OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 18 January 2007 [1]

I — Introduction

1. By the present appeal, the German company SGL Carbon AG ('SGL') asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai and Others* v *Commission* [2] ('the judgment under appeal') in so far as that Court dismissed its action for annulment in Case T-91/03 brought against Commission Decision C(2002) 5083 final of 17 December 2002 ('the contested decision') relating to a proceeding under Article 81 EC.

2. By the judgment under appeal, the Court of First Instance inter alia reduced the fine imposed on SGL in respect of the infringement committed in the isostatic graphite sector and dismissed the remainder of the application.

3. The present appeal is, in terms of the background and the pleas put forward, closely related to the appeal brought in Case C-308/04 P concerning fines imposed by the Commission for participation in a series of agreements and concerted practices in the graphite electrodes sector. That case was decided by judgment of the Court of 29 June 2006. [3]

II — Legal framework

A — *Regulation No 17*

4. Article 15 of Council Regulation No 17 of 6 February 1962: First Regulation imple-

1 — Original language: English.

2 — Not published in the ECR.

3 — Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977. The present appeal is, in these terms, to a certain extent also related to the appeal brought in Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859.

menting Articles [81] and [82] of the Treaty [4] ('Regulation No 17') provides:

'1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently:

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

...

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

...

...

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

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

...'

4 — OJ, English Special Edition 1959-1962, p. 87.

B — *The Guidelines*

5. The Commission Notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' [5] ('the Guidelines') states in its preamble:

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

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

C — *The Leniency Notice*

6. In its Notice on the non-imposition or reduction of fines in cartel cases [6] ('the Leniency Notice'), the Commission set out the conditions under which undertakings cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them.

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

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

5 — OJ 1998 C 9, p. 3.

6 — OJ 1996 C 207, p. 4.

8. Section C of the Leniency Notice, headed 'Substantial Reduction in a Fine', provides as follows:

'Enterprises which both satisfy the conditions set out in section B, points (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50 to 75% of the fine.'

9. The conditions set out in section B, to which section C refers, are where the undertaking in question:

'(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

(b) is the first to adduce decisive evidence of the cartel's existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;

(e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity'.

10. Under paragraph 1 of section D, '[w]here an enterprise 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' and, under paragraph 2 of that section, '[s]uch cases may include the following:

— before a statement of objections is sent, an enterprise provides the Commission

with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

D — *European Convention for the Protection of Human Rights and Fundamental Freedoms*

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

'Right not to be tried or punished twice

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

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

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

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

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

'1 By Decision C(2002) 5083 final ... the Commission found that various undertakings had participated in a series of agreements and concerted practices

within the meaning of Article 81(1) EC and Article 53(1) of the Agreement on the European Economic Area ("EEA") in the specialty graphite sector in the period from July 1993 to February 1998.

2 For the purposes of the Decision, "specialty graphite" describes a group of graphite products, namely isostatic graphite, extruded graphite and moulded graphite used in diverse applications. It does not include steel-making graphite electrodes.

3 The mechanical characteristics of isostatic graphite are superior to those of extruded and moulded graphite and the price of each graphite category varies according to its mechanical characteristics. Isostatic graphite is used, inter alia, in the manufacture, by electrical-discharge machining, of metal moulds for the automobile and electronics industries. It is also used to make dies for the continuous casting of non-ferrous metals such as copper and copper alloys.

4 The production cost differential between isostatic graphite and extruded or moulded graphite is at least 20%. In general, extruded graphite is the cheapest and is therefore chosen if it meets the user's requirements. Extruded products are used in a wide range of industrial applications, mainly in the iron and steel, aluminium and chemical industries and in metallurgy.

5 Moulded graphite is generally used only in large-scale applications, because it is typically inferior to extruded graphite.

...

7 The Decision concerns two separate cartels, one relating to the market for isostatic specialty graphite and the other to that for extruded specialty graphite. There was no evidence of an infringement in respect of moulded graphite. Those cartels covered very specific products, namely graphite in the form of standard and cut blocks, but not machined products, that is made to order for the customer.

8 The major producers of specialty graphite in the western world are multinational corporations. ...

9 When the Decision was adopted, the largest producers of isostatic specialty graphite in the Community/EEA were the German company SGL Carbon AG ("SGL") and the French company Le Carbone-Lorraine SA ("LCL"). The Japanese company Toyo Tanso Co. Ltd ("TT") ranked third, followed by other Japanese companies, namely Tokai Carbon Co. Ltd ("Tokai"), Ibiden Co. Ltd ("Ibiden"), Nippon Steel Chemical Co. Ltd ("NSC") and NSCC Techno Carbon Co. Ltd ("NSCC") and the American company UCAR International Inc. ("UCAR"), which became GrafTech International Ltd.

...

11 The main participants in the world market for extruded graphite were UCAR (40%) and SGL (30%). On the European market they accounted for two thirds of sales. The Japanese producers together held about 10% of the world market and 5% of the Community market. The proportion of sales of extruded products in the form of blocks or cut blocks (unmachined products) was 20 to 30% for UCAR and 40 to 50% for SGL.

12 In June 1997 the Commission commenced an investigation into the graphite electrodes market. The investigation led to the decision of 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement — Case COMP/E-1/36.490 — Graphite electrodes (OJ 2002 L 100, p. 1). In the course of that investigation, UCAR contacted the Commission, in 1999, in order to submit a request on the basis of [the Leniency Notice]. The request related to alleged anti-competitive practices in the markets for isostatic and extruded graphite.

13 On the basis of the documents submitted by UCAR, the Commission sent requests for information under Article 11 of [Regulation No 17] to SGL, Intech, Ibiden, Tokai and TT, requiring detailed information concerning contacts with competitors. Those companies contacted the Commission and expressed their intention to cooperate with the Commission's investigations.

14 In the US, criminal proceedings were brought in March 2000 and in February 2001 against a subsidiary of LCL and a subsidiary of TT for participating in an illegal cartel on the specialty graphite market. The companies pleaded guilty and agreed to pay fines. In October 2001 Ibiden also pleaded guilty and paid a fine.

15 On 17 May 2002 the Commission sent a statement of objections to the addressees of the Decision. In their replies, all the companies apart from Intech EDM BV and Intech EDM AG admitted the infringement. None of them substantially contested the facts.

16 Given the similarity of the methods used by the cartel members, the fact that the two infringements concerned related products and that SGL and UCAR were involved in both cases, the Commission considered it appropriate to address the infringements in the two product markets in a single procedure.

17 The administrative procedure concluded on 17 December 2002 with the adoption of the Decision which found, first, that the applicants, TT, UCAR, LCL, Ibiden, NSC and NSCC had fixed worldwide indicative prices (target prices) on the unmachined isostatic graphite market and, second, that SGL and UCAR had committed a similar infringement, also worldwide, on the unmachined extruded graphite market.

18 With regard to the infringement on the isostatic graphite market, the Decision notes that prices were fixed and broken down by application, geographic area (Europe or the United States) and trade level (distributors/machine shops and large end-users with machining capability). The object of the cartel was to harmonise trading conditions and to exchange shipment records so as to ensure detailed monitoring of sales and the detection of deviations from cartel instructions. On some occasions, information was exchanged concerning the allocation of major customers.

19 The Decision states that collusive agreements were implemented on the iso-

static graphite market by regular multilateral meetings at four levels:

— "top level meetings", attended by the top executives of the companies, at which the main principles of cooperation were established;

— "international working level meetings" concerning the classification of graphite blocks into different categories and the fixing of minimum prices for each category;

— "regional" (European) meetings;

— "local" (national) meetings concerning the Italian, German, French, British and Spanish markets.

...

21 With regard to the extruded graphite market, it is clear from the Decision that the two main players on the European market for such products, SGL and UCAR, admitted participation in a number of bilateral meetings dealing with that market in the period from 1993 to the end of 1996. UCAR and SGL agreed to increase extruded graphite prices on the Community/EEA market. They regularly discussed prices and the classification of products in order to avoid competing on prices. The new prices were in fact announced to customers in turn by one of the parties.

22 On the basis of the findings of fact and legal assessment in the Decision, the Commission imposed on the companies in question fines calculated in accordance with the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ... and the Leniency Notice.

23 Under the first paragraph of Article 1 of the operative part of the Decision, the following undertakings infringed Article 81(1) EC and Article 53(1) of the EEA Agreement by participating, for the

periods indicated, in a complex of agreements and concerted practices affecting the Community and EEA markets for isostatic specialty graphite:

...

(b) SGL, from July 1993 to February 1998;

...

24 Under the second paragraph of the same provision, the following undertakings infringed Article 81(1) EC and Article 53(1) of the EEA Agreement by participating for the periods indicated in a complex of agreements and concerted practices affecting the Community and EEA markets for extruded specialty graphite:

— SGL, from February 1993 to November 1996;

...

25 Article 3 of the operative part imposes the following fines:

...

(b) SGL:

— Isostatic specialty graphite: EUR 18 940 000;

— Extruded specialty graphite: EUR 8 810 000;

...

26 Article 3 further orders that the fines are to be paid within three months of the date of notification of the Decision with default interest at the rate of 6.75%.

27 The Decision was sent to the applicants with a covering letter of 20 December 2002. It stated that after expiry of the

period for payment specified in the Decision the Commission would take steps to recover the sums in question; however, if proceedings were commenced before the Court of First Instance the Commission would not take steps to enforce the judgment provided that interest at the rate of 4.75% was paid and a bank guarantee given.'

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

13. By separate applications, SGL and other undertakings to which the contested decision was addressed brought actions for annulment of the contested decision before the Court of First Instance.

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

'In Case T-91/03 *SGL Carbon* v *Commission* [the Court]:

— sets the fine imposed on the applicant by Article 3 of Decision COMP/E-2/37.667 at EUR 9 641 970 in respect of the infringement committed in the isostatic graphite sector;

— dismisses the remainder of the application;

— orders the applicant to bear two thirds of its own costs and to pay two thirds of the costs incurred by the Commission, and the Commission to bear one third of its own costs and to pay one third of the costs incurred by the applicant.'

V — Forms of order sought before the Court

15. SGL claims that the Court should:

— partially set aside the judgment of the Court of First Instance of the European Communities of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, in so far as it dismissed the action in Case T-91/03 brought against Commission Decision C(2002) 5083 final of 17 December 2002 relating to a proceeding under Article 81 EC;

— in the alternative, reduce the fine imposed on the appellant in Article 3 of the decision of 17 December 2002 and further reduce the amount of the interest payable pending judgment and the default interest laid down in the operative part of the judgment under appeal, as appropriate;

— order the respondent to pay the entire costs of the proceedings.

16. The Commission contends that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.

VI — The appeal

17. SGL puts forward six pleas in law in support of its appeal alleging erroneous application of procedural rules and infringement of Community law.

18. By its first plea, SGL alleges that the Court of First Instance infringed the principle of *ne bis in idem* by failing to take into account the earlier fines imposed on it in the United States. The second plea is directed against the 35% increase in the amount of the fine to reflect SGL's role of sole ringleader. The third plea concerns the failure of the Court of First Instance to consider SGL's objection that its rights of defence were irreparably infringed by the inadequate language knowledge of the members of the Commission's team working on the case. By its fourth plea, SGL claims that the cooperation provided by it was undervalued. By its fifth plea, SGL alleges that the Court of First Instance failed to take into account its ability to pay the fine and that the fines imposed were disproportionately high. In the sixth plea, SGL submits that the determination of the interest rate by the Court of First Instance was incorrect.

A — *The first plea, alleging infringement of the principle of ne bis in idem*

Main arguments

19. By the arguments put forward in its first plea, SGL essentially contends that the Court of First Instance committed an error of law by failing in paragraphs 112 to 116 of the

judgment under appeal to take into account the earlier fines imposed on SGL in the United States in 1999. Those penalties should, if only on grounds of natural justice, have led to a reduction of the fine imposed. This follows from a correct understanding of the fundamental principle of *ne bis in idem*, which is, contrary to the findings of the Court of First Instance, also applicable in relation to sanctions imposed by non-member States.

20. As to the content and scope of application of that principle, SGL refers in particular to Article 50 of the Charter of Fundamental Rights of the European Union, Article 4 of Protocol No 7 of the ECHR, the national legal orders of the Member States and a number of judgments of the Court of Justice and the Court of First Instance. It cannot be deduced from *Boehringer*, [7] as the Court of First Instance wrongly held in paragraph 112 of the judgment under appeal, that the rule against cumulation of penalties does not apply to a case, such as the one at issue, where the facts on which two offences are based are identical. The principle of territoriality, to which the Court of First Instance referred in paragraph 113 of the judgment under appeal, does not contradict this view. Moreover, insofar as the Court of First Instance took the view in paragraph 116 of the judgment under appeal that the interests protected by the Community authorities and the United States authorities were not the same, that finding is incorrect.

21. In addition, SGL maintains in particular that the Court of First Instance was wrong to hold in paragraph 114 of the judgment under appeal that there was no need to consider SGL's assertion that the penalties imposed on it in the United States for its participation in the graphite electrodes cartel also concerned specialty graphite or to hear on that point from the witness named by SGL. In any event SGL had proved the existence of an '*idem*'.

22. At the hearing SGL made the additional point with regard to the judgment of the Court in *SGL Carbon* [8] that, although the Court rejected the view that account must be taken in any event of a previous sanction imposed on an undertaking in a non-member State, that does not mean that the Commission does not have a discretion to take that circumstance into account. Indeed, particularly having regard to the need to ensure that the sanction is proportionate, the Commission may be obliged to use its margin of discretion in the matter in a way that takes account of previous sanctions, such as those at issue.

23. The Commission provides detailed arguments in rebuttal of those put forward by SGL and maintains that the Court of First Instance was correct to hold that the principle of *ne bis in idem* was not applicable in the present case.

7 — Case 7/72 *Boehringer Mannheim* v *Commission* [1972] ECR 1281.

8 — Cited in footnote 3.

Appreciation

24. It should be noted at the outset that the principle of *ne bis in idem* prohibits the same person from being sanctioned more than once for the same unlawful conduct in order to protect one and the same legal interest. It is settled case-law that this principle, which is also enshrined in Article 4 of Protocol No 7 to the ECHR, constitutes a fundamental principle of Community law, the observance of which is guaranteed by the Community judicature. [9] It should, finally, be recalled that the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset. [10]

25. As regards, next, more specifically the plea in question, it must be noted that the Court of Justice has already decided in its judgments in *SGL Carbon* [11] and *Showa Denko*, [12] and essentially reached the same view in *Archer Daniels*, [13] that the Commission is not obliged to take into account proceedings and penalties for infringement of the competition rules to which an undertaking has been subject in non-member States.

26. In that regard, the Court rejected similar claims in *SGL Carbon* based essentially on the same arguments as those put forward by SGL in the present case.

27. As regards the scope of application of the principle of *ne bis in idem* in cases where the authorities of a non-member State have taken action pursuant to their power to impose penalties in the field of competition law applicable in that State, the Court in its reasoning first pointed to the international context of such a cartel, characterised in particular by action of legal systems of non-member States within their respective territories and observed 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. [14]

9 — See, inter alia, Joined Cases 18/65 and 35/65 *Gutmann* v *Commission of the EAEC* [1966] ECR 103, 119; and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59.

10 — See, inter alia, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338.

11 — Cited in footnote 3.

12 — Cited in footnote 3.

13 — Case C-397/03 P *Archer Daniels Midland* v *Commission* [2006] ECR I-4429.

14 — Paragraphs 28 and 29.

28. In addition, the Court stated that the elements forming the basis of other States' legal systems in the field of competition not only include specific aims and objectives but also result in the adoption of specific substantive rules and a wide variety of legal consequences, whether administrative, criminal or civil, when the authorities of those States have established that there have been infringements of the applicable competition rules.

29. The Court clearly distinguished that situation — characterised by different territorial jurisdictions and a multiplicity of legal systems pursuing their own aims and objectives — from one characterised by the exclusive application of Community law and the law of one or more Member States on competition to an undertaking, that is to say, where a cartel is confined exclusively to the territorial scope of application of the legal system of the European Community. [15]

30. It emphasised the specific nature of the legal interest protected at Community level, on account of which the Commission's assessments under the powers available to it may diverge considerably from those made by authorities of non-member States.

31. The Court therefore concluded, having regard essentially to the difference between the legal interest protected by the legal systems of the Community and the interest protected in a non-member State, particularly the United States, that the Court of First Instance was fully entitled to hold that the principle of *ne bis in idem* does not apply.

32. The corresponding claim of SGL in the present case, alleging infringement of the principle of *ne bis in idem*, must therefore be rejected for the same reason.

33. With respect to SGL's reference to other principles, such as the principle of natural justice, it should be added that the Court held in *SGL Carbon* that there are no other principles, including principles of international law, which oblige the Commission to take account of proceedings and penalties to which the undertaking concerned has been subject in non-member States. [16]

34. As regards the argument put forward by SGL at the hearing, that *SGL Carbon* is to be understood as meaning that it provides the Commission with a discretion as to whether to take account of a sanction previously imposed in a non-member State and that the

15 — Paragraph 30.

16 — Paragraphs 33 to 37.

Commission may ultimately be required to do so, suffice it to say that such an approach appears to amount to an attempt to distort the clear interpretation of the Court to the contrary in that judgment and cannot therefore be upheld. [17]

35. It follows that the Court of First Instance did not commit an error of law and infringe the principle of *ne bis in idem* in finding at paragraphs 112 to 116 of the judgment under appeal that the Commission was not obliged, when imposing the sanction on SGL, to take into account the penalties previously imposed on SGL in the United States.

36. Moreover, as regards in particular the reference made to *Boehringer* by the Court of First Instance at paragraph 112 of the judgment under appeal, [18] the Court of Justice did not in fact rule in that case on the question as such whether the Commission is required to set off a penalty imposed by authorities of a non-member State, because it had not been established that the actions of the applicant complained of by the Commission, on the one hand, and the American authorities, on the other, were in truth identical. [19]

37. However, the Court established in that case that the principle of *ne bis in idem* requires that there be identity of actions and that those actions should not differ essentially as regards both their object and their geographical emphasis. [20]

38. In stating at paragraph 112 of the judgment under appeal, introducing its findings as regards that principle, that 'where the facts on which two offences are based arise out of the same set of agreements but they nevertheless differ as regards both their object and their geographical scope, the principle of *ne bis in idem* does not apply', the Court of First Instance merely applied that case-law correctly.

39. Finally, as regards the alleged failure of the Court of First Instance at paragraph 114 of the judgment under appeal to consider SGL's assertion that the penalties imposed on it in the United States for its participation in the graphite electrodes cartel also concerned specialty graphite and to hear on that point from the witnesses named by SGL, it must be noted that, since the Court of First Instance was, as argued above, entitled to hold that the principle of *ne bis in idem* does not apply with regard to penalties imposed in non-member States, by reason of the lack of

17 — See, to that effect, *SGL Carbon*, cited in footnote 3, at paragraph 36, and *Showa Denko*, cited in footnote 3, at paragraph 60.

18 — Cited in footnote 7.

19 — See *Archer Daniels*, cited in footnote 13, paragraphs 48 and 49.

20 — See *SGL Carbon*, paragraph 27.

unity of the legal interest protected, it was consequently right to hold that there is no need to go on to examine the existence of an '*idem*' with regard to the facts, that is the same conduct. That argument must therefore also be rejected.

40. In the light of the foregoing considerations, the first plea must therefore be dismissed as unfounded.

B — *The second plea, directed against the 35% increase in the amount of the fine on account of the allegation that SGL was the sole ringleader*

Main arguments

41. By its second plea, SGL challenges the findings of the Court of First Instance in paragraphs 138 to 155 and paragraphs 316 to 331 of the judgment under appeal, where it found that SGL was an actual ringleader of the cartel and held that the consequential increase in the basic amount of the fine for SGL should be reduced from 50 to 35%.

42. This plea is in two parts.

43. First, SGL essentially submits that no justification was given by the Court of First Instance for increasing the amount of the fine by 35%, since the undisputable facts and that Court's own contradictory findings do not provide for a basis for doing so. In that regard, SGL refers to its arguments put before the Court of First Instance, as summarised in paragraphs 303 to 310 of the judgment under appeal.

44. Secondly, SGL essentially contends that the Court of First Instance was wrong to assume that the statement of objections was sufficient, as far as the attribution of the role of the sole ringleader is concerned, to satisfy its rights of defence. The Court of First Instance failed to take account of the fact that it was not apparent from the Commission's complaints that it was intending to regard SGL as the sole ringleader. That Court was thus wrong to take the view in paragraph 150 of the judgment under appeal that SGL could defend itself appropriately on the basis of the information contained in the statement of objections.

45. The Commission contests each of the arguments put forward by SGL and submits that the plea is at least partially inadmissible.

Appreciation

46. As regards the first part of this plea, it should, first of all, be recalled that an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, secondly, to assess those facts. The Court of Justice thus has no jurisdiction to find the facts or, as a rule, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. [21]

47. Moreover, an appeal cannot be heard by the Court of Justice in so far as it amounts in reality to no more than a request for re-examination of the application already submitted to the Court of First Instance. Under Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice, an appeal must, by contrast, indicate precisely the contested elements of the judgment which SGL seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, merely repeats or reproduces the pleas in law and arguments previously submitted to the Court of First Instance. [22]

48. By the first part of the second plea, SGL challenges the findings of the Court of First Instance in paragraph 316 et seq. of the judgment under appeal that SGL was an actual ringleader. It does not, however, put forward any arguments to show in what way the Court of First Instance committed an error of law in that regard. SGL's arguments are therefore truly directed against the findings and the appraisal of facts by the Court of First Instance in that respect. Moreover, in so far as SGL refers to and repeats its arguments already put forward before the Court of First Instance, this part of the plea amounts in reality to a request for re-examination of the application already submitted before the Court of First Instance.

21 — See, inter alia, order of the Court in Case C-19/95 P *San Marco Impex Italiana* v *Commission* [1996] ECR I-4435, paragraph 40; Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42; and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 177.

22 — See, to that effect, inter alia Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 20, and Case C-208/03 P *Le Pen* v *Parliament* [2005] ECR I-6051, paragraph 39 and the case-law cited therein.

49. It must therefore be concluded that, as the Commission has rightly pointed out, the first part of the second plea should, to that extent, be rejected as inadmissible.

50. However, in so far as SGL claims that the grounds of the judgment under appeal are contradictory, this constitutes a question of law which is amenable, as such, to judicial review on appeal. [23]

51. According to SGL, the reasoning of the Court of First Instance in the judgment under appeal is contradictory in that it held, on the one hand, in paragraph 328 et seq. of that judgment, that the conduct of the other members of the cartel, in particular LCL and Tokai, was not so readily distinguishable from that of SGL as the Commission alleged, but none the less upheld, in paragraph 331, the increase in principle, merely reducing it to 35%.

52. I do not agree that a contradiction exists, since the Court of First Instance did not state that there was no difference between the gravity of SGL's infringement and those of Tokai and LCL, but held only that that difference was not so significant as to justify an increase of 50% in the basic amount fixed for SGL. Consequently, the Court of First Instance, in the exercise of its unlimited jurisdiction, reduced, in paragraph 331 of the judgment under appeal, the uplift from 50 to 35%. That argument is therefore unfounded.

53. The first part of the second plea must accordingly be rejected.

54. As regards the second part of this plea alleging infringement of SGL's rights of defence, the Court of First Instance correctly described, in paragraph 139 of the judgment under appeal, the standard with regard to the calculation of fines as defined in settled case-law of the Court of Justice, according to which, provided that the Commission expressly indicates in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that the infringement has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. [24]

23 — See, in particular, Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 29; Case C-188/96 P *Commission* v *V.* [1997] ECR I-6561, paragraph 24; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 25; and Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 53.

24 — See, to that effect, inter alia, *Dansk Rørindustri and Others* v *Commission*, cited in footnote 21, paragraph 428; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraphs 19 and 20; and *Showa Denko*, cited in footnote 3, paragraph 69.

55. The Court of First Instance also correctly held that, in doing so, the Commission provides those undertakings with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined. [25]

56. It was correct in holding that the rights of the defence in this context are guaranteed before the Commission through the opportunity to make submissions on the duration, the gravity and the forseeability of the anti-competitive nature of the infringement, but that, by contrast, the Commission is under no obligation to explain the way in which it would use each of those elements of fact and law in determining the level of the fine. [26]

57. In my view, having regard to that case-law, the Court of First Instance held without committing an error of law that the statement of objections at issue contained sufficiently precise indications as to the way in which the Commission intended to determine the fine, particularly as regards the gravity of the infringement.

58. As the Court of First Instance noted in paragraph 148 of the judgment under appeal, although such a classification was ultimately not upheld in respect of LCL, the statement of objections alleged in any event that SGL played, with LCL, the role of leader or instigator in the cartel. SGL was thus made aware that the Commission intended to attribute to it the role of a leader and that that might be taken into account in setting the fine.

59. That, at the end of the day, SGL was identified by the Commission as the sole leader of the cartel, did in my view not change SGL's position to such an extent as to impair significantly its right to defend itself, given that it is inherent in the nature of the statement of objections that it is provisional and subject to amendments to be made by the Commission in its subsequent assessment on the basis of the observations submitted to it by the parties, including the abandonment of certain allegations, such as the allegation that LCL played the role of a leader.

60. It should be added, as the Commission has pointed out, that, in terms of the Guidelines and the practice of the Commission in that regard, the increase in the fine imposed can be 50%, irrespective of whether it is only one of the participants in a cartel, or several of them, who are classified as leaders.

25 — See in particular, *Dansk Rørindustri and Others* v *Commission*, cited in footnote 21, paragraph 428, and Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21.

26 — See, to that effect, inter alia, *Dansk Rørindustri and Others* v *Commission*, cited in footnote 21, paragraphs 434 to 439; see also, as regards the case-law of the Court of First Instance in that respect, in particular Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 200.

61. Moreover, the Court of First Instance held in that regard in paragraph 149 of the judgment under appeal that there is nothing to suggest that SGL's liability as ringleader of the cartel was actually increased by the attribution to it of part of the joint leadership role originally attributed by the Commission to LCL. That constitutes a finding of fact which is as such not subject to review by the Court of Justice, given that SGL has not claimed that the Court of First Instance distorted the evidence in this regard. [27]

62. The second part of the second plea must therefore also be rejected.

C — *The third plea, alleging errors of law with regard to the complaint concerning the inadequate language knowledge of the members of the Commission's team working on the case*

Main arguments

63. By its third plea, SGL essentially complains that in paragraph 154 of the judgment under appeal, the Court of First Instance failed to consider its claim that its rights of defence were irreparably infringed by the inadequate language knowledge of the members of the Commission's team working on the case, and did so in spite of SGL's substantiated submissions and offers to provide evidence.

64. The Court of First Instance was wrong to hold that this objection was a pure supposition unsupported by any reliable evidence. That amounts to an erroneous appraisal of the facts.

65. Moreover, the fact that the officials concerned lacked the necessary language skills deprived SGL of its right of defence in the administrative procedure. By considering that circumstance as irrelevant, the Court of First Instance infringed its rights of defence.

66. The Commission takes the view that the findings of the Court of First Instance in paragraphs 154 and 155 of the judgment under appeal are correct and not vitiated by an incorrect appraisal of the facts or an infringement of the rights of the defence. It considers that since the administrative procedure was conducted by the Directorate-General for Competition and concluded by the European Commission as a whole, the language skills of a particular member of the investigating team are not decisive.

27 — See point 46 above.

Appreciation

67. In so far as SGL questions by its third plea, first of all, the finding of the Court of First Instance in paragraph 154 of the judgment under appeal by which it rejected SGL's allegation that the Commission had entrusted SGL's 'German file' to officials who did not have sufficient command of German, that finding is based on an appraisal of facts and an assessment of evidence which cannot as such be challenged in an appeal. [28] That being the case, the third plea is therefore, to that extent, inadmissible.

68. As regards, moreover, the argument advanced on that point that SGL had offered further evidence to substantiate that claim, it should be noted that it falls to the Court of First Instance to assess the relevance of such an offer to the subject-matter of the dispute and the need to examine additional evidence. [29]

69. In so far as SGL alleges, next, that the Court of First Instance infringed its rights of defence in considering the fact that the officials concerned lacked the necessary language skills (in this case German), it must first be noted, as stated above, that the Court of First Instance had already rejected that allegation on the facts, so that the question, as such, whether that circumstance infringed the right to be heard did not actually arise before that Court.

70. Secondly, I would, however, take the view that the language skills — or the lack of them — of a particular member of the team of investigators within the Commission could not *per se* be decisive. The Commission as a whole is responsible for the conduct of proceedings in the field of competition law and also bears collective responsibility for the final decisions concluding those proceedings.

71. If indeed, as the Court of First Instance rightly pointed out in paragraph 154 of the judgment under appeal, SGL were to have succeeded in showing that the figures relied upon by the Commission in the contested decision were inaccurate, the decision would be vitiated by a substantive error and could accordingly be annulled in this respect on that ground, irrespective of whether that flaw was in fact attributable to the insufficient language skills of a particular team member or any other circumstance within the internal organisation of the Commission which might have caused it to commit the error.

28 — See point 46 above and the case-law cited in footnote 21.

29 — See, to that effect, inter alia, *Dansk Rørindustri and Others* v *Commission*, cited in footnote 21, paragraph 68, and *Baustahlgewebe* v *Commission*, cited in footnote 23, paragraph 70.

72. It follows that the third plea must be rejected.

D — *The fourth plea, alleging that the cooperation provided by SGL was undervalued with regard to the reduction of the fine under the Leniency Notice*

Main arguments

73. By its fourth plea, SGL challenges the findings of the Court of First Instance in paragraphs 367 to 375 of the judgment under appeal, by which it rejected SGL's arguments alleging infringement of the Leniency Notice and, by extension, the insufficiency of the reduction of the fine granted by that Court.

74. SGL essentially argues that its cooperation was undervalued. First, the Court of First Instance was wrong to hold in paragraph 367 of the judgment under appeal that SGL was not entitled to a higher reduction on account of its being wrongly classified as a ringleader. Secondly, SGL submits that it was the victim of discrimination, since the cooperation it provided was at least of the same value as that of other participants, particularly UCAR.

75. SGL criticises the findings of the Court of First Instance in paragraphs 368, 370 and 373 of the judgment under appeal and maintains inter alia in that regard that the value of the cooperation provided does not depend on the contribution actually being taken into account by the Commission.

76. According to the Commission, the findings of the Court of First Instance in question are correct and SGL's claims, which are in part inadmissible, should be rejected in their entirety.

77. It refers especially to the discretion which the Commission possesses with regard to the reduction of the fine and, in particular, in assessing the quality and usefulness of the cooperation provided by the various members of a cartel. Moreover, as was rightly pointed out in the judgment under appeal, were the Court of First Instance to have decided that the Commission ought to have found that there was an infringement during a particular period by a particular undertaking, that Court would have assumed for itself the powers of the Commission.

Appreciation

78. First of all, it should be borne in mind that, in accordance with settled case-law, the Commission enjoys a wide margin of discre-

tion with regard to the setting of the amount of the fine, including the reduction of the fine under the Leniency Notice. [30] Whilst it is thus for the Court of Justice to ascertain whether the Court of First Instance has correctly assessed the Commission's exercise of that discretion, it is not for the Court of Justice, when deciding in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance adjudicating, in the exercise of its unlimited jurisdiction, in respect of the determination of the amount of fines. [31]

79. As regards consideration of the reduction granted to SGL, the Court of First Instance, first, based its assessment in that regard, in my view correctly, on the assumption that, according to the clear wording of the Leniency Notice, which refers to an enterprise which is the 'first' undertaking which adduces 'decisive' evidence of the 'existence' of the cartel, only one undertaking, namely the first one to adduce such evidence as to the existence of a cartel but not, in addition, other undertakings (subsequently) putting forward evidence relating to particular periods or aspects of the life of that cartel, may qualify for a very substantial reduction under section B of the Leniency Notice.

80. The Court of First Instance could then rightly take the view that the Commission was entitled to find that UCAR alone was the first undertaking for the purposes of sections B and C of the Leniency Notice.

81. Consequently, the Court of First Instance was also correct to find in paragraph 367 of the judgment under appeal that SGL did not satisfy the conditions laid down under either section B(b) of the Leniency Notice or section B(e), due to its role as a ringleader. That assessment was based on an appraisal of facts which is, as I have pointed out above, [32] not capable of being challenged in the framework of this appeal.

82. As regards, next, SGL's claim directed against paragraph 368 of the judgment under appeal, the Court of First Instance was not wrong to hold that the Commission was under no obligation to reward cooperation by a reduction in the fine, when the Commission did not rely on the evidence concerned with regard to the finding or punishment of an infringement of Community competition law. In that regard, the case-law of the Court of Justice shows that such a contribution can justify a reduction in the fine on grounds of cooperation only if it

30 — See *Dansk Rørindustri and Others* v *Commission*, cited in footnote 21, paragraphs 393 and 394.

31 — See *SGL Carbon*, cited in footnote 3, paragraph 48, and *Dansk Rørindustri and Others* v *Commission*, cited in footnote 21, paragraph 245.

32 — See points 46 and 48 above.

actually enables the Commission to perform its duty of establishing the existence of an infringement and bringing it to an end and in fact furthers the Commission's task, [33] which cannot be the case if the Commission did not even take the contribution concerned into account.

83. In that regard, the Court of First Instance correctly pointed out in paragraphs 369 and 370 of the judgment under appeal that, by reason of the discretion the Commission enjoys in that respect, it cannot be obliged to find and sanction all anti-competitive conduct, nor could the Community judicature find — if only for the purposes of reducing the fine — that the Commission, in the light of the evidence available to it, should have found that there was an infringement during a particular period by a particular undertaking. SGL cannot therefore claim that its contribution should have been rewarded by a substantial reduction in the fine on the ground that the Commission was, on the basis of that contribution, obliged to find or punish a particular infringement.

84. As regards, finally, SGL's claim that the cooperation provided by it was undervalued by comparison with that of the other members of the cartel, it should, first, be noted, as the Court of First Instance rightly pointed out in paragraph 371 of the judgment under appeal, that the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by the various members of a cartel. Secondly, SGL has not shown in what way the Court of First Instance failed to censure a manifest abuse of that discretion by the Commission.

85. Moreover, as regards SGL's claim to be a victim of discrimination with respect to UCAR, it must be noted that, although it is true that, in the setting of the fine and the granting of a reduction, the Commission is in principle, albeit subject to its wide discretion, bound by the principle of equal treatment, [34] the contribution provided by UCAR rightly led it, as I mentioned above, to be categorised as a 'first' undertaking for the purposes of section B of the Leniency Notice. For that reason alone, the weight of its contribution and the reduction granted to it bear no relation to the contribution provided by and the reduction granted to SGL. The latter cannot therefore claim that it has been discriminated against on the grounds of the difference between the reduction granted to it and that granted to UCAR.

33 — See, to that effect, Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraphs 36 and 37; and *Dansk Rørindustri and Others* v *Commission*, cited in footnote 21, paragraph 399.

34 — See *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in footnote 9, paragraph 617.

86. It follows that the findings of the Court of First Instance with regard to the reduction of the fine granted to SGL are not vitiated by errors of law. The fourth plea must accordingly be dismissed.

E — *The fifth plea, alleging that the Court of First Instance failed to take into account SGL's ability to pay the fine and that the fines imposed were disproportionately high*

Main arguments

87. By its fifth plea, SGL claims that the Court of First Instance was wrong to hold in paragraph 333 of the judgment under appeal that the Commission, when determining the amount of the fine, was under no obligation to take account of SGL's difficult financial situation and lack of funds with which to pay the fine.

88. SGL essentially submits two arguments in support of this plea. First, it maintains that the fine imposed — even at its reduced level — is, of itself, disproportionately high, and all the more so if the ability of the company concerned to pay the fine was not taken into account at the time the decision was adopted. Secondly, SGL argues that the Commission and the Court are legally bound to take account of SGL's ability to pay. By failing to check whether the fine imposed threatens the economic viability of the company concerned, the Court of First Instance misconstrued the wording of section 5(b) of the Guidelines.

89. The Commission submits that these arguments are inadmissible or, in any event, unfounded.

Appreciation

90. In so far as SGL has put forward in its appeal, first, a number of arguments calling into question the proportionality of the fine imposed, the fifth plea must be declared inadmissible, since the true position is that it seeks a general re-examination of the fines, which the Court of Justice does not have jurisdiction to undertake in the context of an appeal. [35]

91. Secondly, as regards the claim that the Court of First Instance failed to take account of SGL's ability to pay, it should be noted

35 — See, inter alia, *Dansk Rørindustri and Others* v *Commission*, cited in footnote 21, paragraphs 245 and 246, and Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraphs 48 and 49.

that, according to settled case-law, which paragraph 333 of the judgment under appeal fully reflects, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions. [36]

92. With regard, next, to section 5(b) of the Guidelines, which states that an undertaking's real ability to pay must be taken into account, the Court of Justice has already decided in *SGL Carbon* that that provision does not call into question the above mentioned case-law in any way. As the Court pointed out in that case, the ability to pay can be relevant only in a 'specific social context', namely the consequences which payment of a fine could have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned. [37]

93. In the light of that, I agree with the Court of First Instance that the fact that a measure taken by a Community authority results in the insolvency or liquidation of a particular undertaking is not precluded as such by Community law. Moreover, SGL has not put forward evidence that a specific social context — in the sense described above — exists.

94. In those circumstances, the Court of First Instance did not commit an error of law in rejecting, at paragraph 333 of the judgment under appeal, the plea alleging a failure by the Commission to take account of SGL's ability to pay.

95. The fifth plea must therefore be dismissed.

F — *The sixth plea, alleging an incorrect determination of the interest rate*

Main arguments

96. The sixth plea is directed against paragraphs 408 to 415 of the judgment under appeal, in which the Court of First Instance rejected the pleas by which SGL sought the

36 — See Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 54 and 55, and *Dansk Rørindustri and Others* v *Commission*, cited in footnote 21, paragraph 327.

37 — *SGL Carbon*, cited in footnote 3, paragraph 106.

annulment of the interest rates fixed in the third paragraph of Article 3 of the contested decision (6.75%) and the letter of the Commission of 20 December 2002 (2%).

97. SGL maintains its arguments presented before the Court of First Instance that the interest rates fixed were too high and that the relevant paragraph of the contested decision should be annulled. The particularly high interest to be paid ultimately constitutes an additional fine, for which there is no legal basis.

98. The Commission submits that the arguments put forward by SGL — being related to findings of facts and constituting a repetition of arguments already put before the Court of First Instance — are inadmissible or, in any event, unfounded.

Appreciation

99. It should be noted, first, that, in reply to the alleged illegality of the default interest rate of 6.75% fixed in the contested decision, the Court of First Instance correctly referred in paragraph 411 of the judgment under appeal to settled case-law that the powers conferred on the Commission under Article 15(2) of Regulation No 17 include the power to set the rate of default interest and to determine the detailed arrangements for implementing its decision. [38]

100. It also rightly held that the Commission was entitled to adopt a point of reference higher than the applicable market rate offered to the average borrower, to an extent necessary to discourage dilatory behaviour in relation to payment of the fine. [39]

101. SGL has, in the context of this appeal, not established in what way the Court of First Instance was wrong to hold in paragraph 412 of the judgment under appeal that the Commission did not exceed the discretion conferred on it, as referred to above, with regard to the setting of the default interest rate. Instead, SGL essentially repeats its arguments already examined by the Court of First Instance as to the level of the rate being excessive, which amounts in fact to a request for re-examination. [40] To that extent, the plea must accordingly be declared inadmissible.

38 — See *SGL Carbon*, cited in footnote 3, paragraph 113.
39 — See, to that effect, ibid., paragraphs 114 and 115.
40 — See point 47 above.

102. As regards, secondly, the alleged illegality of the interest rate of 2% on provisional payments made by the undertakings in satisfaction of their fines, the Court of First Instance, in my view correctly, classified this plea, which had not been raised in the application to that Court, as a new plea within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance. It could thus in paragraph 413 of the judgment under appeal rightly reject that plea as inadmissible. It is therefore all the less open to SGL to raise it on appeal.

103. The sixth plea must therefore be rejected.

104. It follows from all the foregoing considerations that the appeal must be dismissed in its entirety.

VII — Costs

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

VIII — Conclusion

106. For the reasons set out above, I propose that the Court should:

(1) dismiss the appeal;

(2) order SGL Carbon to pay the costs.