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COURT OF JUSTICE

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Appeal brought on 1 July 2004 by Showa Denko K.K. against the judgment delivered on 29 April 2004 by the Second Chamber of the Court of First Instance of the European Communities in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 between Tokai Carbon Co. Ltd and others and the Commission of the European Communities

(Case C-289/04 P)

(2004/C 239/01)

An appeal against the judgment delivered on 29 April 2004 by the Second Chamber of the Court of First Instance of the European Communities in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 between Tokai Carbon Co. Ltd and others and the Commission of the European Communities, was brought before the Court of Justice of the European Communities on 1 July 2004 by Showa Denko K.K. (case T-245/01 [1]), established in Tokyo (Japan), represented by M. Dolmans, J. Temple Lang and P. Werdmuller, lawyers.

The Appellant claims that the Court should:

— set aside the judgment in case T-245/01 Showa Denko K.K. v. Commission of the European Communities in part;

— reduce the amount of the Appellant's fine to EUR 6,960,000 or by an amount considered appropriate by the Court of Justice in the exercise of its discretion; and

— take any other measure that the Court of Justice deems appropriate.

Pleas in law and main arguments:

The Appellant submits that there is no indication that the Appellant's group or top management was involved in the cartel, no evidence that the Appellant engaged in the infringements calculatedly, deliberately and knowingly, and certainly no evidence that this was more so for the Appellant than for the other participants. There is therefore no justification for singling out the Appellant and imposing a special 'deterrence factor' on it.

If a fine otherwise calculated needs to be increased for deterrence on this ground, then the amount of the increase must be rationally based on the benefit which the company expected to obtain from the infringement. This increase can only be based on the company's turnover in the market affected by the infringement, adjusted for the probability or otherwise of detection.

The 'size' of the company or group in markets not affected by the infringement are not relevant to the expected benefits and incentives that a company might have to infringe the law, nor do they relate to risk of detection. Economic analysis confirms this. Conglomerate size and finances are therefore not relevant for the calculation of any increase which is needed for deterrence.

In other words, conglomerate size and finances cannot be a reason to single out the Appellant and increase the fine on it. Doing so is discriminatory, disproportionate, arbitrary, and not supported by adequate reasoning.

The Appellant therefore maintains that the Commission and the Court of First Instance were wrong to base the increase in the Appellant's fine for 'deterrence' on the Appellant's group turnover in products not affected by the infringement, without any finding that deterrence was necessary or identifying any rational basis for the amount of the increase.

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[1] OJ C 17, 19.1.2002, p. 15.

Appeal brought on 15 July 2004 by SEC Corporation against the judgment delivered on 29 April 2004 by the Second Chamber of the Court of First Instance of the European Communities in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 between Tokai Carbon Co. Ltd and others and the Commission of the European Communities.

(Case C-307/04 P)

(2004/C 239/02)

An appeal against the judgment delivered on 29 April 2004 by the Second Chamber of the Court of First Instance of the European Communities in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 between Tokai Carbon Co. Ltd and others and the Commission of the European Communities, was brought before the Court of Justice of the European Communities on 15 July 2004 by SEC Corporation (case T-251/01 [1]), established in Amagasaki, Hyogo (Japan), represented by K. Platteau, lawyer.

The Appellant claims that the Court should:

(a) set aside in part the judgment under appeal in so far as it determines that the Commission was entitled to use worldwide product turnover as the differentiating factor when setting the basic amount of the fine imposed on the Appellant;

(b) annul Article 3 of the Decision ([2]), as modified by the Court of First Instance, in so far as it imposes a fine of EUR 6.138 million on the Appellant, or, at least, substantially reduce this fine further to such amount the Court deems appropriate; and

(c) order the Commission to pay the costs incurred before the Court of First Instance and the Court of Justice.

Pleas in law and main arguments:

The Appellant submits that the judgment of the Court of First Instance should be set aside on the following grounds:

1) Violation of Article 253 of the EC Treaty and the principles of non bis in idem and of fairness by holding that the Commission, in setting the fine imposed on SEC and in the context of the particular features of this case, is not obliged to take account of the sanctions previously imposed on SEC by the US competition authorities based on the same facts.

2) Violation of Article 253 of the EC Treaty and the principles of fairness and proportionality, by holding that the Commission is entitled to differentiate the basic amount of the fine of the parties involved on the basis of the worldwide product turnover only, with disregard to the scope of SEC's activities in the EEA.

([1]) OJ C 31, 2.2.2002, p. 12.
([2]) Decision 2002/271/EC of 18 July 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement — Case COMP/E-1/36.490 — Graphite electrodes (OJ 2002, L 100, p. 1).

Reference for a preliminary ruling by the Bundesfinanzhof by order of that court of 20 April 2004 in the case of Fleisch-Winter GmbH & Co. KG against Hauptzollamt Hamburg-Jonas

(Case C-309/04)

(2004/C 239/03)

Reference has been made to the Court of Justice of the European Communities by order of the Bundesfinanzhof (Federal Finance Court, Germany) of 20 April 2004 received at the Court Registry on 21 July 2004, for a preliminary ruling in the case of Fleisch-Winter GmbH & Co. KG against Hauptzollamt Hamburg-Jonas (Hamburg-Jonas Principal Tax Office) on the following questions:

1. Is the fact that on the basis of investigations carried out by customs authorities there is a suspicion that a product is subject to a ban under Community law which prohibits the export of a product eligible for a refund from a particular Member State to other Member States and to non-member countries sufficient of itself to exclude the existence of sound and fair marketable quality within the meaning of the first sentence of Article 13 of Regulation (EC) No 3665/87 ([1]) so that the actual condition or marketability of the particular product is irrelevant?

2. Is confirmation of sound and fair marketable quality within the meaning of the first sentence of Article 13 of Regulation (EC) No 3665/87, given in a national application for payment, information for the purposes of the second paragraph of Article 11(1) in conjunction with Article 3 of Regulation (EC) No 3665/97?

([1]) OJ L 351, p. 1.