

Similar arguments hold true in regard to the other request for information, which is dealt with in paragraph 412 of the judgment. As the Commission knew that SGL had warned a separate undertaking that an investigation was imminent, the Commission had, *inter alia*, asked SGL to which other undertaking it had provided that information. SGL named another undertaking but failed to disclose that it had also warned a third undertaking, as the Commission learned subsequently. By that question the Commission requested information 'concerning ... facts' and did not compel the undertaking to provide 'an admission on its part of the existence of an infringement'. In order to classify the information provided by SGL in its reply as constituting an aggravating circumstance, which is the point on which the Court of First Instance focuses, the Commission first of all had to prove that there had been an infringement.

### **Concerning the extent of the reduction in the case of contributions that have been preceded by a request for information**

In so far as part of the cooperation provided by SGL could be deemed to constitute an answer to a question which, in the context of a binding request for information, that is to say, a request for information in the form of a decision, might be regarded as inadmissible, the Court of First Instance failed, in paragraph 410 of the judgment, to take account of the fact that any reduction can be granted only in proportion to the additional value by which the Commission is aided in its investigations. This additional value will be comparatively greater if it is derived from a voluntary contribution which, having been made at an early stage, saves the Commission in advance from being required to take specific investigative measures, such as the planning and drafting of a request for information (even if it is not binding).

(<sup>1</sup>) Not yet published in the European Court Reports.

**Appeal brought on 19 July 2004 by SGL Carbon AG against the judgment of 29 April 2004 by the Court of First Instance (Second Chamber) in Joined Cases T-236/01, T-239/01, T-244/01, T-245/01, T-246/01, T-251/01 and T-252/01 Tokai Carbon and Others v Commission of the European Communities, in regard to Case T-239/01**

(Case C-308/04 P)

(2004/C 262/26)

An appeal was brought before the Court of Justice of the European Communities on 19 July 2004 by SGL Carbon AG, represented by Martin Klusmann and Kirsten Beckmann, Rechtsanwälte, of Freshfields Bruckhaus Deringer, Freiligrathstrasse 1, D-40479 Düsseldorf, against the judgment of 29 April 2004 by the Court of First Instance (Second Chamber) in Joined Cases T-

236/01, T-239/01, T-244/01, T-245/01, T-246/01, T-251/01 and T-252/01 Tokai Carbon and Others v Commission of the European Communities, in regard to Case T-239/01.

The appellant claims that the Court should:

1. uphold the pleas in law submitted at first instance and set aside in part the judgment delivered by the Court of First Instance of the European Communities on 29 April 2004 in Case T-239/01 (<sup>1</sup>) to the extent to which it dismisses the action in as far as that action is directed against Articles 3 and 4 of the respondent's decision of 18 July 2001;
2. in the alternative, reduce as appropriate the fine imposed on the appellant in Article 3 of Decision COMP/E-1/36.490 and the interest in respect of pending proceedings and default interest fixed in Article 4 of the decision in conjunction with the letter of 23 July 2001 from the respondent (SG 2001 D/290091);
3. in the further alternative, refer the case back to the Court of First Instance for reconsideration in the light of the legal views expressed by the Court of Justice;
4. order the respondent to pay all of the costs of the proceedings.

*Pleas in law and main arguments:*

The appellant seeks, by a total of seven grounds of appeal, to have Articles 3 and 4 of the Commission decision set aside to a greater degree than that to which they were set aside in the judgment of the Court of First Instance:

1. The appellant first submits that there has been an infringement of the principle of *ne bis in idem* by reason of the fact that no account was taken of the sanction which, prior to the adoption of the contested Commission decision, had already been imposed in North America in respect of the same acts. The appellant argues that, in view of the identical substantive objectives pursued by the prohibitory rules serving to protect competition in Europe and North America, some account at least ought to be taken of penalties previously imposed in respect of the same facts. This follows either directly from the *ne bis in idem* principle, as broadly understood, which applies in the relationship of Community law to the law of non-member countries, or from the principle of natural justice, which is even broader in scope and has been applicable since the *Walt Wilhelm* case-law. Furthermore, the Court has, in its judgment in *Boehringer*, already confirmed that there is in principle a duty to take into account sanctions imposed in the U.S. when a case before it relates to the same facts. That is something which the Court of First Instance failed to do.
2. With regard to the Court of First Instance's findings concerning the establishment of the basic amounts of the fine, the appellant submits that the Court of First Instance erred in failing to make a downward adjustment of the basic amount in relation to the appellant, even though this ought to have occurred had the definitive calculation criteria established by that Court been applied in a non-discriminatory manner.

3. In its third ground of appeal the appellant contends that the specific 25 % increase in the basic amount of the fine in the light of warning calls made prior to the commencement of the Commission's inspection was unlawful. Those calls, the appellant submits, did not form part of the facts constituting the charge in issue and, contrary to the view taken by the Court of First Instance, could not have been taken into account as aggravating grounds in the calculation of the fine under Article 15(2) of Regulation No 17 without thereby infringing the principle of *nulla poena sine lege*. The Sarrió case-law which the Court of First Instance cites in support of the opposite contention is, the appellant argues, irrelevant inasmuch as in the facts underlying that case aggravating circumstances in the commission of acts were taken into account for purposes of increasing the fine, whereas later acts which, in retrospect, could or should have made detection of those acts more difficult were not. Furthermore, the Court of First Instance in the present case made assumptions in respect of internal matters to the detriment of the appellant, a course of action at variance with the rules of evidence.

4. In regard to the calculation of the fine, the appellant also takes issue with the fact that the upper limit for a fine of 10 % of an undertaking's turnover, as laid down in Article 15(2) of Regulation No 17, was exceeded. Had the Commission taken as its basis the conclusive turnover figures for 2000 or 1999, it would have been obliged to cap the arithmetical amount of the fine at 10 % of the undertaking's turnover before applying the rule under the leniency programme. The Court of First Instance erroneously left the entire question open on the legally incorrect assumption that it had no bearing on the dismissal of the relevant complaint.

5. The appellant further takes issue with the insufficient attention paid to the significance of documents withheld in the context of the inadequate document access. The appellant expands on its submission at first instance by contending that new and incriminating documents, of which the appellant was unaware and on which it had not previously had an opportunity to set out its views, were even used for the first time in the decision by the Court of First Instance.

6. The appellant further challenges the categorical decision not to take account of what all parties accept was its reduced financial capacity when the fine was being calculated and claims that such a failure constitutes an infringement of the principle of proportionality and breaches its freedom to dispose of its property. Penalties imposed under competition law may not jeopardise the existence of those on whom the penalties are imposed; the operational undertaking must be the standard by which the appropriateness and propriety of sanctions in individual cases fall to be judged. It is in general impermissible to concentrate on those parts of an undertaking which may still be salvageable after insolvency brought about by the imposition of a fine. Every fine must be calculated in such a way that no economic 'death sentences' are passed.

7. The appellant concludes by challenging the fact that no adjudication was made on its multi-limbed head of

complaint concerning the fixing of default interest and interest in respect of pending proceedings, which was dismissed only in the result and not formally. The Court of First Instance erred in law in failing to take into account the fact that there is no legal basis whatever for determining interest and none for the level of interest established which was here used as a basis. Even if one were to recognise that the setting of interest is in principle permissible in order to prevent the bringing of abusive actions, the setting of interest is at best required to be at a significantly lower level in order to attain that objective. That must in particular be the case in view of the drastically increased level of the fine, which leads to an equally drastic increase in the absolute level of the interest imposed. The substantive heads of complaint raised were not addressed in the judgment under appeal; instead, there was a ruling on a head of complaint that the appellant had not raised.

(<sup>1</sup>) Not yet published in the European Court Reports.

**Reference for a preliminary ruling by the Fővárosi Bíróság (Hungary) by order of that court of 24 June 2004 in the criminal proceedings against Attila Vajnai**

(Case C-328/04)

(2004/C 262/27)

Reference has been made to the Court of Justice of the European Communities by order of the Fővárosi Bíróság, Hungary, of 24 June 2004, received at the Court Registry on 30 July 2004, for a preliminary ruling in the criminal proceedings against Attila Vajnai on the following question:

Is Article 269/B, first paragraph, of the Büntető Törvénykönyv (Hungarian Criminal Code), which provides that a person who uses or displays, in public, the symbol consisting of a five-pointed red star commits — where the conduct does not amount to a more serious criminal offence — a minor offence, compatible with the fundamental Community-law principle of non-discrimination? Do Article 6 TEU, according to which the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, Directive 2000/43/EC (<sup>1</sup>), which also refers to fundamental freedoms, and Articles 10, 11 and 12 of the Charter of Fundamental Rights, allow a person who wishes to express his political convictions through a symbol representing them to do so in any Member State?

(<sup>1</sup>) OJ L 180, p. 22.