed out that, in order to assess the actual effect of an infringement on the market, the Commission must take as a reference the competition that would normally exist if there were no infringement (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 116 above, paragraphs 619 and 620; Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 235; Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 645; and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 84 above, paragraph 150).

166 In the case of a price cartel, the Commission may legitimately infer that the infringement had effects from the fact that the cartel members took measures to apply the agreed prices, for example by announcing them to customers, instructing their employees to use them as a basis for negotiation and monitoring their application by their competitors and their own sales departments. In order to conclude that there has been an impact on the market, it is sufficient that the agreed prices have served as a basis for determining individual transaction prices, thereby limiting customers'room for negotiation (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraphs 340 and 341; *PVC II*, paragraph 56 above, paragraphs 743 to 745; and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich AG and Others* v *Commission* [2006] ECR II-5169, paragraph 285).

167 On the other hand, the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel. In that regard, it cannot be held that only the fact that the level of transaction prices would have been different in the absence of collusion may be taken into account in determining the gravity of the infringement (Case C-279/98 *Cascades* v *Commission* [2000]

ECR I-9693, paragraphs 53 and 62). Moreover, it would be disproportionate to require such proof, which would absorb considerable resources, given that it would necessitate making hypothetical calculations based on economic models whose accuracy it would be difficult for the Court to verify and whose infallibility is in no way proved (Opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, point 109).

168 In order to assess the gravity of the infringement, the decisive point is whether the cartel members did all they could to give concrete effect to their intentions. What then happened at the level of the market prices actually obtained was liable to be influenced by other factors outside the control of the members of the cartel. The members of the cartel cannot therefore benefit from external factors which counteracted their own efforts by turning them into factors justifying a reduction of the fine (Opinion of Advocate General Mischo in *Mo och Domsjö* v *Commission*, paragraph 167 above, paragraphs 102 to 107).

169 Consequently, the Commission was legitimately able to rely on the implementation of the cartel in concluding that there was an impact on the market, after having pointed out, in a relevant manner, that the cartel had lasted for more than eleven years and that the members of that cartel controlled more than 90% of the EEA market.

170 As regards the merits of the findings which the Commission drew from that conclusion in the present case, it should be pointed out that the applicants neither prove nor even claim that the cartel was never implemented. It is apparent from the applicants' pleadings that they merely plead that the cartel was only implemented in part, a claim which, if in fact true, is not capable of showing that the Commission wrongly evaluated the gravity of the infringement by taking account of the fact that the unlawful practices at issue had an actual anti-competitive effect on the EEA market

for the products concerned (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 148).

171 Finally, even supposing that the actual impact of the cartel was not established to the required legal standard by the Commission, the classification of the present infringement as 'very serious' is none the less appropriate. The three abovementioned aspects of the assessment of the gravity of the infringement do not carry the same weight in the context of an overall examination. The nature of the infringement plays a major role, in particular, in characterising 'very serious' infringements. It is clear from the description of very serious infringements given in the Guidelines that agreements or concerted practices designed in particular, as in this case, to set prices may, on the basis of their nature alone, be classified as 'very serious', without there being any need to characterise such conduct by reference to a particular impact or geographic area. That conclusion is corroborated by the fact that, whilst the description of serious infringements expressly mentions their impact on the market and their effects on extensive areas of the common market, that of very serious infringements, on the other hand, does not mention any requirement as to the actual market impact or the effects produced in a particular geographic area (Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 178, and *Groupe Danone* v *Commission*, paragraph 170 above, paragraph 150).

172 It follows from all the foregoing considerations that the complaint alleging an overestimation of the gravity of the infringement, in the light of its nature and effects, must be rejected.

The grouping of the undertakings into categories

173 The applicants submit that, contrary to the Guidelines, the Commission determined the starting amount of the fines independently of the global turnover of the undertakings, which led to an infringement of the principle of equal treatment. Thus, Schunk and SGL were classed in the same category even though SGL is almost twice the size

of Schunk. In the Decision, the Commission adopted a 'one size fits all' approach and failed to have regard to certain factors, such as the structure of the applicants in terms of company law and their different levels of difficulty in accessing the capital markets, which would have made it possible to assess the individual capacity of the undertakings to harm competition.

174 First, contrary to the applicants' claim, the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertakings concerned and more specifically on the basis of their total turnover (*Dansk Rørindustri and Others* v *Commission*, paragraph 44 above, paragraph 255).

175 Subject to compliance with the upper limit provided for in Article 15(2) of Regulation No 17, which refers to total turnover (*Musique Diffusion française and Others* v *Commission*, paragraph 43 above, paragraph 119), it is permissible for the Commission to take account of the turnover of the undertaking concerned in order to assess the gravity of the infringement when determining the amount of the fine, but disproportionate importance must not be attributed to that turnover by comparison with other relevant factors (*Dansk Rørindustri and Others* v *Commission*, paragraph 44 above, paragraph 257).

176 In the present case, the Commission applied the calculation method defined in the Guidelines, which provides for numerous factors to be taken into account in assessing the gravity of the infringement for the purpose of determining the amount of the fine, including in particular the nature of the infringement, its actual impact, the size of the relevant geographic market and the necessary deterrent effect of the fine. Although the Guidelines do not provide that the fines are to be calculated according to the overall turnover of the undertakings concerned or their turnover on the relevant product market, they do not preclude such turnover from being taken into account in determining the amount of the fine in order to comply with the general principles of Community law and where circumstances demand it (*Dansk Rørindustri and Others* v *Commission*, paragraph 44 above, paragraphs 258 and 260).

177 In the light of the large disparity in size between the undertakings concerned and in order to take account of the specific weight of each of them and, thus, the real impact of their unlawful conduct on competition, the Commission, in accordance with the fourth and sixth paragraphs of point 1.A of the Guidelines, treated each of the undertakings which had participated in the infringement differently in the Decision. To that end, it grouped the undertakings concerned into three categories on the basis of the EEA-wide turnover of each of them the goods concerned by the present proceedings, and including in that calculation the value of captive use of each undertaking. The resulting figure is a market share which represents the relative weight of each undertaking in the infringement and its effective economic capacity to cause significant damage to competition (recitals 289 to 291 of the Decision).

178 The comparison was based on figures concerning the turnover (expressed in millions of euros) attributable to the goods in question in respect of the last year of the infringement, namely 1998, as shown in Table 1 set out in recital 37 of the Decision and entitled 'Estimates of turnover (including the value of captive use) and market shares in the EEA for the product group subject to the proceeding in the year 1998':

Supplier	Turnover (including the value of captive use)	Market share in EEA (%)
Conradty	9	3
Hoffmann	17	6
[LCL]	84	29
Morgan	68	23
Schunk	52	18
SGL	41	14
Others	20	7
Total	291	100

179 Consequently, LCL and Morgan, considered to be the two largest operators with market shares greater than 20%, were placed in the first category. Schunk and SGL, which are medium-sized operators with market shares of between 10 and 20%, were placed in the second category. Hoffman and Conradty, considered to be small operators by reason of their market shares of below 10%, were placed in the third category (recitals 37 and 297 of the Decision).

180 On the basis of the above findings, the Commission set a starting amount, determined on the basis of the gravity of the infringement, of EUR 35 million for LCL and Morgan, EUR 21 million for Schunk and SGL and EUR 6 million for Hoffmann and Conradty (recital 298 of the Decision).

181 Second, it should be pointed out that the cartel covered the whole of the common market and, following its creation, the whole of the EEA and that the turnover in respect of the products at issue constitutes an appropriate basis to assess, as the Commission did in the Decision, the infringements of competition on the market for the product concerned within the EEA and the relative importance of the participants in the cartel on the market affected. It is settled case-law (see, inter alia, *Musique diffusion française and Others* v *Commission*, paragraph 43 above, paragraph 121, and *Mayr-Melnhof* v *Commission*, paragraph 165 above, paragraph 369) that the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market. In particular, as the Court has pointed out, the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition (Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643).

182 Third, it is to be noted that the method of dividing the members of a cartel into categories in order to apply differential treatment when setting the starting amounts of the fines, the principle of which has been approved by decisions of the Court of

First Instance even though it ignores the differences in size between undertakings in the same category (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 385, and *Tokai* I, paragraph 84 above, paragraph 217), results in a flat-rate starting amount for all the undertakings in the same category.

183 None the less, the division into categories made by the Commission in the Decision must respect the principle of equal treatment, according to which comparable situations must not be treated differently and different situations treated identically, unless such treatment is objectively justified. In addition, according to the case-law, the amount of the fine must at least be proportionate in relation to the factors taken into account in the assessment of the gravity of the infringement (*Tokai I*, paragraph 84 above, paragraph 219, and the case-law cited).

184 To check whether a division of the members of a cartel into categories is consistent with the principles of equal treatment and proportionality, the Court, in the course of its review of the legality of the way in which the Commission exercised its discretion in the area, must nonetheless restrict itself to reviewing whether that division is coherent and objectively justified (*CMA CGM and Others* v *Commission*, paragraph 182 above, paragraphs 406 and 416, and *Tokai I*, paragraph 84 above, paragraphs 220 and 222).

185 Fourth, the applicants merely criticise the lawfulness of the composition of the second category by alleging discriminatory treatment as compared with SGL. The applicants were placed in that category along with SGL with respective market shares of 18 and 14% representing turnover on the market concerned of EUR 52 million and EUR 41 million, which clearly situated them in the division of undertakings with market shares of between 10 and 20%.

186 It should be pointed out that the difference in size between Schunk and the SGL (4 percentage points), belonging to the same category, is smaller than that between, on the one hand, Schunk and Morgan, the smallest operator in the first category, and Schunk and Hoffmann, on the other, the largest operator in the third category. The small difference between Schunk and SGL, in the light of the fact that SGL's market share is not particularly high, thus enabled the Commission, in a coherent and objective manner and thus without infringing the principles of equal treatment and proportionality, to treat Schunk in the same way as SGL as a medium-sized operator and, consequently, to set the same starting amount of EUR 21 million for it as for Schunk, which is lower than that set for LCL and Morgan, which had a significant position on the market at issue (29% and 23%), and greater than the starting amount for Hoffmann and Conradty, which had a very marginal position on that market (6% and 3%).

187 It is thus evident that the applicants cannot legitimately claim that the fine imposed was discriminatory and disproportionate, since the starting point for their fine is justified in the light of the criterion used by the Commission in assessing the importance of each of the undertakings on the relevant market (see, to that effect, *LR AF 1998* v *Commission*, paragraph 43 above, paragraph 304), and also since the amount of EUR 21 million corresponds almost to the minimum threshold laid down in the Guidelines for 'very serious' infringements.

188 Accordingly, the claims concerning the fact that SKT, a company not listed on a stock exchange with a world-wide market share of well below 10%, has far less economic power than companies listed on a stock exchange, such as Morgan, LCL or SGL, parent companies of world-wide groups with easy access to the financial markets, must be rejected as irrelevant.

189 Moreover, even supposing a necessary link between the specific nature of an undertaking and easy access to the financial markets to be established, that factor is not relevant in the present case to determine, *in concreto*, the extent of the infringement

committed by each of the undertakings involved in the cartel and the real significance of those undertakings on the market concerned.

Deterrent effect

190 First, the applicants claim that the Commission assessed the need to ensure deterrence in respect of the undertakings concerned in an undifferentiated and uniform manner, irrespective of their turnover, contrary to the requirements of the case-law and the Guidelines.

191 It should be noted that the aim of the penalties laid down by Article 15 of Regulation No 17 is to suppress illegal activities and to prevent any recurrence (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 173, and *PVC II*, paragraph 56 above, paragraph 1166).

192 As deterrence is an objective of the fine, the need to ensure it is a general requirement which must be a reference point for the Commission throughout the calculation of the fine and does not necessarily require that there be a specific step in that calculation in which an overall assessment is made of all relevant circumstances for the purposes of attaining that objective (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 226).

193 The Commission did not lay down in the Guidelines any method or specific criteria as to the manner in which the objective of deterrence was to be taken into account and which, had they been set out expressly, would have been capable of having binding

effect. In the indications concerning the evaluation of the gravity of an infringement, Section 1 A, fourth paragraph, of the Guidelines refers only to the need to determine the amount of the fine at a level which ensures that it will have sufficient deterrent effect.

194 In the present case, the Commission expressly emphasised the need to set fines at a level which ensures their deterrent effect, which is the general approach which it follows in setting fines and that it was treating the cartel members differently on the basis of their market shares determined on the basis of the relevant turnover. It set the starting amount of Schunk's fine at EUR 21 million (recitals 271 and 289 of the Decision).

195 It is clear from the Decision that, in order to set the starting amount of the fine on the basis of the gravity of the infringement, the Commission categorised the infringement as such, taking into account objective factors, namely the actual nature of the infringement, its impact on the market and the geographic scope of that market. The Commission also took account of factors relating to the individual undertakings, namely the individual circumstances of each member of the cartel, such as its specific weight and, consequently, the actual impact of its unlawful conduct on competition. It was in this second part of its analysis that it pursued, inter alia, the objective of ensuring that the fine was sufficiently deterrent.

196 In the course of that analysis, the Commission grouped the undertakings concerned into three categories on the basis of the EEA-wide turnover of each of them in relation to the goods concerned by the present proceedings, and including in that calculation the value of captive use of each undertaking. The resulting figure is the market share which represents the relative weight of each undertaking in the infringement and its effective economic capacity to cause significant damage to competition (recitals 289 to 291 of the Decision).

197 It is thus evident that, contrary to the applicants' claims, the Commission's assessment of the need to ensure deterrence in respect of the undertakings concerned was

not undifferentiated and uniform but, on the contrary, took account of the importance of those undertakings on the market concerned on the basis of their relevant turnovers.

198 Second, the applicants claim that in the Decision the Commission requires the undertakings concerned to bring an end to the infringement, although they had already brought the infringement to an end in December 1999, more than four years prior to the Decision, which shows that the Commission's assessment of necessary deterrence was based on an inaccurate pictures of the events.

199 That complaint must be dismissed as based on an incorrect premiss. It is apparent from a mere reading of recital 268 and Article 3 of the Decision that the order that the undertakings to which the Decision was addressed were to bring an immediate end, in so far as they had not already done so, to the infringement found is in no way linked to the Commission's assessment of the deterrent effect of the fine.

200 Third, the applicants submit that they are the victims of discrimination in relation to SGL, in that the Commission assessed the necessary dissuasive effect without taking account of the fact that SGL, as an undertaking listed on the stock exchange, had easier access to the financial markets.

201 As has been shown in paragraphs 184 to 187 above, the classification of Schunk and SGL in the same category, on the basis of their turnover resulting from the sale of the products concerned, does not discriminate against Schunk in any way.

202 If it were to be held that an undertaking listed on the stock exchange is able to raise more easily the funds necessary for the payment of its fine, that might, where

necessary, justify the imposition of a fine which is proportionately higher — with a view to ensuring that it has sufficient deterrent effect — than that imposed on another undertaking which committed the same infringement but does not have such resources.

203 Accordingly, any infringement of the principle of non-discrimination committed by the Commission could lead only to an increase in the amount of the fine imposed on SGL and not to a reduction of the fine imposed on Schunk, as claimed by the latter in its pleadings. It should be pointed out that respect for the principle of equal treatment must be reconciled with respect for the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14; Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 160; and *LR AF 1998* v *Commission*, paragraph 43 above, paragraph 367).

204 Fourth, the applicants assert that the fine imposed by the Commission is disproportionate in the light of the fines imposed in the context of the 'same case' by the US anti-trust authorities, given that the US market is more or less identical in size to the European market.

205 In that regard, the Court notes that the exercise of powers by the authorities of non-member States responsible for protecting free competition under their territorial jurisdiction meets requirements specific to those States. The elements underlying other States' legal systems in the sphere 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 (Cour C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 29).

206 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, that is to say, where a cartel is confined exclusively to the territorial scope of application of the legal system of the European Community (*SGL Carbon* v *Commission*, paragraph 205 above, paragraph 30).

207 It follows that, when the Commission imposes sanctions on the unlawful conduct of an undertaking, even conduct originating in an international cartel, it seeks to safeguard the free competition within the common market which constitutes a fundamental objective of the Community under Article 3(1)(g) EC. On account of the specific nature of the legal interests protected at Community level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those of authorities of non-member States (see *SGL Carbon* v *Commission*, paragraph 205 above, paragraph 31).

208 As regards an alleged failure to have regard to the principles of proportionality and/or equity, pleaded by the applicants, 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. Consequently, although the Commission may take into account fines imposed previously by the authorities of non-member States, it cannot be required to do so (*SGL Carbon* v *Commission*, paragraph 205 above, paragraph 36).

209 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, *ACF Chemiefarma* v *Commission*, paragraph 191 above, 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 (*SGL Carbon* v *Commission*, paragraph 205 above, paragraph 37).

210 In the present case, it is sufficient to point out that the cartel at issue in the Decision was confined exclusively to the jurisdiction of the legal order of the European Community and that, in assessing the deterrent effect of the fines, the Commission was thus not required to take account, in any way, of the fines imposed by the United States authorities on undertakings which have infringed national competition rules. In the light of the specific features of the review and punishment of infringements of competition law in the United States, linked to the importance of actions for damages and criminal proceedings, the applicants cannot plead the amount of the fines imposed in the proceedings in that non-member State as a means of establishing that the fine imposed on them in the Decision was disproportionate.

Schunk's cooperation

211 The Commission has a wide discretion as regards the method of calculating fines and it may, in that regard, take account of numerous factors, including the cooperation provided by the undertakings concerned during the investigation conducted by its departments. In that context, the Commission is required to make complex assessments of fact, such as those relating to the cooperation provided by the individual undertakings concerned (*SGL Carbon* v *Commission*, paragraph 153 above, paragraph 81).

212 In that regard, the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (*SGL Carbon* v *Commission*, paragraph 153 above, paragraph 88).

213 In the Leniency Notice, the Commission sets out the conditions under which undertakings cooperating with it during its investigation into a cartel may be exempted from fines, or may be granted a reduction in the fine which would otherwise have been imposed upon them (see Section A, paragraph 3 of the Leniency Notice).

214 Section D of the Leniency Notice provides:

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

2. Such cases may include the following:

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

215 In the present case, Schunk benefited from a reduction of 30% of the amount of its fine pursuant to Section D of the Leniency Notice.

216 To justify its assessment, the Commission stated the following in recital 328 of the Decision:

'Like [LCL], Schunk applied for leniency after having received the Commission's letter [sent to it pursuant to Article 11 of Regulation No 17]. But Schunk submitted its evidence a month later than [LCL]. In this submission, Schunk admitted to the existence of the cartel and its participation therein. However, Schunk did not submit any contemporaneous reports from cartel meetings. The most useful parts of the evidence submitted consisted of a list of cartel meetings which Schunk acknowledged to have taken place. This list included some meetings the Commission was not yet aware of. Schunk also submitted a set of travel documents relating to various meetings. Most of these related to meetings the Commission was already aware of and for which the Commission had asked to receive all available documents in its Article 11 letter. In the course of the investigation, Schunk also replied to a number of questions posed by the Commission in the framework of Schunk's cooperation with the investigation, in order to complete information it had previously voluntarily submitted. However, the Commission notes that, unlike [LCL], Schunk was not pro-active in supplying additional information about the cartel to the Commission. On the whole, the Commission considers that the voluntary evidence provided by Schunk has fulfilled the criterion of materially contributing to the establishment of the existence of the infringement.'

217 The Commission also stated that, after receiving the Statement of Objections, Schunk informed it that it did not substantially contest the facts on which it based its allegations (recital 329 of the Decision).

218 It should be noted that there is no dispute that Schunk satisfied the conditions laid down in Section D, paragraph 2, first and second indents, of the Leniency Notice when the Decision was adopted. The dispute concerns only the amount of the reduction granted, which is 30% as opposed to 40% granted to LCL. Both undertakings benefited from the same reduction of 10% for not substantially contesting the facts. Schunk effectively submits that the reasoning for that difference in the Decision is erroneous and amounts to discriminatory treatment.

219 As regards Schunk's assertion that it was more responsive than LCL, it should be pointed out that, after receiving a request for information in a letter of 2 August 2002 of the Commission written in English, Schunk requested a German version on 8 August 2002, which it received on 4 October 2002. According to Schunk, that explains why it was able to provide an answer to the request for information only on 25 October 2002, namely only three weeks after receiving the German version of that request, whereas LCL gave an answer more than seven weeks after receiving the request for information which had been sent to it.

220 However, SKT wrote to the Commission on 2 September 2002 to inform it that it intended to cooperate with it in the administrative procedure and to check whether, in addition to the answers to the requests for information, it was in a position to provide other useful information, in the light of the evidence which the Commission already had.

221 On 30 September 2002, SKT, through its lawyer, submitted detailed observations and criticisms regarding the scope of the request for information, with, inter alia, an interpretative analysis thereof in order to show that the questions asked were not within the framework defined by the case-law, and stated that the answers to those questions and the submission of the corresponding evidence went, from a legal point of view, beyond the cooperation required of SKT. None the less, SKT stated that it would answer those questions voluntarily and that the information which went beyond the cooperation required was set out in bold letters in its reply.

222 Those two documents provided by SKT confirm that it understood perfectly the request for information before it was translated into German and, accordingly, the applicants cannot seriously claim to have been in a position to provide their contribution only after receiving that translation.

223 Furthermore, LCL also received the request for information written in English, and not in French, and provided information on the agreements and the concerted practices at issue on 22 August 2002, then on 24 and 30 September 2002. Accordingly, the Commission was right to consider that SKT provided its evidence at least one month later than LCL.

224 Even if that latter conclusion were erroneous because only the receipt of the German translation of the request for information were to be taken into account, the other reasons set out in recital 328 of the Decision would justify the difference of treatment.

225 As is apparent from recital 328 of the Decision, the Commission's assessment of the amount of the reduction granted was essentially based on the value of SKT's

contribution. In that regard, it must be pointed out that, according to the case-law, the reduction of fines for cooperation on the part of the undertakings participating in infringements of Community competition law is based on the consideration that such cooperation facilitates the Commission's task of establishing the existence of an infringement and, where relevant, to bring it to an end (*Dansk Rørindustri and Others* v *Commission*, paragraph 44 above, paragraph 399; *BPB de Eendracht* v *Commission*, paragraph 42 above, paragraph 325; Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363; and *Mayr-Melnhof* v *Commission*, paragraph 165 above, paragraph 330).

226 The Commission essentially considered that the evidence provided by SKT had only weak added value in the light of the evidence which it already had in its possession.

227 It points out, without being contradicted by Schunk, that it received from SKT a list of meetings of the cartel, the majority of which it was already aware of, some of which corresponded to the official meetings of the European trade association in the sector, in this case the ECGA.

228 Contrary to Schunks's assertions, the Commission does not state in recital 328 of the Decision that SKT did not send documents dating back to the material time. It is also agreed that SKT sent, along with its reply to the request for information, correspondence addressed to the representatives of the ECGA and a large number of documents evidencing trips and hotel stays in connection with the meetings of the cartel referred to in the list. However, those documents do not constitute 'reports' or minutes of the content of contemporary cartel meetings.

229 As rightly pointed out by the Commission in its pleadings, the list of meetings and the documents on the corresponding trips made sense only in relation to the information provided by other undertakings on the content of the meetings concerned. Moreover, the Commission stated, without being contradicted by Schunk, that, although SKT answered several questions which were put to it in the context of its cooperation in the investigation in order to supplement the information already provided spontaneously, SKT, unlike LCL, did not take the initiative to provide additional information about the cartel.

230 Schunk also claims that, in recital 328 of the Decision, the Commission stresses the fact that it did not cooperate until after receiving the request for information, which is contrary to the case-law that this fact does not constitute a reason for considering that cooperation to be of less value.

231 The first sentence of recital 328 of the Decision states as follows:

'Like [LCL], Schunk applied for leniency after having received the Commission's Article 11 letter. But Schunk submitted its evidence a month later than [LCL]'.

232 In the light of that wording, the interpretation given by the Commission in its defence, according to which that sentence means that it took account only of information going beyond the obligation to provide information under Article 11 of Regulation No 17, is very broad and cannot be upheld. It is apparent from the wording of recital 328 that the Commission took account of the point in time at which benefit of the Leniency Notice was claimed in order to assess the amount of the reduction able to be granted for the contribution provided by SKT.

233 Schunk refers to the judgment in Case T-230/00 *Daesang and Sewon Europe* v *Commission* [2003] ECR II-2733, paragraph 139, to claim that the taking into account of such a point in time is contrary to the case-law. However, it is apparent from paragraph 139 of that judgment, expressly referred to by Schunk, that that judgment is irrelevant in the present case. In that judgment, the Court of First Instance found that the fact of 'refusing' the applicants the benefit of the reduction laid down in Section C of the Leniency Notice, and not Section D as in the present case, on the ground that a request for information had been sent to them, contravened the conditions laid down in that section.

234 In reality, it is apparent from the case-law that, as stated, the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking (*SGL Carbon* v *Commission*, paragraph 153 above, paragraph 88), and, of an overall assessment, it may take account of the fact that that undertaking sent it the documents only after receiving a request for information (*LR AF 1998* v *Commission*, paragraph 43 above, paragraph 365, upheld on appeal in *Dansk Rørindustri and Others* v *Commission*, paragraph 44 above, paragraph 408), but cannot consider it as decisive as a factor for minimising the cooperation provided by that undertaking under Section D, paragraph 2, first indent, of the Leniency Notice (*Tokai I*, paragraph 84 above, paragraph 410). Recital 328 of the Decision does not fail to have regard to that case-law.

235 In any event, it is apparent from recitals 324 and 328 of the Decision that the Commission took into account, in respect of both Schunk and LCL, the fact that those two undertakings requested the benefit of the Leniency Notice after receiving the request for information, and that they were, therefore, both treated identically in that regard.

236 Finally, it should be pointed out that Schunk underlines in its pleadings certain observations made by the Commission in the Decision regarding the relative utility of the information provided by LCL. In so far as Schunk alleges that LCL obtained an unlawful reduction in its fine, and even if the Commission wrongly granted that undertaking a reduction by incorrectly applying the Leniency Notice, it should be

pointed out that respect for the principle of equal treatment must be reconciled with respect for the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (*Williams* v *Court of Auditors*, paragraph 203 above, paragraph 14; *SCA Holding* v *Commission*, paragraph 203 above, paragraph 160; and *LR AF 1998* v *Commission*, paragraph 43 above, paragraph 367).

237 It follows from the foregoing considerations that the Court must reject the complaint alleging that the Commission erroneously assessed the applicants' cooperation and that they were treated less favourably than SGL.

The Commission's counterclaim

238 The Commission requests the Court to exercise its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17 and to increase the amount of the fine imposed on the applicants, which challenged for the first time before the Court the facts set out in the statement of objections. Schunk disputes the very possibility for the Commission to make an application to increase the amount of the fine and, in any event, the merits of the application.

Admissibility

239 In the present case, an action has been brought before the Court of First Instance by Schunk under Articles 230 EC and 231 EC seeking, primarily, annulment of the Decision and, in the alternative, the reduction of the fine imposed.

240 It must be borne in mind that, in accordance with Article 229 EC, regulations adopted by the Council, pursuant to the provisions of the Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations.

241 Such jurisdiction is granted to the Community judicature by Article 17 of Regulation No 17 which provides that '[t]he Court of Justice shall have unlimited jurisdiction within the meaning of Article [229 EC] to review decisions whereby the Commission has fixed a fine or periodic penalty payment'.

242 The Court of First Instance has power to assess, in the context of the unlimited jurisdiction accorded to it by Article 229 EC and Article 17 of Regulation No 17, the appropriateness of the amounts of fines (Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 40; *Cascades* v *Commission*, paragraph 167 above, paragraph 41; and Case C-280/98 P *Weig* v *Commission* [2000] ECR I-9757, paragraph 41). In the context of its unlimited jurisdiction, the powers of the Community judicature are not limited to declaring the contested decision void, as provided in Article 231 EC, but allow it to vary the penalty imposed by that decision (order in *FNICGV* v *Commission*, paragraph 85 above, paragraph 24).

243 The Community judicature is therefore empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 61).

244 Accordingly, although the exercise of unlimited jurisdiction is most often requested by applicants in the sense of a reduction of the fine, there is nothing preventing the Commission from also referring to the Community judicature the question of the amount of the fine and from applying to have that fine increased.

245 Moreover, such a possibility is expressly provided for in Section E, fourth paragraph, of the Leniency Notice which states that 'should an [undertaking] which has benefited from a reduction in a fine for not substantially contesting the facts then contest them for the first time in proceedings for annulment before the Court …, the Commission will normally ask that court to increase the fine imposed on that [undertaking]'. The application made by the Commission in the present case is based precisely on that provision.

246 The Court also notes that unlimited jurisdiction can be exercised by the Community judicature only in the context of the review of acts of the Community institutions, more particularly in actions for annulment. The sole effect of Article 229 EC is to enlarge the scope of the powers of the Community judicature in the context of the action referred to in Article 230 EC (*FNICGV* v *Commission*, paragraph 85 above, paragraph 25).

247 It follows that Schunk's arguments that the application to increase the Commission's fine is incompatible with Article 230 EC and fails to have regard to the subject-matter of the action defined in the application, must be rejected.

248 Furthermore, Schunk's argument that the application referred to above infringes the 'principle of good faith', in so far as it based on conduct known to the Commission during the administrative procedure, must also be rejected as resulting from a misreading of the Commission's pleadings.

249 As has been pointed out, the application to have the fine increased is based on Schunk's attitude; in the Commission's view, Schunk disputes for the first time

before the Court facts which were previously admitted during the administrative procedure.

250 It follows from the above that that application must be declared admissible and the Court must rule on the substance.

Substance

251 In the light of the Court's power to increase fines imposed pursuant to Regulation No 17, it is appropriate to establish whether, as the Commission essentially maintains, the circumstances of the present case warrant the cancellation of the 10% reduction granted to Schunk for its cooperation, which would thus increase the final amount of the fine.

252 Under Section D, second paragraph, second indent, of the Leniency Notice, an undertaking is to benefit from a reduction of the fine if, 'after receiving a statement of objections, [it] informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations'.

253 In the present case, it should be pointed out that forms of order sought by the applicants seek not only the reduction of the fine but also the annulment of the Decision as such, and that, in the course of their arguments in support of the complaints alleging infringement of the principles of proportionality and equal treatment, the applicants directly dispute the facts raised against them in the statements of objections and on which the finding of an infringement of Article 81 EC is based.

254 As pointed out above, the applicants disputed for the first time before the Court the agreements on the ban on advertising, the anti-competitive practices concerning the goods intended for automobile suppliers and producers of consumer products and the system supervising the implementation of the collusive agreements, on which, inter alia, the finding in the Decision of an infringement of Article 81 EC is based.

255 The Commission submits that the applicants also disputed for the first time in the application the importance of the document reproduced on page No 9823 of the case file (Annex A 21), concerning automobile suppliers and producers of consumer products and the agreements relating to the exclusion of competitors.

256 That document relates to the challenge concerning the anti-competitive practices relating to the products intended for automobile suppliers and producers of consumer products noted in paragraph 254 above.

257 As regards the agreements concerning the exclusion of competitors, the Commission refers to the applicants' complaints alleging the absence of an overall plan of the members of the cartel to bring about a lasting change in the structure of competition on the market by means of take-overs, which, as has been pointed out, results from a misreading of recital 173 of the Decision and can thus not be regarded as a late challenge of the alleged facts.

258 It should be pointed out, at this stage, that the three challenges referred to in paragraph 254 above have been rejected pursuant to the case-law under which facts which an undertaking has expressly acknowledged during the administrative procedure are to be regarded as established, that undertaking being barred from putting forward pleas disputing those facts in proceedings before the Court (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 84 above, paragraph 227; *Tokai I*, paragraph 84 above, paragraph 108; and *Tokai II*, paragraph 56 above, paragraphs 324 and 369).

259 That being so, there are no grounds for cancelling the minimum reduction of 10% allowed to Schunk under the second indent of paragraph 2 of Section D of the Leniency Notice and the Commission's counterclaim must therefore be rejected (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v Commission, paragraph 84 above, paragraph 369).

260 In its pleadings, the Commission refers to *Tokai I*, paragraph 84 above, in which the Court of First Instance upheld a claim that the Commission's fine should be increased, even though the applicant's arguments did not call into question the facts which had expressly been accepted. The Court stated that the Commission, contrary to any expectation which it might reasonably have based on the applicant's objective cooperation in the administrative procedure, had to draw up and submit a defence to the Court dealing with a challenge concerning illegal acts which it was entitled to consider that the applicant would no longer call in question.

261 The Commission's pleadings suggest that what was upheld in a case where the applicant's arguments did not call into question the facts expressly admitted must also be upheld in a case where, as in the present case, there is a late challenge to the facts found during the administrative procedure.

262 The fact remains that, as rightly pointed out by the applicants, Article 15(2) of Regulation No 17 provides that the amount of a fine can be determined only on the basis of the gravity and duration of the infringement. The fact that the Commission was constrained to draw up a defence dealing with a challenge to facts which it was entitled to consider that the applicant would no longer call in question is not such as to justify, in the light of the two exclusive criteria for determining the amount of the fine, an increase of that fine. In other words, the expenses incurred by the Commission as a result of the proceedings before the Court are not a criterion for determining the amount of the fine and must only be taken into account when applying the provisions of the Rules of Procedure relating to costs.

263 In the light of all of the above, all of the applications made in the context of the present action must be dismissed.

Costs

264 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Schunk GmbH and Schunk Kohlenstoff-Technik GmbH to pay the costs.**

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 8 October 2008.

Registrar President

E. Coulon M. Vilaras

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