II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION 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

(notified under document number C(2001) 1986)

(Only the English and German texts are authentic)

(Text with EEA relevance)

(2002/271/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1216/1999 [2], and in particular Articles 3 and 15 thereof,

Having regard to the Commission's decision of 24 January 2000 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty [3],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

1. THE FACTS

1.1. *SUMMARY OF THE INFRINGEMENT*

(1) This Decision imposing fines for an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement is addressed to the following undertakings:

— SGL Carbon AG ('SGL')

— UCAR International Inc. ('UCAR')

— VAW Aluminium AG ('VAW')

— Showa Denko K.K. ('Showa Denko')

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 148, 15.6.1999, p. 5.
[3] OJ L 354, 30.12.1998, p. 18.

— Tokai Carbon Co., Ltd ('Tokai')

— Nippon Carbon Co., Ltd ('Nippon')

— SEC Corporation ('SEC')

— Carbide/Graphite Group, Inc. ('C/G').

(2) The infringement consists in the participation of the producers of graphite electrodes in a continuing agreement and/or concerted practice contrary to Article 81(1) of the Treaty and (from 1 January 1994) Article 53(1) of the EEA Agreement, covering the whole of the Community and Norway, Austria, Sweden, Finland, by which they:

— fixed the prices of the product,

— agreed on and implemented a mechanism for implementing price increases,

— allocated markets and market share quotas,

— agreed not to increase production capacity,

— agreed not to transfer technology outside the circle of cartel participants,

— set up machinery for monitoring and enforcing their agreements.

(3) The undertakings participated in the infringement during the following periods:

— SGL: from May 1992 to March 1998

— UCAR: from May 1992 to March 1998

— VAW: from May 1992 to at least the end of 1996

— Showa Denko: from May 1992 to at least April 1997

— Tokai: from May 1992 to February 1998

— Nippon: from May 1992 to February 1998

— SEC: from May 1992 to February 1998

— C/G: from January 1992 to November 1996.

1.2. *THE GRAPHITE ELECTRODES INDUSTRY*

1.2.1. THE PRODUCT MARKET

(4) Graphite electrodes are ceramic-moulded columns of graphite used primarily in the production of steel in electric arc furnaces, also referred to as 'mini-mills'. The electric are process currently accounts for some 35 % of steel production in the Community and its share is increasing. Electric arc furnace steelmaking is essentially a recycling process whereby scrap steel is converted into new steel. Electrodes can be up to 700 mm (30 inches) in diameter and 2 800 mm (9 feet) in length and weigh up to 2 200 kg. The electrodes form part of the roof structure of the furnace. After the furnace is filled with selected scrap, the electrodes are lowered until the tips almost touch the scrap. Electricity is passed into the electrodes and jumps from the electrode tip to the scrap steel. As conductors of electricity, graphite electrodes generate sufficient heat (up to 3 000 °C) to melt scrap steel and further refine molten steel into a finished product. Nine electrodes, joined in columns of three, are used in the average three-phase AC electric arc furnace to melt scrap steel. Because of the intensity of the melting process, one electrode is consumed approximately every eight hours.

(5) Graphite electrodes are produced using special 'needle' coke, a by-product of the oil industry, and coal tar pitch. The manufacturing process has six steps, namely forming, baking, impregnation, rebaking, graphitising and machining. During graphitising the product is heated electrically to over 3 000 °C and is physically transformed into graphite, the crystalline form of the carbon and a unique material with low electrical but high heat conductivity, high strength and performance at high temperature that makes it suitable for use in electric arc furnaces. The processing time for an electrode is approximately two months. There are no product substitutes for graphite electrodes.

1.2.2. SUPPLY OF GRAPHITE ELECTRODES

(6) The major producers of graphite electrodes in the Western world are multinational corporations. The business is essentially a global one and is characterised by an oligopolistic structure and high entry barriers.

Total world production of graphite electrodes in 1998 was around 1 million tonnes.

In the Community some 280 000 tonnes of graphite electrodes were produced, a considerable proportion of which was exported to third countries.

(7) In 1998 graphite electrodes were produced in some 50 locations worldwide. The largest producer of graphite electrodes, UCAR, has a total production capacity of [...]* (*) at 12 locations; in the Community it has three production facilities (France, Spain and Italy), with a capacity of around [...]*. The second largest producer of graphite electrodes in the world is SGL Carbon, with a capacity [...]*. It has production sites in Europe and in North America.

Showa Denko is ranked third in the world: it produces in Japan and the United States, but has no manufacturing facilities in Europe.

1.2.3. DEMAND FOR GRAPHITE ELECTRODES

(8) The demand for graphite electrodes is directly linked to the production of steel in electric arc furnaces; the customers are principally steel producers, which account for some 85 % of demand. There are some 200 producers of electric steel in the Community and Norway. In 1998 world crude steel production was 800 million tonnes, of which 280 million tonnes (35 %) was produced in electric are furnaces. Community steel production totalled 160 million tonnes, of which 60 million (38 %) was electric steel. Germany has the highest steel production of any Member State (1997: 45 million tonnes), but only a quarter of output (11,8 million tonnes) is produced in electric are furnaces. Italy produces about 60 % (15 million tonnes) of its steel in mini-mills, that is to say, steelworks using electric arc furnaces to produce steel from scrap (as opposed to the 'traditional' blast furnace/oxygen converter route from iron ore).

(9) In the past twenty years, electric are furnace production has become increasingly important (35 % of world output in 1998, up from 18 % twenty years ago).

During the 1990s mini-mills were constructed to produce flat-rolled steel as well as long products. In addition, a number of large integrated stell mills (using blast furnace/oxygen converters) in Europe have moved into electric steelmaking in preference to the traditional route for some of their production.

World electric are steel production grew from 196 million tonnes in 1987 to 270 million tonnes in 1997, an increase of 38 % over a ten-year period. In 1995, approximately 20 million tonnes of net new electric steel capacity was added worldwide. Some forecasts predict that global electric steelmaking capacity will catch up with oxygen steel in ten years.

(10) According to the cartel's own figures (see CMS Report/Forecast 1995 & 1996, points 72-73, Appendix 20 [4]), demand for electrodes in the Community in 1996 was estimated at 160 000 tonnes. Italy, the largest single national market, was estimated at 44 000 tonnes; Germany 31 000 tonnes, Spain 24 000 tonnes, France 18 500 tonnes and the United Kingdom 16 000 tonnes. (For Norway demand was estimated at 1 200 tonnes.)

(11) Graphite electrodes are priced in the appropriate national currency per tonne for the standard 24-inch diameter electrode on a delivered basis. The price as at 1 January 1998 was DEM 5 600/tonne (or equivalent). For larger-sized electrodes (and for DC electrodes) the price is subject to a premium of 15 to 30 %.

1.2.4. INDUSTRY RESTRUCTURING

(12) During the 1980s improvements in both electrode and electric steelmaking technology led to a substantial decline in the specific consumption of electrodes per tonne of steel produced (from 6 kg/tonne in 1979 to 3 kg in 1991: the West European average is now some 2,4 kg).

The steel industry was also undergoing major restructuring in this period.

Up to and including the 1980s, the graphite electrode industry in Europe was characterised by a relatively large number of producers operating at national level. In Germany, the main manufacturers were Sigri, Conradty and VAW. In France and Belgium the local producers were Pechiney and UCF. The Italian producers were Union Carbide and Electrocarbonium. Anglo-Great Lakes and Union Carbide produced electrodes in the United Kingdom. Other producers were Genosa in Spain (owned by Pechiney) and in Austria Steeg, partly owned by Sigri. The American producers Airco (owned by BOC) and Great Lakes Carbon exported electrodes to the EEA market, as did Japanese producers including Showa Denko, Tokai and NCK.

(*) The square brackets marked with an asterisk denote confidential information which has been deleted from the text.

(4) All references in this Decision to numbered appendices are to the appendices to the Statement of Objections.

As a result of the fall-off in demand for electrodes, a restructuring process in the worldwide electrodes industry began in the late 1980s/early 1990s. Several plants were closed. Sigri GmbH (100 % owned by Hoechst) was merged with the US-owned producer Great Lakes Carbon to form SGL, which acquired SERS, the graphite division of Pechiney, in 1993. In 1990/91, Union Carbide Corporation set up its carbon products division as a separate entity, UCAR. Airco was sold off and restructured as the Carbide/Graphite Group.

Western producers tried to expand their sales to the Asian market in order to occupy perceived overcapacity. The Japanese graphite electrodes industry was put under some pressure and the number of Japanese producers was reduced from six to four.

(13) Up to 1991, the two smaller German producers of graphite electrodes, VAW Carbon GmbH and C. Conradty Nürnberg GmbH, had a joint sales company, Cova GmbH. This company ceased trading in September 1991 but was not formally liquidated until 1994. Since 1991 the two companies have had their own separate sales organisation.

The global industry rationalisation reduced the number of Western producers from 16 to 9, with two global leaders UCAR and SGL holding more than [...]* of the market in western Europe and [...]* worldwide.

In 1982 the industry was operating at less than 60 % capacity. By 1996, as a result of the consolidation and restructuring, capacity utilisation was running at 85 %.

1.2.5. THE RELEVANT GEOGRAPHIC MARKET FOR GRAPHITE ELECTRODES

(14) The Commission considers that the market for graphite electrodes is at least EEA-wide. However, there are several indicators that point to a worldwide market.

(15) The restructuring process in the worldwide graphite electrodes industry which took place in the late 1980s and early 1990s led to a significant reduction in the number of Western producers. During the time period referred to in this Decision, the market was dominated by two global leaders, UCAR and SGL, holding more than [...]* of the EEA market and more than [...]* of the worldwide market.

(16) Transportation costs and tariff barriers might well lead to somewhat higher costs, but they do not prevent the producers from trading on a worldwide basis. This is demonstrated by the fact that the Carbide Graphite Group, without having any production sites outside the United States, was able to trade in Europe and to obtain a market share of approximately 7 %.

(17) Finally, the worldwide character of the market for graphite electrodes is also confirmed by the structure, organisation and operation of the cartel itself. The producers involved agreed on an overall scheme by which the world market for graphite electrodes was cartellised and held regular meetings that covered the world market (see in particular points 49, 51 and 55 below).

(18) The Commission therefore concludes that the market for graphite electrodes is global.

1.2.6. INTERSTATE TRADE

(19) The EEA market for graphite electrodes in 1998 was worth some EUR 420 million. All the Member States of the Community, plus Norway as a contracting party to the EEA are producers of electric steel and consumers of graphite electrodes. The two main producers of electrodes, SGL and UCAR, have production facilities in several Member States. SGL has plants in Germany, Italy, France, Spain, Austria and Belgium; UCAR's facilities are located in France, Italy and Spain. The two other European producers, Conradty and VAW Carbon, both produce in Germany only. The product is marketed in all the Member States plus Norway (see the table below). According to the data supplied to the Commission, some 44 % of the graphite electrodes supplied in the Community from European production facilities is shipped across Community national boundaries. There is therefore substantial trade between Member States and, since its creation, within the EEA.

The following table shows the combined shipments of SGL, VAW Carbon [5], Conradty and UCAR from Community production sites to each of the Member States for the year 1996 [6] (imports from the United States, Japan and other countries not included).

[5] VAW Carbon's figures for the Benelux countries are included under 'Belgium', for Portugal under 'Spain' and for Ireland under 'UK'.

[6] As declared to the Commission in response to requests for information under Article 11. The figures for some producers would appear to understate the actual position.

Market	Tonnage supplied from Community production sites by SGL, VAW, UCAR, Conradty	Imports from other Community Member States in %
Austria	816	38,48
Belgium	3 564	72,05
Denmark	1 843	100
Finland	2 022	100
France	13 684	38,62
Germany	19 416	46,16
Greece	2 099	100
Ireland	353	100
Italy	36 300	21,83
Luxembourg	2 234	100
Netherlands	360	100
Portugal	1 079	100
Spain	19 633	9,72
Sweden	5 404	100
UK	8 403	100

Norway is a steel producer but has no domestic electrode production. The Norwegian market for electrodes of 1 200 to 2 000 tonnes per year is supplied primarily from the Community by UCAR, SGL and VAW.

Prior to their accession to the Community in 1995, Finland and Sweden were also supplied entirely by imports. Austria (a relatively small producer of steel) had a domestic supplier (SGL) but some 300 tonnes of electrodes were imported each year from Member States.

1.2.7. THE PRODUCERS

(20) There are now effectively only nine Western producers which supply the European (EEA) market with graphite electrodes: the two leaders are SGL Carbon and UCAR, which between the supply [...]*. The two smaller European producers VAW and Conradty, both located in Germany, together have around [...]* of the market. C/G, with a market share of about [...]*, supplies the EEA market from the United States.

The Japanese producers between them have about 3 % to 4 % of the EEA market. Indian, Chinese and Russian producers supply the rest of demand in the Community and the EEA.

(21) SGL Carbon AG (SGL) is the world's largest producer of carbon and graphite products, with a global market share of roughly 20 %. It is the world's second largest producer of graphite electrodes, close behind UCAR. The company has its headquarters in Wiesbaden, Germany.

SGL's structure focuses on three business areas: carbon and graphite, speciality graphite and technical products. With a 55 % share of group sales, carbon and graphite is the company's most important business area. The core product in this area is graphite electrodes.

The company evolved from two mergers in 1992 and 1993. In February 1992, Sigri GmbH (as it was then), which was at the time wholly owned by Hoechst AG, merged its activities in the field of carbon and graphite production with the Great Lakes Carbon Group (GLC). In october 1993 the graphite activities of Pechiney SA, a major French packaging and aluminium producer, were transferred to SGL. In December 1994 SGL was transformed from a private limited liability company (GmbH) into a public company (AG). Since June 1996 the company has been fully independent of Hoechst AG.

SGL's total worldwide turnover in 2000 was DEM 2 560 million (approximately EUR 1 262 million). Its own estimates put its share of the European graphite electrode market in 1998 at [...]*. SGL's production facilities in the EEA are located in Germany, Italy, France, Spain, Austria and Belgium.

(22) UCAR International Inc. (UCAR) is the world's largest producer of graphite electrodes and one of the world's leading manufacturers of graphite and carbon products, with sales in virtually all consuming countries and manufacturing facilities in North and South America, Europe and Asia. The company had its principal place of business in Danbury, Connecticut, USA; the corporate headquarters are now located in Nashville, Tennessee. Its European headquarters are in Rungis, France.

UCAR was formerly the Carbon Products Division of Union Carbide Corporation. In February 1991 a 50 % interest in the company was sold by Union Carbide to Mitsubishi Corporation. In 1995 UCAR carried out a leveraged recapitalisation and completed an initial public offering of common stock.

(23) The company is engaged in the development, manufacture and marketing of carbon and graphite products for the steel, ferroalloys, aluminium, chemicals, aerospace and transportation industries. Its principal products are graphite electrodes, carbon electrodes, graphite specialit-

ies, carbon specialities, cathode blocks and flexible graphite. Graphite electrodes accounted for [...]* of UCAR's total revenues in 1999.

Graphite electrodes are manufactured in eight countries. The spread of its graphite electrode sales according to geographic region in 1998 was as follows: USA and Canada: [...]*; Africa and the Middle East: [...]*; Western Europe: [...]*; Eastern Europe: [...]*; Mexico: [...]*; South America: [...]* and Asia-Pacific: [...]*.

In the EEA, UCAR has production facilities in France, Italy and Spain.

UCAR's total turnover in 2000 was USD 776 million (approximately EUR 841 million). Its share of the European graphite electrodes market was around [...]* in 1998.

(24) VAW Aluminium AG is a large industrial group with diverse activities and a network of subsidiaries. The production facilities for carbon and graphite products are in Grevenbroich, Germany. VAW Aluminium AG produces aluminium, rolled products, flexible packaging, castings, etc.

Until 31 December 1995 VAW Carbon GmbH (hereafter 'VAW Carbon'), a wholly owned subsidiary of VAW Aluminium AG, acted as the sales company for the carbon and graphite products manufactured by VAW Aluminium AG.

On 1 January 1996 the whole of VAW Aluminium AG's carbon and graphite production activities at Grevenbroich were transferred to another wholly owned subsidiary company which was renamed VAW Carbon GmbH and subsequently absorbed the 'old' company of that name. Under a management buyout effective on 1 July 1998 all the assets of the 'new' VAW Carbon GmbH were sold to a newly formed company, Erftcarbon, whose share capital was owned as to 85 % by NatWest Ventures (Nominees) Ltd of London and as to 15 % by management.

VAW Carbon's share of the market for graphite electrodes in Europe was around 6 % in 1997. The worldwide turnover of VAW Aluminium AG in 2000 was EUR 3 693 million.

(25) Showa Denko K.K. (SDK), part of the Japanese Fuyo Group, is one of the leading companies in the Japanese chemical industry, consisting of five major business groups handling petrochemicals, chemicals, electronics, inorganic materials and aluminium. To further strengthen and expand the aluminium business, SDK merged with Showa Aluminium Corporation on 30 March 2001. SDK's head office is in Tokyo. A wholly owned subsidiary of SDK, Showa Denko Carbon, Inc. (SDC), is based in South Carolina, USA. A European subsidiary of SDK is located in Düsseldorf (Showa Denko Europe GmbH).

SDK's total group turnover in 2000 was JPY 747 billion (approximately EUR 7 508 million) worldwide. SDK's sales of graphite electrodes in Europe from 1992 to 1996 were mainly in Germany. In 1995 it also had sales in France, Sweden and the United Kingdom.

(26) Tokai Carbon Co., Ltd. (Tokai) is one of the leading manufactures of carbon black, graphite electrodes and fine carbon in Japan. The company's head office is in Tokyo. Carbon products accounted for [...]* of 1998 revenues. The company has twelve consolidated subsidiaries, eleven in Japan and one in the United States. The company started in 1918 and merged with Tokyo Carbon in 1992.

Tokai supplied graphite electrodes to the United Kingdom (1991 to 1998), Germany (1996 to 1998), France (1997 only), Sweden (1991 to 1996) and Austria (1991 only).

Tokai's total turnover worldwide in 2000 was JPY 65 billion (approximately EUR 471 million).

(27) Nippon Carbon Co., Ltd. (Nippon) was established in 1915 and manufactures electrodes and carbon products. Artificial graphite electrodes, carbon black, carbon fibre and other carbon products accounted for 93 % of 1998 revenues. Its head office is in Tokyo.

The company's world turnover in 2000 was JPY 19 billion (approximately EUR 189 million). In the period from 1992 to 1996 Nippon sold graphite electrodes in Europe only to Finland, the United Kingdom and Ireland.

(28) SEC Corporation (SEC) was established in 1934 to manufacture electrodes for electric are furnaces. The company is affiliated to Ohtani Steel K.K., which holds 23,61 % of issued stock. SEC acquired Kyowa Carbon, a carbon products manufacturer, in 1986. Graphite electrodes accounted for 45 % of fiscal 1999 unconsolidated revenues. Its head office is in Amagasaki, Hyogo, Japan.

SEC's sales of graphite electrodes in Europe were confined to the German market and limited to the years 1992, 1994 and 1995.

The total worldwide turnover of SEC in 2000 was JPY 15,4 billion (approximately EUR 155 million).

(29) The Carbide/Graphite Group Inc. (C/G), the successor of Airco, is a US producer of graphite electrodes, needle coke and calcium carbide products. It was formed as the

result of a leveraged buyout (LBO) by management of Airco in June 1988. C/G is the only manufacturer of graphite electrodes which produces its own needle coke, the principal raw material in the manufacture of graphite electrodes. needle coke is also sold to other manufacturers of graphite electrodes. The corporate offices of the company are in Pittsburgh, Pennsylvania.

C/G's total worldwide turnover in 2000 was USD 207 million (approximately EUR 225 million).

C/G has no production facilities outside the United States. In Europe it sells through agents. Its market share in graphite electrodes worldwide and in Europe is about 7 %.

(30) The following table gives an overview of the relative importance of each undertaking on the worldwide and EEA market and on their respective size:

Company	Worldwide turnover in graphite electrodes (1998, EUR million ([7])) + market share in the worldwide graphite electrodes market (1992 to 1998)	EEA-wide turnover in graphite electrodes (1998) + market share in the EEA-wide graphite electrodes market (1992 to 1998)	Total worldwide turnover ([8]) (2000, EUR million ([9]))
SGL	[...]*	[...]*	1 262
UCAR	[...]*	[...]*	841
VAW Carbon VAW Aluminium	[...]* ([10])	[...]*	3 693
C/G	[...]*	[...]*	225
SDK	[...]*	[...]*	7 508
Tokai	[...]*	[...]*	652
SEC	[...]*	[...]*	155
Nippon	[...]*	[...]*	189

([7]) For the purpose of calculating the respective turnover figures the following average annual EUR/national currency exchange rates have been used (source: Eurostat): EUR 1 = DEM 1,96913; EUR 1 = USD 1,12109, EUR 1 = JPY 146,415.

([8]) The figures provided are based on the companies' replies to Article 11 requests from the Commission.

([9]) For the purpose of calculating the respective turnover figures the following average annual EUR/national currency exchange rates have been used (source: Eurostat): EUR 1 = DEM 1,95583; EUR 1 = USD 0,921937; EUR 1 = JPY 99,4748.

([10]) As with effect from 1 July 1998 the graphite electrode activities of VAW Carbon were sold to Erftcarbon GmbH, the Commission will take the turnover figures for 1997 as a basis.

1.3. *PROCEDURE*

1.3.1. PREVIOUS COMMISSION INVESTIGATION

(31) The Commission conducted a previous investigation into the graphite electrodes market, beginning in 1983, after receiving information concerning a possible price cartel among the European producers. The companies concerned included European subsidiaries of Union Carbide Corporation, the two predecessors of SGL (Sigri and Great Lakes Carbon) and the then joint distribution company (Cova) of Conradty and VAW Carbon. The investigation revealed that prices offered by the major producers of graphite electrodes were nearly identical, but the evidence discovered was not considered sufficient to prove the existence of a price-fixing agreement and the file was closed in 1986.

1.3.2. THE COMMISSION'S INVESTIGATIONS OF JUNE 1997

(32) On 5 June 1997, acting under Article 14(3) of Regulation No 17 ([11]) Commission officials, accompanied by representatives of the national competition authorities of the Member States concerned, carried out simultaneous and unannounced investigations at the following undertakings:

— SGL Carbon (Germany)

— VAW Carbon GmbH and VAW Aluminium AG (Germany)

— Conradty (Germany)

— UCAR (France).

No direct evidence of any cartel or illicit practices was found at the time. However, the Commission did obtain at SGL a series of tables showing past and future prices for graphite electrodes in each Community national market for the period from 1 October 1994 to September 1996, the evidential value of which became apparent only subsequently when identical or similar tables were obtained from other producers (UCAR, C/G, Showa Denko): see points 63 to 65 below.

(33) During the investigation at VAW Carbon, one of its representatives admitted that the undertaking had been warned by SGL to expect a Commission investigation. (Appendix 1: minute of notification of 6 June 1997). SGL itself confirmed in its reply under Article 11 dated 30 July 1997 that it had warned VAW and Conradty of the forthcoming investigations. UCAR also states [...]*

([11]) OJ 13, 21.2.1962, p. 204/62.

that it was warned by SGL in advance; by the time the investigation started, all the relevant files had been 'reviewed' and incriminating documents destroyed or moved to a safe location away from offices and private homes.

1.3.3. INVESTIGATIONS IN OTHER JURISDICTIONS

(34) In the United States, a Grand Jury subpoena was issued in May 1997 against C/G. Agents of the Federal Bureau of Investigation executed judicial search warrants at a number of producers on 5 June 1997. These investigations led to the bringing of criminal proceedings for conspiracy to fix prices contrary to Section 1 of the Sherman Act 1890 against SGL, AG, UCAR International Inc., Showa Denko Carbon Inc. and Tokai Carbon Co. Ltd: see point 42 below.

1.3.4. ARTICLE 11 REQUESTS

(35) In December 1997 the Commission addressed requests for information under Article 11 of Regulation No 17 to some 67 consumers of graphite electrodes, asking them to provide detailed information on suppliers, pricing and discounts.

A first set of requests under Article 11 was sent to SGL, VAW Carbon and Conradty between June 1997 and July 1998, requiring detailed explanations concerning contacts with competitors, SGL's warnings of the forthcoming investigation and travel expense records for certain employees.

In December 1997 requests under Article 11 (in general terms) were addressed to the Japanese producers SDK, SEC, Tokai and Nippon, which were not at the time suspected of direct involvement in the agreements. In their replies the last three named companies claimed that they set their prices in Europe according to 'market information' and in negotiations with customers. Further requests for information were sent to them in April and May 1998 regarding their presence at meetings.

On the basis of information received during 1998 and early 1999, a further set of Article 11 requests was addressed by the Commission to SGL, VAW Carbon and Conradty in March 1999 and to C/G on 8 June 1999.

1.3.5. THE UNDERTAKING'S REACTIONS

(36) In February 1998 (after its receipt of the request for information) the Japanese producer SDK contacted the Commission, expressing an intention to cooperate fully with its investigations. During 1998 it supplied certain information (mainly orally but partly in document form) to the Commission. [...]* providing detailed information on the cartel, its structure and basic rules and the meetings between competitors.

In March 1998 UCAR also approached the Commission, admitting orally its participation in an illegal cartel and offering to cooperate with its investigations. In its response of 20 August 1998 to the Commission's request under Article 11, UCAR confirmed its involvement in 'illegal contacts' between competitors. Certain documentary evidence was also provided by UCAR in the course of 1998. On 25 March and 22 April 1999, UCAR's legal advisers submitted on behalf of the company written statements made by its [...]* and [...]*, both of whom had represented UCAR at several cartel meetings. On 22 June 1999 UCAR provided a corporate statement incorporating the information disclosed earlier.

SGL indicated to the Commission in April 1998 that it was willing to admit the infringement and cooperate with the inquiries. Despite four meetings with Commission officials (on 16 April, 21 April, 3 August and 1 December 1998), no relevant information or documentation was however forthcoming from SGL. Finally, on 8 June 1999, and following the receipt of an Article 11 request of March that year, SGL provided a detailed statement on the operation of the cartel, but claimed to be under no legal obligation to do so under Article 11.

In June 1998 the United States producer Carbide/Graphite Group contacted the Commission offering its cooperation and subsequently provided certain documentation relevant to the cartel. On 11 October 1999 Carbide/-Graphite provided the Commission with a corporate statement on the cartel.

VAW Carbon having initially claimed to be unable and in any case not obliged to provide detailed information in response to the Commission's request for information of 31 March 1999, announced by letter of 12 July 1999 that it wished to cooperate with the investigation and provided a statement as to its participation in the implementation of a cartel.

Conradty has never admitted participating in any collusive arrangements.

Apart from SDK, the Japanese producers originally denied all participation in arrangements to fix prices in Europe and provided non-committal and evasive responses. Although they confirmed some contacts with SGL, UCAR and SDK on relevant dates they explained that they were for the purpose of the general exchange of information (SEC Article 11 reply of 13 July 1998; Nippon Carbon Article 11 reply of 18 December 1998; Tokai Article 11 replies of 18 November 1998 and 1 March 1999).

1.3.6. THE ADMINISTRATIVE PROCEDURE

(37) On 24 January 2000 the Commission sent a Statement of Objections to the addressees of this Decision. In view of the insufficiency of direct documentary evidence against Conradty, and certain inconsistencies in the accounts of its possible participation, the Commission did not proceed against that undertaking.

(38) The companies had access to the Commission's investigation file between 14 and 23 February 2000. VAW Aluminium AG and Nippon did not participate in that exercise.

(39) SGL argues that it did not have complete access to the file as the Commission refused to disclose to SGL its internal documents. SGL maintains further that the Commission did not provide it with a list and description of its internal documents; it was therefore not possible for SGL to get a complete overview of contacts between the Commission and other companies in the context of their cooperation (SGL's letter of 9 March 2000, SGL's reply to the Statement of Objections, p. 23).

This argument must be rejected. According to well established case-law (see the judgments of the Court of First Instance in Case T-7/89 *Hercules* v *Commission* [1991] ECR II-1711, paragraph 54 and Joined Cases T-25/95 etc. *Cimenteries CBR and others* v *Commission*, not yet reported, paragraph 420), the Commission is under no obligation with regard to the rights of the defence to grant access to its internal documents during the procedure. A list and a description of internal documents, as requested by SGL, would thus not contribute to the exercise of the undertaking's right of defence.

As far as contacts with undertakings in the context of their cooperation are concerned, the Commission considers that SGL's reasoning is based on a fundamentally wrong premise. Those contacts with other companies are in fact not part of the internal file. The documents are kept in the normal investigation file to which the parties had access; several documents however were treated, at the request of the companies concerned, as confidential.

(40) Having replied in writing to the Statement of Objections, all the addressees of this Decision except Nippon Carbon took part in the Oral Hearing on the case, which was held on 25 May 2000. At the Oral Hearing the undertakings were also given the opportunity to comment on the written replies of the other parties which had been made available to them three weeks earlier.

(41) In their written replies to the Statement of Objections none of the producers substantially contested the facts on which the Commission based its Statement of Objections.

1.3.7. PROCEEDINGS IN OTHER JURISDICTIONS

(42) Following the investigations conducted by the Department of Justice and the Federal Bureau of Investigation, criminal charges were filed in the United States under Section 1 of the Sherman Act against four producers: SDK Carbon Inc., the US subsidiary of SDK; Tokai Carbon Co. Ltd. of Japan; UCAR International Inc.; and SGL Carbon AG. In addition, SGL's Chief Executive Officer was also charged personally with conspiracy.

C/G was granted immunity from prosecution under the Department's corporate amnesty programme.

All the accused pleaded guilty to the charges and agreed to pay fines which were set at USD 32,5 million for SDK, USD 6 million for Tokai Carbon, USD 110 million for UCAR and USD 135 million for SGL.

In November 1999 SEC and Nippon also pleaded guilty and agreed to pay fines which were set at USD 4,8 million and USD 2,5 million respectively.

In addition to the fine on the corporation, SGL's Chief Executive Mr Robert Köhler was personally fined and agreed to pay USD 10 million. In a subsequent round of cases, the former President and Chief Executive Officer

of UCAR, Mr Robert Krass, agreed to plead guilty to conspiracy, serve a 17-month prison term and pay a fine of USD 1,25 million; UCAR's former Chief Operating Officer was also sentenced under a plea bargain agreement to a 9-month jail term and a fine of USD 1 million.

In January 2000 a criminal charge was filed against the Japanese company Mitsubishi Corporation which had owned 50 % of the stock of UCAR from 1991 to 1995. In February 2000 UCAR issued a civil complaint against Mitsubishi Corporation and Union Carbide in order to recover money wrongfully extracted in alleged violation of US company law. In February 2001 Mitsubishi was convicted after a two-week jury trial for aiding and abetting the conspiracy among graphite electrode producers. It was fined USD 134 million.

Civil proceedings were also filed in the United States District Court on behalf of a class of purchasers claiming triple damages against UCAR, SGL, C/G and SDK.

On 18 March 1999 UCAR was convicted and fined CAD 11 million for a criminal violation of Sections 45 and 46 of the Canadian Competition Act. On 18 July 2000 SGL also pleaded guilty and agreed to pay a fine of CAD 12,5 million.

Civil proceedings were instituted by purchasers (steel producers) in Canada on 18 June 1998 against UCAR, SGL, C/G and SDK claiming damages for conspiracy and violation of the Canadian Competition Act. In some cases restitution has been negotiated.

On 18 March 1999 the Japan Fair Trade Commission issued warnings to the four Japanese manufacturers (Tokai, SDK, Nippon and SEC) based on suspected violation of the Japanese Anti-monopoly Act.

1.4. *DETAILS OF THE INFRINGEMENT*

1.4.1. PRELIMINARY OBSERVATIONS: THE DOCUMENTARY EVIDENCE

(43) The facts set out below in points 44 to 93 are based principally on the following evidence:

— [...]*

— [...]*

— [...]*

— [...]*

— [...]*

— [...]*

— [...]*

— [...]*

1.4.2. INITIAL CONTACTS

(44) Contacts between the major producers with a view to concluding market-sharing and price-fixing agreements in Europe and elsewhere originated in 1991.

They took place initially on a bilateral basis between Sigri (later SGL) and UCAR. (The merger of Sigri and GLC to form SGL became effective in February 1992.) According to UCAR [...]*'s statement (indirectly confirmed by VAW), the initiative came from Sigri [...]*.

At the first known contact, in which the Sales Directors of Sigri and UCAR recognised a 'need' to increase prices, it was agreed that when Sigri announced an impending price increase in Germany, UCAR would follow, which is indeed what occurred.

After this first bilateral contact, the same persons also held meetings with representatives of the other European producers, Pechiney and VAW Carbon [...]*.

(45) Contacts between the Western and Japanese producers had also begun in late 1991 and covered the global market.

Meetings took place in New York (between UCAR, SDK, Tokai, Nippon and SEC); in Milan in September 1991 (between UCAR and SDK, the latter representing all the Japanese producers); and in Tokyo in April 1992 (SGL, SDK, Tokai, Nippon and SEC).

The meetings included discussions of prices and conditions in the graphite market worldwide [...]*.

(46) The plan to set up a worldwide cartel involving UCAR, SGL and the Japanese producers was developed in March 1992. The [...]* UCAR and SGL met in Zurich on 15 March; the next day the two had a meeting in Wiesbaden and agreed to hold a 'summit meeting' with their Japanese counterparts in order to agree a global system of market control. SGL blames UCAR's then for taking the initiative [...]*. Whether or not this was the case, it was in fact SGL [...]* who proposed the plan to the Japanese during his visit to Tokyo on 6 to 8 April 1992 and who actually sent out written invitations [...]*.

As a result of these contacts, the top executives of the world's major graphite electrode producers met in London at the invitation of SGL on 21 May 1992 and agreed on the structure, method of operation and organisation of a worldwide cartel to control the market (see points 49 and 50 below).

1.4.3. ORGANISATION AND PARTICIPANTS

1.4.3.1. ***Structure***

(47) The producers recognised that the graphite electrode industry worldwide was now based on three 'legs': SGL representing Europe, UCAR the United States and, for Japan, SDK, Tokai, Nippon and SEC as a group [...]*. The structure, organisation and operation of the cartel were based on that shared assessment of the market.

Cartel meetings were held at several different levels:

— periodic 'Top Guy' meetings of the, [...]* or [...]* of UCAR, [...]* SGL and the Japanese producers (once a year or more frequently if necessary),

— regular 'Working Level' meetings of the [...]* from the producers and sometimes VAW Carbon (twice or three times a year),

— group meetings of the 'European' producers without the Japanese (once or twice per year),

— national or regional meetings for particular markets,

— bilateral contacts between companies.

1.4.3.2. ***Participants in meetings***

(48)

	SGL	UCAR	SDK	Tokai	Nippon	SEC	VAW Carbon
'Top Guy' meetings	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	
'Working Level' meetings	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*	[...]*
European/ National	[...]*	[...]*					[...]*

[...]*.

Details of the dates, locations and attendance for most of the cartel meetings are set out in [...]*; see also the [...]*.

The presence at meetings of representatives of Tokai, Nippon and SEC is either admitted or is demonstrated by their travel records: see replies by Tokai of 18 November 1998 and 1 March 1999, by Nippon of 18 December 1998 and by SEC of 13 July 1998 and their replies to the Statement of Objections.

1.4.4. THE BASIC PRINCIPLES OF THE CARTEL

(49) At the first 'Top Guy' meeting, held in London on 21 May 1992, the major producers agreed the overall scheme by which the world market for graphite electrodes would be cartellised.

Participants were SGL, UCAR, Mitsubishi (then a major shareholder in UCAR and its sales agent, as well as a producer in its own right), SDK and Tokai (the latter also representing the interests of Nippon and SEC).

VAW Carbon and C/G were not invited and did not attend.

The meeting was led by [...]* SGL, who spoke also on behalf of UCAR: the two Western producers adopted a common position vis-à-vis their Japanese counterparts. Indeed, SDK and Tokai both claim that SGL and UCAR threatened the Japanese producers and acted quite aggressively towards them [...]* (Tokai's Reply to the Statement of Objections, p. 10).

(50) During the meeting the following basic principles were set out and agreed [...]*:

— prices for graphite electrodes should be set on a global basis,

— decisions on each company's pricing had to be taken not by the commercial managers but by the Chairman/General Managers only,

— the 'home producer' (market leader) was to establish the market price in its home area and the other producers would then 'follow' (in the United States and parts of Europe, UCAR was designated the leader; SGL led the rest of Europe and the four Japanese producers were the market leaders in Japan and parts of the Far East),

— for 'non-home' markets (export markets where there was no 'home' producer or market leader) prices would be decided by consensus,

— non-home producers should not compete aggressively; market shares would be allocated with non-home producers being required eventually to withdraw from the home markets of the others (the allocation of non-home or export markets was to be decided at the regular 'Working Level' meetings),

— there was to be no expansion of capacity (the Japanese were supposed to reduce their capacity),

— there should be no transfer of technology outside the circle of producers participating in the cartel.

The subsequent meetings of the cartel involved implementing, monitoring and, if necessary, modifying the basic scheme that had been agreed by the 'Top Guys' at this meeting.

1.4.5. IMPLEMENTATION OF THE CARTEL AGREEMENT

1.4.5.1. ***Cartel meetings***

(i) **'Top Guy' and 'Working Level' meetings**

(51) The London 'Top Guy' meeting was followed almost immediately by a 'Working Level' meeting in Zurich on 25 May 1992. The participants [...]* were from SGL, UCAR, SDK, Tokai, SEC, Nippon and VAW Carbon.

The world graphite market was reviewed region by region (these were the Far East; Middle East and Africa; Western Europe; Eastern Europe; Latin America and North America: see Appendix 20). Shares in different markets were allocated [...]*. The [...]* of SGL was designated to be the contact partner of the Japanese producers for the EEA market ([...]* SGL's Reply to the Statement of Objections, p. 11).

(52) The first European region price-fixing meeting took place in Berlin on 3 June 1992 and was attended by [...]* SGL [...]* and UCAR. The producers agreed, *inter alia*, on target prices for the EEA market [...]*. SGL contests the existence of such an agreement [...]* (SGL's Reply to the Statement of Objections, pp. 11 and 12). As SGL admits however the presence of its corporate officers in Berlin for a Trade Association meeting [...]*, the Commission considers that UCAR's [...]* Statement is more convincing on this point.

On 28 August 1992, another high level meeting covering the European market and pricing was held in Paris (Hotel Sofitel) between executives from SGL and UCAR [...]*.

There was a second 'Working Level' meeting with the Japanese producers in Lugano on 19 September 1992; UCAR and SGL met shortly before to agree on minimum prices for the European market, prices were then communicated to the Japanese participants at the meeting in Lugano. At this same meeting volumes and quotas were set for the regions other than Europe (Middle and Far East, Latin America) [...]*.

(53) A further [...]* meeting between UCAR and SGL to discuss the European market took place in Milan on or around 27 to 30 October 1992: the somewhat furtive circumstances are described in the [...]* (the [...]* had not even been told about the meeting in advance by his superior); see also [...]*.

The next relevant meeting was again at 'Working Level' and took place in Vienna on 3 March 1993. The participants were from SGL, UCAR, Tokai, SEC, Nippon and SDK. There was a general exchange of graphite electrode market information region by region. Information on prices and certain customers was also exchanged and discussed [...]*.

(54) Later known 'Working Level' meetings between SGL, UCAR and the Japanese group took place in July 1993 in Singapore; on 8 September 1993 in Zurich; on 16 to 17 November 1993 in Zurich; on 25 July 1994 in Zurich; on 6 February 1995 in Tokyo; on 11 to 12 September 1995 in Rohrschach; in April 1996 in Kyoto; in July 1996 in Meitingen; on 12 to 13 September 1996 in Rohrschach; in April 1997 in Tokyo; in August 1997 in South-East Asia; in November 1997 in Hong Kong and in February 1998 in Bangkok [...]*.

UCAR, SGL and the Japanese producers went to all the 'Working Level' meetings. VAW Carbon admits going to such meetings until the end of 1996, but its attendance was somewhat less frequent than that of the other participants; it did not attend meetings outside Europe [...]*.

(55) These 'Working Level' meetings usually covered the world market, with each region (North America, Latin America, Western Europe, Eastern Europe, Asia-Pacific and Middle East/North Africa) being considered separately. In addition to discussions on pricing and on certain customers, the participants exchanged information on their individual sales volumes covering several years: the previous year, current year and projections for the coming year. The information was totalled by region and broken down country by country for each producer, with the Japanese forming one group: [...]*.

Volume data for all areas, including Europe, were updated and revised at each meeting.

(56) 'Top Guy' meetings are known to have taken place on or around 20 August 1994 in Zurich; on 5 to 6 February 1995 in Tokyo; and on 14 to 15 March 1995 in Paris. (A meeting in London on 13 November 1993 may also have involved some 'Top Guys': [...]*.)

At some of these meetings, the principles agreed in London in May 1992 were reaffirmed and the participants were reminded of the need to follow what had then been decided.

The 'Top Guys' also agreed to charge certain premiums on the price of large-size electrodes, namely a surcharge on the price charged for standard 24-inch electrodes (for example, a 10 % premium for 28-inch electrodes and a 40 % premium for 30-inch electrodes).

Other matters covered included the production and marketing by Showa Denko's US subsidiary SDC of 28 $^{3}/_{4}$-inch electrodes, to which the other producers objected because although the SDC product competed with their 30-inch electrodes, it was priced by SDC in line with the cheaper 28-inch product. SGL and UCAR allegedly put pressure on SDK to either stop selling the product or price it in line with 30-inch rather than 28-inch electrodes. (Eventually production of this model by SDC was discontinued after assurances to that effect had been given by SDK in April 1995: [...]*)

(ii) **European group meetings**

(57) As from 1992, in addition to these 'Top Guy' and 'Working Level' meetings with the Japanese producers, 'group' meetings with respect to West European pricing took place mainly in Zurich and Lugano and were attended by representatives of the two major producers UCAR and SGL, as well as of VAW Carbon.

According to UCAR, these 'European group' meetings were discontinued after a year or so [...]*; following SGL's acquisition of the graphite electrode interests of Pechiney in 1993, there was (says UCAR) no longer any perceived need for all the European producers to meet as a group. According to UCAR, SGL had close contacts with the other two German producers, VAW Carbon and Conradty; although UCAR had no direct knowledge, it believed that SGL communicated directly with them when the need arose to coordinate pricing in Europe [...]*.

VAW Carbon states [...]*, that it took part in such meetings 'once or twice a year' (which implies that they continued after 1993).

(iii) **Bilateral contacts**

(58) UCAR and SGL continued to have numerous bilateral contacts in both meetings and telephone conversations to coordinate their pricing and market conduct in Europe. These contacts were not only made regularly at the level of the European [...]*, but also involved frequent meetings and telephone conversations between the respective [...]* of UCAR and [...]* SGL [...]*.

For the specific purpose of keeping these contacts secret, SGL [...]* of Sales had a special dedicated telephone installed at his home with a fax machine. The conversations took place two or three times per month and involved agreement on 'relevant market parameters' (as SGL puts it).

The bilateral telephone contacts between UCAR and SGL were supplemented by personal meetings which occurred two or three times each year, several times in the Hilton Hotel at Zürich airport, in a hotel close to Geneva airport, in the Holiday Inn Hotel and in the Sofitel in Paris. These meetings took place typically in the autumn when the price increases for the next year were being planned.

According to SGL, the meetings invariably followed the same agenda. Market data were exchanged, including information on sales volumes and price levels; the participants also discussed the prices that could be achieved and sales forecasts. On this basis UCAR and SGL developed the new target prices for each national market. They also agreed partly (Italy) on the respect of 'home markets' and the maintenance of 'key account clients' [...]*.

(iv) **Precautions to conceal meetings and contacts**

(59) In order to disguise or conceal their contacts and meetings, the participants took elaborate precautions [...]*:

— documents were either not distributed at the meetings or were destroyed afterwards,

— expenses for meetings were paid in cash with no explicit reference to those meetings in travel expense claims,

— telephone calls were initiated directly between the corporate officers without passing through secretaries (at an early stage [...]* SGL had inadvertently been identified by name in a telephone call to UCAR and always subsequently had to be referred to cryptically as '[...]*'),

— mobile telephones and home faxes (on separate dedicated lines) were used to contact competitors; once the authorities began their investigations, contacts were made only when strictly necessary (UCAR's [...]* obtained a mobile telephone operating on a Swiss network),

— a system of code names for the companies and some individuals was devised to cover their real identities. SGL was referred to as 'BMW'; UCAR as 'Pinot'; the Japanese group were dubbed 'Cold', a derivation from the first letters of their individual code names 'Chivas', 'Ocean', 'Lawn' and 'Dry'. VAW Carbon was known as 'Wave'. Individuals were also given code names: UCAR's [...]* was known as 'Artemis'; others were given the names 'Moustache' and 'Taurus' [...]*.

1.4.5.2. ***Agreement on European prices***

(60) During the period 1992 to 1998, there were frequent bilateral contacts between UCAR and SGL to agree and monitor pricing in Europe (these are listed in [...]*). The [...]* or [...]* for Europe of the two companies (they also attended the 'Working Level' cartel meetings) developed price recommendations, usually on the basis of information received from the different country Sales Managers. These 'recommendations' were discussed between UCAR and SGL during either their personal meetings or telephone conversations (see point 58 above). The discussions on pricing between UCAR and SGL also occurred at or on the sidelines of the 'Working Level' meetings with the Japanese producers: the Japanese were informed about the European prices during the global meetings at which price discussions on the other parts of the world also took place.

SGL and UCAR agreed in their bilateral contacts the prices for Western Europe using the German mark as the reference currency; the corresponding prices for each national market were then fixed in the appropriate currency, the basic idea being to ensure that prices across Europe stayed within a five to ten per cent differential (see, for example, [...]*).

If [...]* SGL and UCAR could not agree on prices, the decision was referred to the [...]* of the two companies.

(61) UCAR provided the Commission with a table showing for each region and for each Member State the prices to be applied as of 1 July 1992 and 1 January 1993 (Appendix 4).

The prices are shown in the national currencies of most countries. For the Netherlands, Portugal and Greece the German mark is used; and for Denmark, Finland and Norway the price is the equivalent of the Swedish krona price in the appropriate national currency.

The document was probably faxed to UCAR by SGL. (It may well be however that this was also in fact the price list which had been agreed at the 'Working Level' meeting of 25 May 1992 or the meeting in Berlin between SGL and UCAR on 3 June 1992.)

(62) If the real decision-makers on pricing in Europe were SGL and UCAR, the matter was also the subject of contacts and meetings between the two majors and the smaller producers supplying the West European market.

VAW Carbon in its Statement [...]* says that, at the European meetings which it attended, the participants exchanged views as to the amount of the price increase which the market would bear in the different countries (SGL was said to have always led the discussions). According to VAW Carbon, one or other of the two large producers took it upon itself to lead the price increase publicly.

It was SGL which communicated the prices to be applied and the 'targets' for each national market in Europe to the other producers.

(63) During its investigation at SGL in June 1997, the Commission discovered several price tables for the period 1994 to 1997 giving electrode prices for the different countries and regions in the world. As part of the price-fixing exercise, targets for future price increases were set well in advance.

A price table (dated 12 August 1996) was found showing the prices that had come into effect or were to be applied on seven dates between 1 October 1994 and 1 July 1996.

The part relating to Western Europe is reproduced below:

		1.10.1994	1.4.1995	1.7.1995	1.10.1995	1.1.1996	1.4.1996	1.7.1996
Germany	DEM	[...]*		[...]*				[...]*
Italy	ITL	[...]*	[...]*		[...]* [...]*		[...]*	
France	FRF	[...]*	[...]*			[...]*		
UK	GBP	[...]*	[...]*		[...]*		[...]*	
Spain	ESP	[...]*	[...]*			[...]* [...]*		
Norden (12)	DEM	[...]*		[...]*				[...]*
Austria	ATS	[...]*		[...]*				[...]*
Belgium	BEF	[...]*	[...]*			[...]*		
Netherlands	DEM	[...]*		[...]*				[...]*
Luxembourg	FRF	[...]*	[...]*		[...]*			
Switzerland	DEM	[...]*		[...]*				[...]*
Greece	DEM	[...]*		[...]*				[...]*
Portugal	DEM	[...]*				[...]*		
Turkey	DEM	[...]*				[...]*		

(64) The main evidential significance of this table (which did not, at face value, indicate any collusion between the producers and could be explained as a purely internal document) derives from the fact that virtually identical tables were in the possession of other producers and have now been supplied to the Commission.

An almost identical version of the table (reference 13-6-95/GV) was obtained by the Commission from SDK on 13 March 1998 [...]*. A later version dated 2 August 1995 was faxed to SDK by SGL on 23 August (Appendix 7).

Exactly the same table as had been sent to SDK on 23 August was faxed by SGL to UCAR's Chairman on 25 August 1995 (Appendix 8).

On 24 October 1995, the same document was faxed to Carbide/Graphite Group by its German sales agent who had received it by fax from VAW Carbon (Appendix 9; C/G's Article 11 reply of 22 July 1999, p. 6).

Similar price tables found during the investigation at SGL are annexed as Appendices 10 to 14.

(12) 'Norden' covers Denmark, Sweden, Finland and Norway: see Appendix 4.

These spreadsheets were clearly part of the exercise of fixing prices for the European markets and may be taken as typical of the documentation produced and used by the cartel during the whole of its operation.

(65) [...]* also provided handwritten tables made by [...]* (Appendices 15, 16) which it explains as follows:

'These are examples of lists of world graphite electrode markets with current and future price objectives. [...]* The price lists were prepared by SGL on a periodic basis and distributed to the graphite electrode producers.'

([...]*, Attachment II, p. 6)

The active role of SGL in promulgating the price to be applied in Europe is confirmed by Appendix 17, a note made by C/G's then Chief Executive Officer of a telephone conversation with [...]* SGL about target prices in the European market: see also pp. 3-4 of C/G's Article 11 reply of 22 July 1999.

1.4.5.3. ***Implementation of price increases***

(66) In order to implement the prices agreed between them (and communicated to other producers), SGL and UCAR arranged in advance which of them would act first to announce the increase to customers. Once the price was established, it could not be undercut.

This device was agreed in principle at a meeting in Geneva in October 1992 between the two [...]* of SGL and UCAR. (They also agreed to respect the existing 'customer structure' — that is, not to seek by attractive offers the 'established' customers of the rival company.)

Which of the two was designated to 'lead' the price increase in a particular national market in Europe depended on their respective positions in that market.

Since SGL had a more important presence in Germany and Scandinavia than UCAR, it had the responsibility for announcing and leading the price increase in those markets. UCAR generally led the price increases in France and United Kingdom. In the other two major Community markets for electrodes, Italy and Spain, where UCAR and SGL had roughly equal market shares, they decided on each occasion which one of them would 'publicly' act as the price leader to get the new price established in the market [...]*.

(67) Price increases were announced to customers in each country by the national sales managers, who had contacts with some of their counterparts regarding the implementation of prices: [...]*

It was not normal practice to issue written price lists to customers (see, however, for Italy, point 77 below). Price increases were apparently announced orally, although sometimes at a customer's request they were confirmed by letter [...]*.

(68) UCAR and SGL invariably applied the agreed list price levels to their customers. In certain cases confidential discounts were given which were not shown on the invoice or referred to in writing.

According to UCAR, the price increases to customers generally 'stuck' after 1992, in contrast with the period 1987 to 1991, before the establishment of the cartel [...]*.

(69) Price increases were often staggered and came into effect on different dates for different countries or groups of countries. In countries where the product was invoiced in German marks, the price would be increased at the same time as in Germany. The increase in France, Belgium and Luxembourg would normally be at a different date and would for a time bring prices into line across Europe (until the process started again and prices were moved up first in the DEM zone). On occasions, a planned price increase might be postponed. Thus in early 1997, UCAR proposed a price rise for Europe, to be effective on 1 July 1997. There had already been an increase on 1 January that year and SGL was 'not enthusiastic' but nevertheless agreed to support UCAR if it instituted an increase. In the event however the increase was not implemented: [...]*.

As soon as the price increase announced by the market leaders was accepted by customers, the smaller producers would 'follow' the major producers and apply the new prices [...]*.

1.4.5.4. ***Price increases 1992 to 1997***

(70) At the beginning of the cartel (May 1992) the 'European' price for graphite electrodes stood at DEM 3 600/tonne (markets using the German mark were Germany, Scandinavia, the Netherlands, Greece, Portugal and Switzerland).

The price in German marks rose in a series of step increases (some nine can be identified) to reach DEM 5 400 on 1 July 1996, an increase of 50 % in five years (see Appendix 14).

In 1997 with a view to the upcoming cartel investigation, the price increase planned for 1 July 1997 was postponed to 1998. During 1997/1998 the prices reportedly stagnated at a level of DEM 5 500/tonne. As of 1 January 1998 the price was DEM 5 600/tonne.

1.4.5.5. ***Market sharing***

(71) The market share quotas assigned to the different producers had been agreed in Zurich in May 1992 [...]*.

There is no contemporaneous record of the actual quotas agreed at that meeting.

Significantly, however, an SGL internal paper of November 1996 setting out its strategy up to the year 2000 (Appendix 18) observes:

'Market Share/Competition

Market shares will stay stable with 25 % for SGL, 31 % for UCAR and 24 % for Japanese'

and later recommends:

'Follow equilibrium with stable market shares for SGL (25 %), UCAR (31 %) and Japanese (24 %).'

[They refer to worldwide market shares].

For Western Europe the predicted market shares for 1996 of each of the producers is SGL 40 %, UCAR 31 %, C/G 8 %, the Japanese 3 % and the 'others' (namely Conradty and VAW Carbon) 13 % (Appendix 19). In the absence of other evidence and since they are not contested by the parties in their written replies to the Statement of Objections, it may be taken that these figures correspond to the quotas agreed.

(72) At their subsequent 'Working Level' meetings, the participants reviewed their sales in the different markets and exchanged information in order to monitor observance of the quotas allocated.

According to UCAR, all the participants brought to the meetings information on their sales volumes which was then collated and tabulated in three columns: SGL, UCAR and the four Japanese producers together. The information was totalled by region and broken down by country within each region [...]*. This is confirmed by Tokai which says that these 'demand forecasts' also showed the estimates for the near future (Tokai's Reply to the Statement of Objections, p. 8).

For the purpose of formalising the exchange of volume information and making the collection of data more efficient, SGL proposed at the 'Top Guy' meeting in Tokyo in February 1995 the adoption of a 'Central Monitoring System' (CMS). Tokai was designated by the cartel to collect the data from the Japanese producers, UCAR and SGL. Appendix 20 is an example of such a report. Headed 'CMS Report/Forecast 1995 & 1996' it begins with a general overview on the global market and the positions on a regional basis of SGL, UCAR and the Japanese; the three 'legs' of the world industry are likened to a triangle in which a balance of market shares has to be maintained:

'The balance in market shares within this triangle in these 4 years inclines to Pinot ...' [meaning UCAR].

'There is a sign of enlarging distortion in the balance of market shares within the triangle which might result in some destructive reactions from the losing part. Though it is not easy to say what the just balance is, we have to be vary (sic) careful about the balance all the more we are more or less enjoying the fruit of the cooperation ...'.

'The coming years till 2000 will be very important and adequate for us to promote a new way of symbiosis in which we can all secure reasonable profits, while on the

other hand from another point of view these years, by disorderly releasing the power accumulated and reserved under the cooperation, could be years of destruction of what we have so far formed into a shape.'

Four tables are attached (a fifth, 'Sales volume and share overview', is missing).

(73) For present purposes, the relevant tables are a 'World Review of sales volume and demand as of end August 95' and a 'World Forecast Sales Volume and Demand 1996 as of end August 95'. For the West European region, all the steel producing countries including Norway are shown: Benelux is treated as a single entity and Ireland appears to be included under United Kingdom. The total is broken down for each country under the headings 'Japan', 'SGL', 'UCAR', 'VAW Carbon' and 'Others'. (UCAR's recollection of the information being tabulated in just three columns appears to have overlooked the data for VAW Carbon.)

While the text of the report itself employs the code names 'BMW', 'Cold', 'Pinot' and 'Wave', the disguise has slipped in the attached tables.

Although the 'Sales Volume and Share Overview' table (on which the 'General Overview' commentary on the world market is based) is missing, it would appear to have covered each of the years 1993 to 1996 and presumably followed a scheme similar to that shown in the table headed 'Far East Review Market as of end August 1995' with a 'guideline' market share for each of the producers and 'adjustments' of actual sales to comply with quota.

The forecast market shares for 1995 on a worldwide basis come close to the 'stable market shares' referred to by SGL in its strategy paper (see point 71 above): UCAR 32,1 % (as against 31 %); SGL 25,7 % (25 %) and the Japanese 23,5 % (24 %).

In Western Europe the forecast for 1995 is SGL 41 %, UCAR 32,7 %, VAW Carbon 6,6 % and the Japanese 3,2 %.

Tokai denies that detailed volume or market share allocations for the European market were specifically discussed with the Japanese producers (Tokai's Reply to the Statement of Objections, pp. 9 to 13). Even if that might be correct, it has to be stated that Tokai (as all the other Japanese producers) were informed of the relevant figures for the European market and did not object.

SGL claims that the Central Monitoring System was never realised (SGL's Reply to the Statement of Objections, p. 12). This is however to deny the express wording of the documentary evidence of Appendix 20. SGL's assertion is also contradicted by other producers' statements (Tokai's Reply to the Statement of Objections, p. 10 [...]*. According to UCAR, volume information was still being exchanged at the last group meetings in Hong Kong in November 1997 and in Bangkok in February 1998 [...]* (see points 91 and 92 below).

1.4.5.6. ***Local meetings and contacts***

(i) **General**

(74) During the operation of the cartel, there were also frequent contacts and meetings between the participants at the level of individual countries for the purpose of implementing and monitoring the prices which had been agreed at the higher level in the working meetings.

Given that the individuals concerned were instructed to take precautions to conceal or disguise their contacts with competitors, there is no abundance of direct evidence: however the general pattern of the collusive behaviour is apparent from the [...]* and the [...]*.

These contacts and meetings covered Germany, France, Italy, Spain and the United Kingdom.

(ii) **Germany**

(75) SGL is the principal local producer and the clear market leader in Germany, but that country is also one of UCAR's most important markets. According to UCAR, customers for graphite electrodes typically prospected the market for prices twice a year, and would normally ask the producers for price quotes in the autumn for the following year. SGL communicated the level and the timing of its proposed price increases to UCAR, which applied the same basic prices (although it claims often to have given discounts). There were usually two price increases per year.

Occasionally meetings took place at 'local' level. While SGL claims that these contacts were sporadic, usually unplanned and took place 'by chance' on the occasion of trade association meetings ([...]* SGL's Reply to the Statement of Objections, p. 12), UCAR's account is indicative of something less spontaneous: representatives of the two companies met occasionally and discussed prices and exchanged summarised information on their respective sales in Germany (UCAR claims it generally understated its sales by 15 %). Specific customers were sometimes also discussed [...]*.

These meetings, which took place in restaurants or bars and on the occasion of the annual 'Eisenhüttentag' in Düsseldorf, were also sometimes attended by a representative from VAW Carbon [...]*; VAW Carbon for its part now admits attending meetings for specific European national markets (Statement, p. 3). SGL has implied without being specific that there were also sporadic contacts with Conradty up to 1997 [...]* but there is no independent evidence to corroborate its statement.

(iii) **France**

(76) In around late 1994/early 1995, the [...]* UCAR France contacted his counterpart in SGL to check the prices being offered to customers.

These contacts took the form of telephone conversations (about every two months) and meetings (about four times a year).

UCAR is the 'lead' producer in France (see point 62 above) and so established the prices in the marketplace. On the occasion of a concerted price increase, UCAR's representative would check with SGL that it was applying the same prices.

According to UCAR, the telephone contacts were made from a public call box [...]*.

(iv) **Italy**

(77) There is no substantial disagreement between UCAR and SGL about the time when the 'basic rules' for collusion on the Italian market were determined, although each attributes the initiative to the other.

On 27 October 1992 the [...]* SGL and UCAR met in Milan, together with other company employees [...]*.

From then on, UCAR and SGL representatives were in contact to discuss the details of implementing the agreed prices in the Italian market. There were regular meetings, sometimes as frequently as once a month, between marketing managers; the venue was SGL's office or restaurants in Milan. The Managing Directors of UCAR's and SGL's Italian subsidiaries also met periodically. The purpose of the meetings was to coordinate measures for implementing price increases, as well as to analyse market developments and to ensure that the agreed market shares were respected and price undercutting avoided. Customers were then informed of forthcoming price increases in individual letters. Towards the end of November, price lists were dispatched to customers giving the prices that would be valid from 1 January [...]*.

(78) C/G has provided the Commission with documents from its Italian sales agent relating to a meeting between 'our well known competitors', meaning the four manufacturers/suppliers active on the Italian market: Appendices 21 and 22.

According to C/G's sales agent (Appendix 22):

'the announced meeting took place on Friday, 12 November (1993). Agreements and decisions as follows:

— on 22 November they are addressing to their customers a letter enclosing the new 1994 official list of prices as well as their selling terms

— official price from the official list: 5 000 ITL/Kg

— net price they are going to quote 4 350 ITL/kg.'

According to C/G (Article 11 reply, p. 7), the 'competitors' were probably SGL, UCAR, SDK and Cova. As Cova had not been active since 1991, C/G is probably referring to VAW Carbon and Conradty. There is no other evidence of SDK taking part in local meetings for Italy.

SGL has also stated (Statement, p. 21) that meetings on the Italian market took place with UCAR, Conradty, VAW Carbon and (at the beginning of the cartel) Pechiney: these meetings were held once or twice per year in a restaurant in Milan to determine pricing and to analyse market development.

(v) **Spain**

(79) The Managing Directors and Sales Managers of UCAR's and SGL's Spanish operations were also in regular (and clandestine) contact during the relevant period [...]*. After the cartel prices for the Spanish market had been fixed at European level, the Sales Managers for Spain were informed and made contact by telephone (using fictitious names) in order to decide on the practicalities: who would 'announce' first, and when the price increase would take effect. Normally price increases were scheduled to come into force on 1 February, and needed some four months' warning, so these contacts were usually in the last quarter of the year.

In addition to the telephone calls, meetings were sometimes arranged to discuss the Spanish market, perhaps once a year. The meetings between the Sales Managers are also confirmed by SGL [...]*.

Besides bilateral (UCAR/SGL) meetings, there were occasional contacts between SGL and the two other German producers supplying the Spanish market. A VAW representative used to telephone SGL twice or so each year in order to find out when SGL was intending to announce a price increase and what the amount would be [...]*.

(vi) **United Kingdom**

(80) The marketing representatives of UCAR and SGL in the United Kingdom were periodically in telephone contact between 1995 to mid-1997 to cross-check on their prices to particular customers (who were suspected of giving deliberately misleading information to their suppliers so as to bring down the price).

Such calls were made from pay telephones. On at least two occasions in 1996/1997 short meetings took place in a hotel off the M1 motorway near Derby [...]*.

1.4.5.7. ***The involvement in the cartel of C/G and VAW Carbon***

(i) **C/G**

(81) C/G as a United States producer which sells in the Community via agents has historically been in the position of a price follower: its policy was to set its prices slightly below those of the two major suppliers in the European market, reflecting the lack of after-sales support and its status as a second or third supplier to most accounts.

C/G did not attend either the 'Top Guy' or the 'Working Level' meetings of the cartel. However, it admits that it did become aware of contacts among competitors concerning the graphite electrode business [...]*. It admits further that it did take part in bilateral meetings and telephone contacts with competitors on prices and markets, principally with SGL, but also with UCAR, the Japanese companies and VAW Carbon [...]*. Contacts began in or around late 1991 when [...]* SGL took the initiative to meet the then Chief Executive Officer of C/G in New York. According to C/G, the discussions included profitability and pricing in the industry but did not cover specifics [...]*.

The first meeting in which a discussion of business conditions and prices took place was (by C/G's account) in January 1993. After a lunch at the Park Lane Hotel, [...]* SGL handed to the [...]* of C/G a price list (now lost or destroyed) with countries, columns and dates and told him that they were SGL's target prices (C/G Article 11 reply, p. 9; [...]*). It should however be noted that already by mid-1992 internal records of C/G suggest that it knew of arrangements to divide the market (see point 85 below).

C/G admits that it had further meetings and telephone conversations with SGL regarding volumes and prices (C/G Article 11 reply, pp. 8 and 9).

On 12 September 1995, an executive of C/G met [...]* SGL (Appendix 23). The subject matter of that meeting is not recorded but C/G had already been informed via VAW Carbon of the price increase planned for 1 January 1996 and later received the SGL price list from the same source (see point 64 above).

(82) C/G has remained vague in its accounts of its contacts with competitors. The following records of contacts with SGL for 1996 may however be taken to typify the subject matter of the contacts during the whole of the period.

In summer 1996 the [...]* SGL in a telephone call to C/G's then Chairman and CEO supplied him with current and target prices which he noted down at the time. There had already been several telephone contacts on the same subject [...]*.

Although SGL tries to deny it (SGL's Reply to the Statement of Objections, p. 13), it is apparent from C/G's record of the conversation (Appendix 17) that SGL was bringing pressure to bear on C/G to restrain its sales in Europe. A note at the bottom of the page reads:

'(1) not prepared to take hits anymore, keep volume under control (2) show restraint (3) Europe consumption of graphite — 24 000 tonnes (4) SGL taking all the hits (5) [...]* (6) [...]* (7) [...]*.'

(According to C/G, Nos 5 to 7 were important customer accounts which it feared might be targets for retaliation if it did not comply with SGL's wishes: C/G Article 11 reply of 22 July 1999, p. 4.)

[...]* SGL, who apparently on several occasions blamed C/G for selling too much in Europe [...]*, subsequently sent a fax to C/G's Chief Executive Officer on 25 September 1996 (Appendix 24) listing his estimation of C/G's sales in the different countries and regions of the world for 1993 to 1996. In response to this demand, C/G's Chief Executive Officer noted C/G's 'real' sales against the estimates made by SGL and faxed them back to its [...]* (C/G Article 11 reply of 22 July 1999, p. 2).

In a later meeting between representatives of SGL and C/G at Frankfurt airport on or around 19 November 1996, C/G's General Manager for the Electrodes Business Unit of C/G's sales insisted that SGL's estimates of C/G's sales in the fax of 25 September were incorrect [...]*. In addition to its meetings and conversations with SGL, C/G now admits to have had periodic contacts with both UCAR and the Japanese producers [...]*. Fragmented or sporadic as such contacts may have been (and this is how C/G depicts them), they would have left its executives in no doubt of the expectation the other producers had of it.

SGL attempts to minimise these contacts with C/G by saying that they were necessitated by the fact that C/G wanted to sell needle coke to SGL (SGL's Reply to the Statement of Objections, p. 13). This is however contradicted by C/G in its Statement [...]* and its Article 11 reply of 22 July 1999 and by the abovementioned documents. In these it is clearly demonstrated that SGL volunteered information regarding graphite electrode target prices and implementation dates and complained about C/G's volume of sales in certain European markets.

(83) C/G for its part argues [...]* that it 'did not use any of the information given to it by SGL's [...]* in setting its prices. Rather, C/G set its prices in export markets based on a variety of factors, including what customers told C/G's agents they were paying for graphite electrodes. C/G would not make any decisions with respect to pricing without getting information from the relevant customers. C/G's pricing was driven by that information, not by information given to it by SGL's [...]* about what might happen in the future'.

(84) The Commission considers however that this explanation is disingenuous: C/G was informed in advance of the price increases and target prices decided by UCAR and SGL in the European markets and ensured that it did not hinder or upset their plans. It was well aware that the prices being paid by customers and the target prices that SGL had communicated to it were one and the same thing. Passing the target prices in advance to C/G gave the ringleaders of the cartel the security of knowing that their prices would be followed by C/G, which (as the following evidence shows) in any event adapted its behaviour to fit in with the wishes of the cartel and particularly of SGL.

(85) C/G argues further that the Commission's allegation in the Statement of Objections that certain executives were aware of the existence of the cartel is not supported by any facts (C/G Reply to the Statement of Objections, p. 2).

In this context the Commission states that as early as 22 July 1992, — two months after the 'Top Guy' meeting in London — the weekly report to the Chairman observed (Appendix 25):

'(We) have effectively booked "our share" in Germany for the second half. All at DM 4 000 +/MT.'

The reference by C/G to 'our share' is strongly indicative that some understanding already existed that its sales should be restricted in the particular market. Certainly VAW Carbon seems to have had the impression (Appendix 26) that C/G had agreed to limit its sales in Germany. Despite C/G's professed ignorance as to why VAW

Carbon could have gained this impression (Article 11 reply, p. 7), such an understanding would be entirely consistent with SGL's repeated insistence that C/G had sold 'too much' in Europe.

C/G employees also knew of the 'unwritten promise' among the world graphite producers not to increase their capacity as decided in London in May 1992 (Appendix 27).

Indeed its agents in Brussels even referred openly to one major customer in France awarding its business to C/G instead of SGL: 'We benefited of a negative action against one of the Biggies — SGL. They [meaning the customer in question] hope to destabilise the cartel in making one party very unhappy.' (Appendix 28).

(86) C/G's policy towards the cartel is summed up in a fax letter of 11 November 1993 to its German agents. Explaining why the agents had to withdraw immediately an offer of a DEM 100 discount to Scandinavian customers (who are invoiced in German marks), the C/G senior executive writes:

'Let me try and explain why we are taking this position. As I've told you before, we are a distant No 4 in Electrode production in the world. With UCAR, SGL and the Japanese as a group controlling over 85 % of the world's production, we are not in a position to do anything to disrupt their willingness and ability to increase prices in the world.'

(Appendix 29).

C/G claims that the last contacts with SGL took place in November 1996 [...]*. There is no information which would indicate the contrary (see also point 115 below).

(ii) **VAW**

(87) In its initial reply to the Commission's request for information of 31 March 1999, VAW Carbon admitted that it had been present at 'informal' meetings with representatives of SGL, UCAR and the four Japanese producers. According to VAW Carbon, the meetings which it attended were usually held in Switzerland and took place once or twice a year. However, it produced no relevant documentation and claimed to be unable to provide further details of dates, locations or participants at particular meetings. (Indeed, like the others involved, VAW Carbon's representative took steps to conceal his participation in meetings by deliberately not generating travel expenses claims.)

By letter of 12 July 1999 however, VAW Carbon admitted its participation during the period from 1 January 1992 to the end of 1996 in regular meetings which involved the planning and implementation of a cartel led by SGL and UCAR in which volume quotas and prices for graphite electrodes were fixed [...]*.

According to VAW Carbon, its position as a price 'follower' was well known to the two majors and its participation in meetings should not even have been necessary for the success of the cartel. Whereas SGL claims that it 'only informed' VAW Carbon on dates and locations of meetings (SGL's Reply to the Statement of Objections, p. 13), VAW Carbon indicates that SGL had insisted on VAW's participation in the regular meetings [...]*.

(88) VAW Carbon was present at the first 'Working Level' meeting in Zurich on 25 May 1992 in which the various markets were allocated among the participants and a price list was produced.

Until the end of 1996, the Managing Director of VAW Carbon attended multilateral ('Working Level') sessions held in Europe [...]*. After that period the company was no longer invited (it does not explain why).

VAW Carbon also admits that it took part in separate European group meetings once or twice a year, as well as in meetings to discuss particular national markets.

VAW Carbon also acted as a link between the cartel and C/G through its German selling agents: see Appendices 9, 30 (VAW Carbon's Managing Director had presumably received the price lists from SGL).

The involvement of VAW Carbon in the monitoring of sales volumes (the CMS scheme) is demonstrated by Appendix 20.

VAW Carbon claims to have stopped attending 'informal' meetings with competitors at around the end of 1996. There is no information from other cartel members which would indicate the contrary (see point 115 below).

1.4.5.8. ***Continuation of the cartel meetings after the investigations***

(89) The simultaneous investigations conducted by the Commission and the United States Anti-trust authorities in June 1997 did not put an immediate end to the cartel.

(90) SDK claims that it had already announced its intention to cease participation in the meetings at the 'Working Level' meeting in Tokyo in April 1997 [...]*. Indeed, by late 1996, customers in the United States had strongly resisted an announced price increase of 9 % due to take effect in early 1997 and had even publicly stated that they had complained to the Department of Justice. By some accounts, the possibility of an investigation had already been foreseen some months before the Commission carried out its visits.

(91) Immediately following the Commission inspections on 5 June 1997 — about which SGL had warned the other producers — SGL and UCAR discussed the outcome of the investigation. SGL assured UCAR that no incriminating documents had been found: [...]*.

A meeting was held in Malaysia in mid-July 1997, attended by representatives of SGL, Nippon, Tokai and SEC; SDK and UCAR declined to attend and the meeting was held in their absence. Details of the discussions and transactions are not available [...]*.

In November 1997 another meeting was held in Hong Kong and lasted a day and a half. The participants were SGL, UCAR, Tokai, SEC and Nippon. They discussed the stage reached by the Commission's proceedings and revised the CMS (Central Monitoring System) volume charts for each region and market ([...]* see also SGL's Reply to the Statement of Objections, p. 13).

(92) The last known tripartite meeting was held in Bangkok on 13 February 1998 [...]*. Participants came from SGL and UCAR and on the Japanese side from Tokai, SEC and Nippon. The Central Monitoring System tables were again updated in accordance with the usual practice. SGL and UCAR informed the Japanese companies of the then current European prices.

Outside the 'Working Level' meetings with the Japanese, the European Sales Directors of UCAR and SGL remained in regular contact to coordinate their prices in the European markets.

UCAR had apparently not implemented a price increase in Europe on 1 July 1997 as planned. The increase was postponed to 1 January 1998. The telephone contacts and meetings were concerned, *inter alia*, with this matter.

(93) In addition to the frequent contacts on pricing between the European [...]*, [...]* of UCAR and SGL also had regular conversations (including one using a mobile telephone registered in Switzerland).

These bilateral contacts continued until at least March 1998 [...]*.

Whereas SGL in its reply to the Statement of Objections (p. 13) denies giving any such advice, both [...]* and SEC (Reply to the Statement of Objections, p. 12) confirm that the senior executives of SGL had told the Japanese producers not to cooperate with the Commission's investigations and not to reply to the Article 11 requests for information. Given that SGL had warned several other cartel members of the forthcoming inspections (see point 27 above), that apart from SDK none of the Japanese producers initially cooperated with the Commission and that their replies to the Commission's Article 11 requests remained very vague, these accounts appear credible to the Commission.

UCAR says [...]* that SGL's [...]* continued to phone UCAR's Director of Sales even after the latter had been dismissed by the company. Several contacts took place between April 1998 and October 1998.

2. **LEGAL ASSESSMENT**

2.1. *THE EC TREATY AND THE EEA AGREEMENT*

2.1.1. RELATIONSHIP BETWEEN THE EC TREATY AND THE EEA AGREEMENT

(94) The arrangements described applied to all steel producing countries in the EEA, that is, all the present Member States plus Norway (Iceland and Liechtenstein do not produce steel). The arrangements in question extended to Austria, Sweden and Finland prior to their accession to the Community on 1 January 1995.

The EEA Agreement (EEA), which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. This Decision therefore covers the application as from that date of those rules (primarily Article 53(1) of the EEA Agreement) to the arrangements to which objection is taken.

In so far as the arrangements affected competition and trade between Member States, Article 81 of the Treaty is applicable; as regards the operation of the cartel in Norway and its effect on trade between the Community and those EFTA States which were or are part of the EEA ('EFTA/EEA States') as well as between the EFTA/EEA States themselves, it falls under Article 53 of the EEA Agreement.

2.1.2. JURISDICTION

(95) According to Article 56(1) (c) and (3) EEA the Commission is competent in the present case to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, since the cartel had an appreciable effect on trade between Member States and competition within the Community.

2.2. *APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT*

2.2.1. ARTICLE 81(1) OF THE TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT

(96) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

(97) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains an identical prohibition on agreements etc. but replaces the conditions of (a) affecting trade 'between Member States' with 'between contracting parties' and (b) preventing, restricting or distorting competition within the common market with 'within the territory covered by ... (the EEA) agreement'.

2.2.2. AGREEMENTS AND CONCERTED PRACTICES

(98) The prohibition in Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement relates to agreements, decisions by associations and concerted practices.

An agreement can be said to exist when the parties adhere to a common plan that limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties.

In its judgment in Joined Cases T-305/94, etc. *Limburgse Vinyl Maatschappij NV and others* v *Commission* (PVC II) [1999] ECR II-931, the Court of First Instance stated (at paragraph 715) that 'it is well established in the case-law that for there to be an agreement within the meaning of Article [81(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way'.

(99) Article 81(1) of the Treaty [13] distinguishes 'concerted practices' from 'agreements between undertakings' and 'decisions by associations of undertakings'. The object is to bring within the prohibition of that Article 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 (Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619).

The criteria of coordination and cooperation laid down by the case-law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the

[13] The case-law of the Court of Justice and Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 EEA.

object or effect of which is 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 40-48/73, etc. *Suiker Unie and others* v *Commission* [1975] ECR 1663.)

(100) Thus conduct may fall under Article 81(1) of the Treaty as a 'concerted practice' even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour. (See also the judgment of the Court of First Instance in Case T-7/89 *Hercules* v *Commission* [1991] ECR II-1711, at paragraph 256.

Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period: judgment of the Court of Justice in Case C-199/92 P *Hüls* v *Commission*, [1999] ECR I-4287, at paragraphs 158 to 166.

(101) It is not necessary, particularly in the case of a complex infringement of long duration, for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible realistically to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to subdivide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement of the present type: see again the judgment of the Court of First Instance in Case T-7/89 *Hercules* v *Commission*, at paragraph 264.

In its *PVC II* judgment (see point 98 above), the Court of First Instance stated (at paragraph 696) that '[i]n 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, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81 EC] of the Treaty'.

(102) An 'agreement' for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose.

(103) As the Court of Justice (upholding the judgment of the Court of First Instance) pointed out in Case C-49/92 P *Commission* v *Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 81, it follows from the express terms of Article 81(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.

A complex cartel may thus properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.

(104) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries or even cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.

The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not rule out its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An under-

taking which takes part in the common unlawful enterprise through actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk (judgment of Court of Justice in *Anic*, at paragraph 83).

2.2.3. THE NATURE OF THE INFRINGEMENT IN THE PRESENT CASE

(105) There is evidence that the collusion between the producers of graphite electrodes affecting the Community began with contacts as early as 1990 and developed during late 1991 and the early part of 1992.

It is not necessary, in order for there to be an infringement of Article 81(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of 'agreement' in Article 81(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement. Further, the process of negotiation and preparation culminating in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

For the purposes of the present case, however, the Commission will begin its assessment with the definitive adoption and implementation by the producers of the common cartel plan.

(106) In the first 'Top Guy' meeting in London on 21 May 1992, the major producers — SGL, UCAR and the Japanese 'group' — agreed the basic principles by which they would cartelise the world market for graphite electrodes. They agreed to fix prices and to implement a price increase mechanism, to allocate national markets and market share quotas. Furthermore, they agreed not to increase production capacity and not to transfer technology outside the circle of cartel participants. A monitoring and enforcement scheme was set up (for details, see points 71 to 73 above).

This plan, to which they all subscribed, as indeed did VAW Carbon, was implemented over a period of several years employing the same mechanisms and pursuing the same common purpose of eliminating competition.

The working-out of the plan at regular meetings does not give rise to discrete 'agreements' but constitutes the implementation of the same overall and illegal scheme.

Given the common design and common objective which the producers steadily pursued of eliminating competition in the graphite electrode industry, the Commission considers that with regard to the EEA market the conduct in question constituted a single continuing infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement in which each participant must bear its responsibility for the duration of its adherence to the common scheme.

(107) Although the arrangements between the producers could correctly be considered as presenting all the characteristics of a full 'agreement', some factual elements of the illicit venture could aptly be described as a concerted practice (were it appropriate or necessary to do so).

C/G was involved on the fringes of the cartel and indeed did not itself attend any group meetings. If it was on the periphery, it still however cooperated with and knowingly associated itself with the overall objectives of the cartel. Its contacts with the cartel via SGL and others enabled it knowingly to adapt its market conduct more closely to that of the other producers and permitted the others to operate on the assumption that it would follow their lead and would not disrupt their planned price initiatives.

Although it is not necessary as far as C/G is concerned to categorise the infringement precisely (see the *PVC II* judgment, at paragraph 696) its involvement could well be considered as having more of the characteristics of a concerted practice. In the event, however, the exact classification of its behaviour in terms of Article 81(1) of the Treaty is immaterial: C/G cannot purport to dissociate itself from the overall scheme in which it knowingly participated.

2.2.4. RESTRICTION OF COMPETITION

(108) The complex of agreements in the present case had the object and effect of restricting competition in the Community and EEA.

Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which:

— directly or indirectly fix selling prices or any other trading conditions,

— limit or control production, markets or technical development,

— share markets or sources of supply.

(109) These are the essential objectives of the horizontal arrangements under consideration in the present case. Price being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at an inflation of the price to their benefit and above the level which would be determined by conditions of free competition. Market-sharing and price fixing by their very nature restrict competition within the meaning of both Article 81(1) of the Treaty and Article 53(1) EEA.

(110) The present cartel has to be considered as a whole and in the light of the totality of the circumstances, but the principal aspects of the complex of agreements and arrangements which can be characterised as restrictions of competition are:

— fixing of prices,

— allocating markets and market share quotas,

— requiring 'non-home market' producers to withdraw from or not compete 'aggressively' in particular markets,

— freezing/restricting/closing down production capacity,

— limiting the transfer of technology outside the cartel.

These principal aspects were implemented by the cartel members mainly by:

— agreeing concerted price increases,

— designating the producer which was to 'lead' price increases in each national market,

— circulating lists of current and future target prices in order to coordinate price increases,

— devising and applying a reporting and monitoring system to ensure the implementation of their restrictive agreements,

— participating in regular meetings and having other contacts in order to agree the above restrictions and to implement and/or modify them as required.

2.2.5. EFFECT ON TRADE BETWEEN MEMBER STATES AND BETWEEN EEA CONTRACTING PARTIES

(111) The continuing agreement between the producers had an appreciable effect on trade between Member States and between EEA contracting parties.

Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

As demonstrated in the 'Interstate trade' section (see point 19 above), the graphite electrode market is characterised by a substantial volume of trade between Member States. There is also a considerable volume of trade between the Community and EFTA: Norway imports 100 % of its requirements, primarily from SGL, UCAR and VAW Carbon, and prior to the accession of Austria, Finland and Sweden, Austria imported a substantial quantity and the other two countries the totality of their graphite electrode requirements.

The application of Articles 81(1) of the Treaty and 53(1) of the EEA Agreementto a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States (see the judgment of the Court of First Instance in Case T-13/89 *Imperial Chemical Industries* v *Commission* [1992] ECR II-1021, at paragraph 304).

In the present case, the cartel arrangements covered virtually all trade throughout the Community and EEA in this important industrial sector. The withdrawal from particular markets of the 'non-home market' producers as well as the existence of a price-fixing and quota mechanism must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed (see the judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck and others* v *Commission* [1980] ECR 3125, at paragraph 170).

In so far as the activities of the cartel related to sales in countries that are not members of the Community or the EEA, they lie outside the scope of this Decision.

2.2.6. PROVISIONS OF THE COMPETITION RULES APPLICABLE TO AUSTRIA, FINLAND, NORWAY AND SWEDEN

(112) The EEA Agreement entered into force on 1 January 1994. For the period prior to that date during which the cartel operated, the only provision relevant for the present proceedings is Article 81 of the Treaty; in so far as the cartel arrangements covered Austria, Finland, Norway and Sweden prior to that date (then EFTA Member States), they will not be regarded as a violation of Article 81(1) of the Treaty.

In the period 1 January to 31 December 1994, the provisions of the EEA Agreement applied to the four EFTA Member States which had joined the EEA; the cartel thus constituted a violation of Article 53(1) of the EEA Agreementas well as of Article 81(1) of the Treaty, and the Commission is competent to apply both provisions. The operation of the cartel in these four EFTA States during this one-year period falls under Article 53(1) EEA.

After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81(1) of the Treaty became applicable to the cartel in so far as it affected those markets. The operation of the cartel in Norway remained in violation of Article 53(1) EEA.

In practice, it follows from the foregoing that in so far as the cartel operated in Austria, Finland, Norway and Sweden, it constituted a violation of the EEA and/or Community competition rules as from 1 January 1994.

2.2.7. DURATION OF THE INFRINGEMENT

(113) Although it is apparent from the statements of both SDK and UCAR that contacts between UCAR, Sigri and the Japanese producers had started as early as 1991, the Commission will in the present case limit its assessment under the competition rules and the application of any fines to the period from May 1992, this being the date of the first 'Top Guy' meeting in London when the basic principles for the cartellisation of the market were agreed.

It should of course be noted that in so far as the cartel covered Austria, Finland, Norway and Sweden, this does not constitute an infringement of the competition rules prior to 1 January 1994, when the EEA Agreement came into effect.

The participation in the infringement of UCAR, SGL and the Japanese producers from 21 May 1992 is established by the participation in the first 'Top Guy' meeting of their respective Presidents/General Managers or (in the case of Nippon and SEC) another undertaking representing their interests.

In any event, the fact that Nippon and SEC did not attend the first 'Top Guy' meeting of 21 May 1992 is immaterial since they were both represented by Tokai and were themselves present at the first 'Working Level' meeting only four days later, as was VAW Carbon.

The involvement of C/G in the collusion will be taken from January 1993 when collusion on pricing was openly discussed for the first time (see point 81 above).

(114) In spite of the investigations conducted by both the Federal Bureau of Investigation and the Commission, cartel meetings continued until at least 13 February 1998, the last known 'Working Level' meeting having taken place on that date with the participation of representatives of SGL, UCAR and three of the Japanese producers: SEC, Nippon and Tokai. Indeed SGL and UCAR continued their illegal contacts for at least another month (see point 93 above).

Although UCAR has stated (point 93 above) that further contacts were initiated by SGL over the following six months, in the absence of corroboration the Commission will for the purposes of assessing fines proceed on the basis that the participation of SGL and UCAR in the cartel ended in March 1998. For the three Japanese producers — SEC, Nippon and Tokai — the relevant date will be taken as mid-February.

SDK had by then already withdrawn from the meetings. Although it states that new senior management in Tokyo had issued a directive as early as January 1997 to the effect that participation in anti-competitive behaviour

would not be tolerated, an SDK representative actually went to the meeting in Tokyo on 9 and 10 April 1997, supposedly to inform the other members of the cartel that it would no longer participate. Other cartel members who do not mention SDK as participating in later meetings [...]* (indirectly) confirm this. April 1997 can therefore be taken as the date SDK withdrew from the arrangements (Showa Denko's Reply to the Statement of Objections, p. 8).

(115) VAW Carbon claims to have ceased attending meetings at the end of 1996. In the absence of any contrary evidence, the Commission will take this as the relevant date for determining duration in its case.

C/G says that during 1996 its General Manager requested [...]* SGL to stop telephoning C/G (Article 11 reply, p. 9). The last meeting it admits attending was in Frankfurt in November 1996, which will be taken as the date C/G withdrew from the cartel [...]*.

2.2.8. ADDRESSEES OF THE PRESENT PROCEEDINGS

(116) It is established by the facts as described in Part 1 of the present Decision that SGL, UCAR, Showa Denko, Tokai, Nippon, SEC and C/G directly participated in the cartel. Consequently, each company will bear responsibility for the infringement and is therefore an addressee of the present Decision.

(117) The question of the appropriate addressee arises only in one case, where the attribution of the conduct of the subsidiary to its parent company must be discussed. That case is VAW Carbon.

The original VAW Carbon GmbH (registered in Grevenbroich) acted until 31 December 1995 as a 'mere selling company' (*reine Vertriebsgesellschaft*) for the carbon and graphite products manufactured by VAW Aluminium AG. According to VAW Carbon's reply of 9 July 1999 to the Commission's request for information of 28 June 1999 (point 2) it was a wholly owned subsidiary of VAW Aluminium AG.

VAW Aluminium AG is a large industrial group with diverse activities and a network of subsidiaries. Its carbon (and graphite electrode) sector was the subject of corporate restructuring on two occasions during the period of the cartel.

(118) As from 1 January 1996 the entire carbon and graphite activities (including production and sales) of VAW Aluminium AG were transferred to its wholly owned subsidiary company Ingal GmbH, Bonn, which was renamed (somewhat confusingly) VAW Carbon GmbH (the 'new' VAW Carbon GmbH). In January 1996 it absorbed the old VAW Carbon GmbH (Grevenbroich), which was deleted from the companies register.

In September 1998, under a leveraged buyout operation by the management (financed mainly by NatWest Ventures (Nominees) Ltd of London ('NatWest')), the business and assets of the 'new' VAW Carbon GmbH were acquired with the consent of VAW by a newly-formed company Erftcarbon GmbH & Co KG, in which NatWest owns 85 % and the management 15 % of the share capital.

Under Article 14 of the purchase contract, the responsibility for any fines or penalties to which the 'new' VAW Carbon GmbH may have been liable under the Commission's investigation in the present case however remained with that company.

The 'new' VAW Carbon GmbH continues in existence, but only as a dormant company with no commercial activity. Its only current assets are the monies received from the sale.

(119) The Commission addressed the Statement of Objections to VAW Aluminium AG, the parent company of VAW Carbon GmbH.

(120) During the administrative procedure in the present case, VAW Aluminium AG argued that the Statement of Objections and any Decision should be addressed not to itself but to VAW Carbon GmbH. According to VAW Aluminium AG, its subsidiary was entirely responsible for the selling and marketing of the product; VAW Aluminium AG was never involved in the cartel (VAW Reply to the Statement of Objections, pp. 1 and 2).

(121) The Commission rejects VAW Aluminium AG's arguments. In its recent judgment in Case C-286/98 P *Stora Kopparbergs Bergslags SG* v *Commission* [2000] ECR I-9925, at paragraph 28, the Court of Justice upheld the Court of First Instance finding that a parent company might be held liable for its subsidiary's conduct stating that 'as [the] subsidiary was wholly owned, the Court of First Instance could legitimately assume [...]* that the parent company in fact exercised decisive influence over its subsidiary's conduct [...]*'.

This presumption has not been rebutted in the present case. VAW Aluminium AG did not submit any evidence to support its assertion that VAW Carbon GmbH had behaved autonomously.

Furthermore, VAW Aluminium AG's allegation that it was totally unaware of the anti-competitive behaviour of its wholly owned subsidiary is contradicted by the fact that the Commission found during its inspection at VAW Aluminium AG a notice that Mr Müller of VAW Carbon GmbH had informed VAW Aluminium AG of the forthcoming cartel inspections by the Commission (see point 33 above; Appendix 1: minute of notification of 6 June 1997).

(122) The Commission therefore considers that VAW Aluminium AG may be held liable for VAW Carbon's conduct.

(123) The Commission notes that until 1 January 1996 VAW Aluminium AG was itself primarily and directly involved in the production of carbon and graphite products; the 'old' VAW Carbon GmbH (of which it was in any event the 100 % owner) was merely the corporate identity of its sales organisation. The fact that for approximately one year afterwards the carbon and graphite production activity of VAW Aluminium AG was located in a wholly owned subsidiary does not affect the Commission's assessment in this regard.

Finally, the Commission considers that there might be difficulties in collecting any fine from a dormant company with no commercial activity and whose continued existence depends entirely upon the tax advantages it brings VAW Aluminium AG.

For all these reasons the present Decision is addressed to VAW Aluminium AG.

2.3. *REMEDIES*

2.3.1. ARTICLE 3 OF REGULATION No 17

(124) Where the Commission finds there is an infringement of Article 81(1) of the Treaty or Article 53(1) of the EEA Agreementit may require the undertakings concerned to bring that infringement to an end in accordance with Article 3 of Regulation No 17.

The infringement continued long after the simultaneous investigations carried out by the Commission and the United States authorities. Documentation was destroyed in advance of the anticipated investigation. In January 1998 SGL also attempted to persuade the Japanese producers not to cooperate with the Commission. In the circumstances it is impossible to say with any certainty if the infringement has ceased and indeed there are some indications to the contrary.

(125) It is therefore necessary for the Commission to require the undertakings to which the present Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision by an association of undertakings which might have the same or similar object or effect.

2.3.2. ARTICLE 15(2) OF REGULATION No 17

2.3.2.1. ***General considerations***

(126) Under Article 15(2) of Regulation No 17 ([14]) the Commission may by decision impose on undertakings fines of between EUR 1 000 and EUR 1 million, or a sum in excess thereof 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, they infringe Article 81(1) of the EC Treaty and/or Article 53(1) of the EEA Agreement.

(127) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation No 17.

(128) The role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fine imposed any aggravating or mitigating circumstances and will apply, as appropriate, the Notice on the non-imposition or reduction of fines in cartel cases (the 'Leniency Notice') ([15]).

([14]) Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area, 'the Community rules giving effect to the principales set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply *mutatis mutandis*'.

([15]) OJ C 207, 18.7.1996, p. 4.

2.3.2.2. ***The basic amount of the fines***

(129) The basic amount is determined according to the gravity and duration of the infringement.

(i) **Gravity**

(130) In assessing the gravity of the infringement, the Commission will take account of its nature, its actual impact on the market and the size of the relevant geographic market.

— *Nature of the infringement*

(131) It follows from the foregoing that the present infringement consisted mainly of market-sharing and price-fixing practices, which are by their nature very serious violations of Articles 81(1) of the Treaty and 53(1) EEA.

(132) The cartel constituted a deliberate infringement of Articles 81(1) of the Treaty and 53(1) EEA. With full knowledge of the illegality of their actions, the leading producers combined to set up a secret and institutionalised system designed to restrict competition in a major industrial sector.

(133) The cartel arrangements permeated the whole industry, were mostly conceived, directed and encouraged at the highest levels of the undertakings concerned and operated entirely for the benefit of the participating producers and to the detriment of their customers and ultimately the general public.

(134) The Commission therefore considers that the present infringement constituted by its nature a very serious infringement of Article 81(1) of the Treaty and Article 53(1) EEA

— *The actual impact of the infringement on the graphite electrodes market in the EEA.*

(135) The Commission considers that the infringement, committed by producers which for the period relevant to this Decision represented almost 90 % of the worldwide and EEA market for graphite electrodes, had an actual impact on the graphite electrodes market in the EEA. Prices were not only agreed but also announced and implemented.

(136) The cartel was characterised by a continuous concern for the setting of target prices (see points 60 to 65 above). Once the two major producers, SGL and UCAR, had agreed on prices, they arranged in advance which of them would announce the increases to customers. As soon as the price increase was accepted by customers, the smaller producers 'followed' the major producers and applied the new prices. Notwithstanding the fact that a planned price increase was occasionally postponed or not implemented, prices applied on the market followed those agreed by the cartel to a considerable extent over a period of six years (see points 66 to 69 above).

(137) Due to a substantial decline in the consumption of graphite electrodes and a restructuring process affecting the whole industry in the 1980s, European graphite electrode prices plunged. As a result, in 1990/91 prices were around 50 % lower than at the end of 1996. The cartel agreements were implemented by a series of step increases between 1992 and 1996. During this period prices nearly doubled. Only in 1997, with a view to the upcoming cartel investigation, the price increases already planned were postponed and stagnated (see point 70 above). Thus the price increases had a clear effect on the market at least in that the prices agreed were not only announced but also implemented.

(138) UCAR claims that the cartel had only limited impact on the steel industry. Because of the unprofitable level of prices in the early 1990s, price increases were necessary to justify the continued manufacture of graphite electrodes. Price increases also allowed quality improvements which benefited the steel industry (UCAR's reply to the Statement of Objections, p. 18).

(139) Contrary to UCAR's argument, the Commission considers that the significant increase in the price of graphite electrodes between 1992 and 1996/97 (see point 70 above) must be interpreted in the light of the fact that the cartel members agreed on target prices, market share allocation and a reporting and monitoring system (see point 135 above). Although it is difficult to say whether and to what extent prices would have been different without the cartel, the conscious implementation of the cartel agreements created a serious risk that prices were higher than under normal conditions of competition.

(140) The Commission also rejects the suggestion that benefits to industrial and commercial activity such as quality improvements or employment should be used to offset the negative effects of infringements of the competition rules. In any case, UCAR has not established a clear link between the alleged improvements in quality and the cartel.

(141) C/G argues that given its small presence in Europe and its history as a price follower its conduct had no adverse impact on competition at all. C/G's contacts with its competitors did not change C/G's pricing behaviour; it would have priced in exactly the same way if those contacts had never occurred (C/G's Reply to the Statement of Objections, p. 12 and Economic Study presented at the Oral Hearing).

(142) The Commission agrees that C/G was only a price follower on the market. However, it is clear that owing to its participation in the cartel it received crucial price and sales information. C/G was therefore in a completely different position from other fringe players on the market that did not have the same first-hand information. Any claim that C/G continued to pursue an independent price strategy is not at all credible and must be dismissed.

(143) In conclusion, the Commission considers that the parties concerned by the present Decision have not been able to rebut its finding as to the actual impact of the infringement on the graphite electrodes market in the EEA.

— *The size of the relevant geographic market*

(144) For the purpose of assessing gravity it is important to note that the cartel covered the whole of the common market and, following its creation, the whole of the EEA.

— *The Commission's conclusion on gravity*

(145) Taking all these factors into account, the Commission considers that the undertakings concerned by the present Decision have committed a very serious infringement.

— *Differential treatment*

(146) Within the category of very serious infringements, the proposed scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensures it has sufficient deterrent effect. The Commission notes that this exercise seems particularly necessary where, as in the present case, there is considerable disparity in the size of the undertakings participating in the infringement.

(147) In the circumstances of this case, which involves several undertakings, it will be necessary in setting the basic amount of the fines to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition.

(148) For this purpose the undertakings concerned can in principle be divided into three categories according to their relative importance in the market concerned, subject to adjustment where appropriate to take account of other factors and especially the need to ensure effective deterrence.

(149) As the basis for comparing the relative importance of an undertaking in the market concerned, the Commission considers it appropriate to take in the present case the worldwide product turnover. This is supported by the fact that this was a global cartel, the object of which was, *inter alia*, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market. Moreover, the worldwide turnover of any given party to the cartel also gives an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have effected the cartel had it not participated. The comparison is made on the basis of the worldwide product turnover in the last year of the infringement (1998).

(150) It is very clear from the table at point 30 that SGL and UCAR were the two major producers of graphite electrodes in the worldwide and EEA market. They will therefore be placed in the first category. C/G, SDK and Tokai, which had significantly lower market shares in the worldwide market (5 % to 10 %), are placed in the second category. VAW, SEC and Nippon, with worldwide market shares each of them below 5 %, are placed in the third category.

(151) On the basis of the foregoing, the appropriate starting point for a fine resulting from the criterion of relative importance in the market concerned is for each category as follows:

— SGL and UCAR: EUR 40 million

— C/G, SDK and Tokai: EUR 16 million

— VAW, SEC and Nippon: EUR 8 million.

(152) In order to

(a) ensure that the fine has a sufficient deterrent effect; and

(b) take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from that conduct under competition law;

the Commission will determine whether any further adjustment of the starting point is needed for any undertaking.

(153) In the cases of VAW Aluminium AG [16] and SDK, the Commission considers that the appropriate starting point for a fine resulting from the criterion of the relative importance in the market concerned requires further upward adjustment to take account of their size and their overall resources.

(154) On the basis of the foregoing, the Commission considers that in the case of VAW Aluminium AG, the need for deterrence requires that the starting point of its fine determined in recital 151 should be increased by 1,25 to EUR 10 million. In the case of SDK, being by far the largest undertaking concerned by this Decision, the starting point of its fine determined in recital 151 should be increased by 2,5 to EUR 40 million.

(ii) **Duration of the infringement**

(155) As mentioned, the Commission considers that SGL, UCAR, Tokai, Nippon and SEC infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from May 1992 until February/March 1998. They committed a long-term infringement of five years and 9 to 10 months. The starting amount of the fines determined for gravity is therefore increased by 55 % for each company.

(156) SDK and VAW committed a medium-term infringement of four years and 7/11 months respectively. The starting amount of their fines determined for gravity is therefore increased by 45 % for each company.

(157) C/G committed an infringement of medium duration of three years and 10 months. The starting amount of the fine determined for gravity is therefore increased by 35 %.

(iii) **Conclusion on the basic amounts**

(158) The Commission accordingly sets the basic amounts of the fines for SGL and UCAR at EUR 62 million, for VAW Aluminium AG at EUR 14,5 million, for SDK at EUR 58 million, for Tokai at EUR 24,8 million, for C/G at EUR 21,6 million and for SEC and Nippon at EUR 12,4 million.

2.3.2.3. ***The individual fines***

(159) On the basis of its conclusions on the basic amount of fines, the Commission will assess for each company on an individual basis any aggravating or mitigating circumstances and will apply, as appropriate, the Leniency Notice.

(i) **SGL**

— *Aggravating circumstances*

(160) The gravity of the infringement is aggravated in SGL's case by the following circumstances:

— SGL's role as one of the ringleaders and instigators of the cartel,

— its attempts to obstruct the Commission proceedings by giving warnings to other companies of the forthcoming investigations,

— its continuation of this clear-cut and indisputable infringement after the investigations.

— *Arguments of SGL*

(161) SGL contests the Commission's finding that it was one of the ringleaders and instigators of the cartel. It argues that UCAR and its former parent companies Union Carbide and Mitsubishi Corporation initiated the contacts and played the leading role (SGL's reply to the Statement of Objections, pp. 14 to 16).

— *Arguments of the Commission*

(162) It is apparent from the facts as described in Part 1 of this decision that SGL was the 'European' leg of the cartel (see recital 47). It was SGL together with UCAR which took the main decisions with regard to target

[16] As stated above (see recitals 117 to 123), the Commission holds the parent company VAW Aluminium AG responsible for the anti-competitive behaviour of VAW Carbon GmbH, its wholly owned subsidiary.

prices and market allocation in the Member States and which had regular contacts with VAW Carbon and C/G.

(163) Finally, the fact that UCAR also played a leading role in the infringement does not excuse or lessen SGL's behaviour. Both undertakings were by far the most powerful cartel members with the same ambition, namely to be the leader in the world graphite market.

— *Conclusion*

(164) The abovementioned substantial aggravating circumstances justify an increase of 85 % in the basic amount of the fine.

— *Mitigating circumstances*

(165) There are no mitigating circumstances relating to the infringement in SGL's case that could justify a reduction.

(166) The appropriate fine is therefore EUR 114,7 million.

— *Application of the Leniency Notice*

(167) The Commission will grant a reduction of the otherwise appropriate fine in recognition of SGL's cooperation under its Leniency Notice.

(168) Under Section D of the Notice an undertaking which does not comply with all the conditions set out in Sections B or C can still benefit from a significant reduction of 10 % to 50 % of the fine that would otherwise have been imposed where (for example):

— before a Statement of Objections is sent, it 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, it informs the Commission that it does not substantially contest the facts on which the Commission bases its objections.

(169) Even if the infringement did continue for several months after the investigation, SGL cooperated at an early stage, and adequate recognition should be accorded in the reduction granted.

— *Arguments of SGL*

(170) SGL claims that its cooperation went in substance far beyond the contributions of other companies and occurred at an earlier stage. First contacts with the Commission took place as early as April 1998, when the company announced its willingness to cooperate. It was however the parallel criminal and civil law proceedings in the United States and the incompatibility between the different prosecution systems which prevented SGL from providing any relevant information.

(171) SGL argues further that as soon as a plea agreement had been reached with the US Department of Justice, it provided the Commission on 8 June 1999 with a detailed and voluntary statement (SGL's reply to the Statement of Objections, pp. 2, 5 to 8).

— *Arguments of the Commission*

(172) The conditions under which a company wishing to cooperate with the Commission may be granted a reduction in its fine are clearly set out in the Leniency Notice. It is up to each company to consider carefully the benefits resulting from any cooperation with the Commission and difficulties which could possibly arise in other proceedings and in particular in the United States. As any cooperation under the Leniency Notice is provided on a voluntary basis, it is each company's individual decision to choose the appropriate means and timing. The Commission can however only take into account real and effective contributions.

(173) Given that no actual cooperation had been provided by SGL since the first contacts in April 1998, the Commission on 31 March 1999 sent the company a formal request for information pursuant to Article 11 of Regulation No 17. Contrary to SGL's arguments, the Commission was perfectly entitled to ask the questions as set out in its request. SGL only replied in part, however. Only after a further reminder of 31 May 1999, in which the Commission reserved the right to adopt a formal decision pursuant to Article 11(5) of Regulation No 17, did SGl provide on 8 June 1999 a corporate statement as to its participation in the cartel.

(174) Given that any cooperation under the Leniency Notice must be voluntary and in particular outside the exercise of any investigatory power, the Commission considers that a substantial part of the information provided in this statement in fact constitutes SGL's reply to the Commission's formal request for information. SGL's statement will be regarded as a voluntary contribution within the meaning of the Leniency Notice only where the information provided went beyond that requested under Article 11, in particular, with regard to details of certain meetings of which the Commission was unaware, and on the national implementation of the cartel in Europe.

(175) After due consideration of all these circumstances, the Commission will reduce the fine that it would otherwise have imposed on SGL by 30 % in accordance with the first indent of Section D(2) of the Leniency Notice.

(176) SGL will therefore be required to pay a fine of EUR 80,29 million.

— *Liability for the infringement with regard to the* ne bis in idem *principle*

(177) During the procedure SGL raised several arguments with regard to its liability to any fine from the standpoint of *ne bis in idem* (see SGL's written reply to the Statement of Objections, pp. 17 to 21, and a Legal Study of the *ne bis in idem* principle presented at the Oral Hearing).

(178) SGL claimed variously (and not entirely consistently) that:

(a) under the general *ne bis in idem* principle of criminal law, it should not be prosecuted or sanctioned a second time for the same action under EC competition law, the conviction and the fine in the United States having already expunged the totality of its culpability;

(b) the United States had fined SGL on the basis of total world turnover;

(c) on the basis of general principles of justice and equity, the Commission in calculating any fine should 'set off' against the appropriate amount the fine imposed in the United States and any punitive element in the civil damage awards.

— *Arguments of the Commission*

(179) The Commission rejects all of SGL's arguments. It does not consider that fines imposed elsewhere, especially in the United States, have any bearing on the fines to be imposed for infringing European competition rules. The exercise by the United States (or any third country) of its (criminal) jurisdiction against cartel behaviour can in no way limit or exclude the Commission's jurisdiction under EC competition law.

(180) More importantly, it is in any case untrue that (as SGL argued) the Commission was intending to sanction it for exactly the same facts as the US courts had. By virtue of the principle of territoriality, Article 81 of the Treaty is limited to restrictions of competition in the common market and Article 53 EEA is limited to restrictions of competition in the EEA market. In the same way, the US antitrust authorities only exercise jurisdiction to the extent that the conduct has a direct and intended effect on United States commerce.

(181) For the sake of completeness, the Commission also refers to the reduction of the US criminal fine. As the Commission demonstrated during the Oral Hearing when it produced the sentencing memorandum and fining calculations from the US procedures (both are public documents), the basic fine in the United States had been calculated only on SGL sales in the United States and had been agreed to by SGL. Indeed, as the fine calculations showed, SGL had negotiated a very substantial reduction in the US criminal fine to below the normal minimum in order to take account under the 'ability to pay' test of its expected liability to penalties in the Community and Canada and to civil damages.

(182) SGL is thus acting in a contradictory manner in securing a reduction in the appropriate fine in the United States by reference to likely penalties in the Community and then claiming in the latter jurisdiction that it should not be subject to any fine at all.

(183) Finally, the possibility that undertakings may have been required to pay damages in civil actions is of no relevance. Payments of damages in civil law actions which have the objective of compensating for the harm caused by cartels to individual companies or consumers cannot be compared with public law sanctions for illegal behaviour.

— *Ability to pay*

— *Arguments of SGL*

(184) SGL argues that the company's financial situation was weakened by the high fines imposed by other competition authorities and civil damage payments. Further sanctions by the Commission might force the company into bankruptcy.

— *Arguments of the Commission*

(185) In consideration of this argument, the Commission requested detailed information on the company's financial position ([17]). After examining the company's reply of 6 June 2001 the Commission concludes that it is not appropriate in the present case to adjust the amount of the fine. To take account of the mere fact of an undertaking's loss-making financial situation due to general market conditions or changes in the company's corporate structure would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market. Finally, in the present case there is no justification for setting off fines imposed by other competition authorities or civil damage payments (see points 179 to 183 above).

(186) The total fine imposed on SGL will therefore be EUR 80,29 million.

(ii) **UCAR**

— *Aggravating circumstances*

(187) The gravity of the infringement is aggravated in UCAR's case by the following circumstances:

— UCAR's role as one of the ringleaders and instigators of the cartel,

— its continuation of this clear-cut and indisputable infringement after the investigations.

— *Arguments of UCAR*

(188) UCAR argues that SGL played the leading role in the EEA market (UCAR's reply to the Statement of Objections, p. 4). SGL took the general lead in the price increases and had a higher market share than UCAR.

— *Arguments of the Commission*

(189) Both UCAR and SGL were the driving forces behind the cartel. They initiated the contacts in 1991, developed the whole plan to set up a cartel and organised the first 'Top Guy' meeting in May 1992 at which they adopted a 'common position' vis-à-vis the other producers.

(190) With regard to the EEA market, it appears from the facts that UCAR and SGL agreed on new target prices for each national market, the respect of home markets and the maintenance of 'key account clients'. It is UCAR itself which admits that it generally led the price increases in France and the United Kingdom (see point 66 above; [...]*). For several other EEA markets it was decided on each occasion whether UCAR or SGL would take the lead.

(191) The fact that SGL also played a leading role in the infringement does not excuse UCAR's behaviour. Both undertakings were by far the most powerful cartel members with the same ambition, namely to be the leaders on the market.

(192) Having regard to the foregoing, the basic amount of the fine should be increased in the case of UCAR by 60 %. The appropriate fine is therefore EUR 99,2 million.

— *Mitigating circumstances*

— *Compliance programme*

— *Arguments of UCAR*

(193) UCAR claims that it was the only company involved in the infringement which took specific actions against employees responsible for the infringement and set up a comprehensive compliance programme (UCAR's reply to the Statement of Objections, pp. 14 to 16).

— *Arguments of the Commission*

(194) The Commission welcomes the fact that after the cartel investigations UCAR conducted an internal investigation and set up a compliance programme. This initiative

([17]) Commission's request for information pursuant to Article 11 of Regulation No 17 dated 23 May 2001.

however cannot dispense the Commission from its duty to sanction the very serious infringement of competition rules that UCAR committed in the past.

— *Economic difficulties of the whole graphite electrodes industry*

— *Arguments of UCAR*

(195) According to UCAR the Commission should take into account the mitigating circumstance that the graphite electrodes industry as a whole and UCAR in particular was facing economic difficulties in the early 1990s (UCAR's reply to the Statement of Objections, p. 17).

— *Arguments of the Commission*

(196) The Commission does not consider that the situation invoked by UCAR constitutes a mitigating circumstance.

(197) It has to be made clear that, in attempting to cope with difficult market conditions or falls in demand, undertakings must use only means that are consistent with the competition rules. Price-fixing and market-sharing are certainly not legitimate means of combating difficult market conditions. Nor are undertakings entitled to flout Community competition rules because of alleged overcapacity.

— *Conclusion*

(198) The Commission concludes that there are no mitigating circumstances relating to UCAR's infringement that could justify a reduction of the fine.

(199) The fine calculated for UCAR is EUR 99,2 million. However, since the final amount calcultated according to the above method may not in any case exceed 10 % of the worldwide turnover of UCAR (as laid down by Article 15(2) of Regulation No 17) the fine will be set at EUR 84,1 million, so as not to exceed the permissible limit.

— *Application of the Leniency Notice*

(200) The Leniency Notice will be applied to UCAR. Although it was not the first company that provided the Commission with decisive evidence, it contributed substantially to establishing important aspects of the case.

(201) UCAR contacted the Commission in March 1998 and indicated its intention to cooperate. In June 1998 it provided several documents and in particular a price table identical to that which the Commission had found during its investigation at SGL. It was the first company which acknowledged 'illicit contacts with competitors', in reply to a formal request for information. In March and April 1999 it submitted to the Commission two statements by former employees giving details of the organisation and structure of the cartel, at both international and European level. In June 1999 UCAR provided a detailed corporate statement.

(202) The Commission will therefore grant UCAR under the first indent of Section D(2) of the Leniency Notice a reduction of 40 %.

— *Ability to pay*

— *Arguments of UCAR*

(203) UCAR argues that due to the recent decline of prices and sales in the graphite electrodes industry its financial situation has deteriorated to the extent that its ability to pay a fine is largely reduced. As approximately 70 % of UCAR's business consists of graphite electrodes, it is particularly concerned by this situation (UCAR's reply to the Statement of Objections, pp. 27 to 34).

(204) UCAR also claims that its former parent companies, Union Carbide and Mitsubishi, benefited from the cartel through a series of dividends and other transactions culminating in a leveraged recapitalisation in January 1995.

(205) Finally, UCAR argues that the company's financial situation was further weakened by the high fines imposed by the United States and Canadian competition authorities and civil damage payments.

— *Arguments of the Commission*

(206) With regard to UCAR's first argument, the Commission requested detailed information on the company's financial position ([18]). After examining the company's reply of 25 May 2001 the Commission concludes that it is not appropriate in the present case to adjust the amount of the fine. To take account, when determining the fine,

([18]) Commission's request for information pursuant to Article 11 of Regulation No 17 dated 10 May 2001.

of an undertaking's loss-making financial situation due to general market conditions or changes in the company's corporate structure would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market.

(207) UCAR's second argument does not change the gravity of UCAR's participation in the cartel nor the need for effective deterrence. Finally, in the present case there is no justification for setting off fines imposed by other competition authorities or civil damage payments (see recitals 179 to 183).

(208) The total fine imposed on UCAR will therefore be EUR 50,4 million.

(iii) **SDK, Tokai, SEC and Nippon**

— *Aggravating circumstances*

(209) For Tokai, SEC and Nippon the Commission must take into account one aggravating circumstance, namely their continuation of this clear-cut and indisputable infringement after the Commission had carried out its investigations.

(210) The fines of Tokai, SEC and Nippon will therefore be increased by 10 %.

— *Mitigating circumstances*

(211) Tokai and SEC argue that the Commission should take into account as a mitigating circumstance their exclusively passive role in the arrangements concerning the EEA market. Similar to that, Nippon Carbon argues that it played a very limited role (SEC's Reply to the Statement of Objections, pp. 16 and 17; Nippon Carbon's Reply of 17 May 2000 to the Statement of Objections, p. 2). Tokai further suggests that its partial non-implementation of the 'home producer principle' by increasing its sales to the Community in the period under investigation should also be considered as mitigating (Tokai's Reply to the Statement of Objections, pp. 12 and 13).

(212) As to the role of the Japanese producers, the Commission is of the opinion that in substance they must be regarded as active members. This follows not only from their participation in 'Top Guy' and 'Working Level' meetings over a long period, but also from their behaviour during the meetings, where they actively took part in discussions. This is true particulary of Tokai and SDK, being the largest Japanese producers.

(213) Although the Japanese producers did not attend specific European group meetings, they were kept up to date by SGL and UCAR on the target prices. Furthermore, it is not contested that one of the basic principles of the cartel, namely that non-home producers should not compete aggressively, was valid also for the EEA market. The abstention of the Japanese producers from the EEA market must therefore be considered in the context of their adherence to the basic principales of the cartel and not as a sign of passive behaviour.

(214) This has to be taken into consideration also with regard to Tokai's second argument, namely partial non-implementation of the home-producer principle. Even if Tokai slightly increased its sales between 1992 and 1996, it respected the basic principles of the cartel.

(215) The Commission therefore concludes that there are no mitigating circumstances which could be applied to Tokai, SEC or Nippon.

(216) The following fines for the undertakings are therefore considered to be appropriate (before any reduction under the Notice on the non-imposition or reduction of fines):

— SDK: EUR 58 million,

— Tokai: EUR 27,28 million,

— SEC: EUR 13,64 million,

— Nippon: EUR 13,64 million.

— *Application of the Leniency Notice*

— *SDK*

(217) Under the Leniency Notice, the Commission will take into account the fact that SDK was the first company which actually provided substantial and decisive evidence on the cartel. Several crucial documents were handed over to the Commission in March 1998 (in particular the 'CMS Report' and several price lists), [...]*. This evidence assisted the Commission significantly in establishing the facts on which this Decision is based.

(218) In accordance with Section C of the Leniency Notice, the fine on SDK will be reduced by 70 %.

— *Tokai, SEC and Nippon*

(219) Tokai, SEC and Nippon Carbon did not contest the factual allegations made in the Statement of Objections. SEC also submitted a list of meetings and its participants (Annex 7 to its Reply to the Statement of Objections).

(220) The Commission rejects however both SEC's and Nippon Carbon's argument that they maintained continuous and complete cooperation throughout the investigation (SEC's Reply to the Statement of Objections, pp. 12 and 13; Nippon Carbon's letter of 17 May 2000). Their quite vague replies to several of the Commission's requests for information under Article 11 of Regulation No 17 cannot be regarded as voluntary cooperation in the context of the Leniency Notice.

(221) The Commission further rejects SEC's attempt to justify its behaviour by maintaining that SGL and another Japanese company recommended it not to cooperate. This might well be true, but it is clearly SEC's own corporate decision and responsibility to cooperate in the Commission's investigation.

(222) Each of the three companies will therefore receive a reduction under the second indent of Section D(2) of the Leniency Notice of 10 %.

— *Conclusion*

(223) The total fines imposed on the four undertakings will therefore be as follows:

— SDK: EUR 17,4 million,

— Tokai: EUR 24,5 million,

— SEC: EUR 12,2 million,

— Nippon: EUR 12,2 million.

(iv) **VAW**

— *Mitigating circumstances*

(224) VAW Carbon claims that it played only a passive role in the cartel. Like C/G, it had a position as a 'price follower' and its participation in meetings was not necessary for the success of the cartel [...]*.

(225) VAW carbon must be regarded as an active member of the cartel. Its representatives were present at several 'Working Level' meetings in Europe and at separate European group meetings. It was involved in discussions on prices and the monitoring of sales volumes (see recital 88). Its active involvement in price discussions also contradicts VAW Carbon's second argument that it was only a 'price follower'. Finally, the Commission dismisses VAW Carbon's last argument. VAW Carbon's participation in the cartel was part of the overall scheme of the cartel to control the worldwide market and to include the most important producers.

(226) VAW Carbon also suggests that it acted under some pressure from SGL. The Commission notes however that this does not relieve VAW of its own corporate responsability. In particular, it could have reported the case to the Commission.

(227) The Commission concludes that there are no mitigating circumstances which could be applied to VAW.

— *Application of the Leniency Notice*

(228) In its reply of 10 May 1999 to the Commission's detailed request for information of 31 March 1999 pursuant to Article 11 of Regulation No 17, VAW Carbon initially claimed that it was under no obligation to answer certain questions and that, in any event, it was unable to provide documents or information.

(229) It was only in its letter of 12 July 1999 that VAW Carbon announced its willingness to cooperate and provided a statement as to its participation. The Commission considers however that a substantial part of the information provided in this statement in fact constitutes VAW Carbon's reply to the Commission's formal request for information of 31 March 1999.

(230) Only to the extent that the information provided went beyond that requested under Article 11 and beyond the information already in the Commission's possession could VAW Carbon's statement be considered as a relevant contribution within the meaning of the Leniency Notice.

(231) Taking into consideration the fact that VAW Carbon's cooperation started before the Commission adopted its Statement of Objections and continued afterwards, VAW Aluminium AG will receive a reduction of 20 % in accordance with the first indent of Section D(2) of the Leniency Notice.

(232) As stated in recitals 117 to 123, the Commission holds VAW Aluminium AG, as the parent company of VAW Carbon GmbH, responsible for the anti-competitive conduct of its wholly owned subsidiary.

(233) The total fine imposed on VAW Aluminium AG will therefore be EUR 11,6 million.

(v) **C/G**

— *Mitigating circumstances*

(234) As a mitigating circumstance the Commission will take into account the fact that C/G played only a passive role in the infringement. It did not attend any 'Top Guy' or 'Working Level' meetings and took the position of a 'price follower' (see recital 81).

(235) A further reduction will be granted to C/G on the basis of its partial non-implementation of the offending agreements. Between 1993 and 1996 C/G actually increased its sales in Europe, thereby not respecting the basic principle of the cartel of restricting sales in 'non-home' markets.

(236) The fine on C/G will therefore be reduced by 40 %. The appropriate fine for C/G is therefore: EUR 12,96 million.

(237) The Commission will not however accept C/G's argument that it acted under economic pressure. Even if it might be correct that other producers put pressure on C/G, it remained C/G's own decision and responsibility to participate in the infringement.

(238) With regard to any structural overcapacity in the sector, it has already been stated (see recital 197) that undertakings may use only means which are consistent with Community competition rules to cope with difficult market conditions.

— *Application of the Leniency Notice*

(239) In accordance with the first indent of section D(2) of the Leniency Notice, the fine on C/G will be reduced by 20 % in recognition of its having supplied certain information to the Commission.

(240) Contrary to what C/G claims it is however not entitled to a reduction of at least 50 %. Although already in July 1998 it supplied certain documents on contacts between competitors to the Commission, it was only in October 1999 that a Corporate Statement was submitted in which C/G was however ambiguous with regard to its role in the cartel. The reply of 21 July 1999 to the Commission's formal request for information pursuant to Article 11 of Regulation No 17 cannot be regarded as a voluntary contribution within the meaning of the Leniency Notice.

— *Ability to pay*

(241) C/G claims that its current financial situation is very serious. Due to a downturn in the market for graphite electrodes, the steel crisis, high oil prices and the strength of the US currency it is highly leveraged today. High civil damage payments resulting from lawsuits in the United States have further weakened the company.

(242) In consideration of this argument, the Commission requested detailed information on the company's financial position ([19]). After examining the company's reply of 25 May 2001 the Commission concludes that it is not appropriate to adjust the amount of the fine in the present case. To take account of the mere fact of an undertaking's lossmaking financial situation due to general market conditions or changes in the company's corporate structure would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market. Finally, in the present case there is no justification for setting off fines imposed by other competition authorities or civil damage payments (see recitals 179 to 183).

(243) The total fine imposed on C/G will therefore be EUR 10,3 million.

2.3.2.4. ***The amount of the fines imposed in the present proceedings***

(244) In conclusion, the Commission sets the fines to be imposed pursuant to Article 15(2) Regulation No 17 as follows:

— SGL Carbon AG: EUR 80,2 million

— UCAR International Inc.: EUR 50,4 million

— VAW Aluminium AG: EUR 11,6 million

([19]) Commission's request for information pursuant to Article 11 of Regulation No 17 dated 10 May 2001.

— Showa Denko K.K.: EUR 17,4 million

— Tokai Carbon Co. Ltd: EUR 24,5 million

— Nippon Carbon Co. Ltd: EUR 12,2 million

— SEC Corporation: EUR 12,2 million

— The Carbide Graphite Group: EUR 10,3 million,

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in a complex of agreements and concerted practices in the graphite electrodes sector:

SGL Carbon AG: from May 1992 to March 1998,

UCAR International Inc.: from May 1992 to March 1998,

VAW Aluminium AG: from May 1992 until the end of 1996,

Showa Denko K.K.: from May 1992 until April 1997,

Tokai Carbon, Co. Ltd: from May 1992 to February 1998,

Nippon Carbon Co. Ltd: from May 1992 to February 1998,

SEC Corporation: from May 1992 to February 1998,

The Carbide Graphite Group Inc.: from January 1993 until November 1996.

Article 2

The undertakings referred to in Article 1 shall immediately bring to an end the infringements referred to in that Article, in so far as they have not already done so.

They shall refrain from repeating any act or conduct referred to in Article 1, and from adopting any measure having equivalent object or effect.

Article 3

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

(a) SGL Carbon AG: EUR 80,2 million;

(b) UCAR International Inc.: EUR 50,4 million;

(c) VAW Aluminium AG: EUR 11,6 million;

(d) Showa Denko K.K.: EUR 17,4 million;

(e) Tokai Carbon Co. Ltd: EUR 24,5 million;

(f) Nippon Carbon Co. Ltd: EUR 12,2 million;

(g) SEC Corporation: EUR 12,2 million;

(h) The Carbide Graphite Group Inc.: EUR 10,3 million.

Article 4

The fines imposed in Article 3 shall be paid, within three months of the date of notification of this Decision to the following Bank account:

Account No 642-0029000-95
European Commission
Banco Bilbao Vizcaya Argentaria (BBVA)
SWIFT Code: BBVABEBB — IBAN Code: BE 76 6420 0290 0095
Avenue des Arts, 43
B-1040 Brussels

After 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 working day of the month in which this Decision is adopted, plus 3,50 percentage points, namely 8,04 %.

Article 5

This Decision is addressed to:

1. SGL Carbon AG
Rheingaustraße 182
D-65203 Wiesbaden

2. UCAR International Inc.
3102 West End Avenue, Suite 1100
Nashville, Tennessee 37203
USA

3. VAW Aluminium AG
Georg-von-Boeselager Straße 25
D-53117 Bonn

4. Showa Denko K.K.
13-9, Shiba Daimon 1 — Chome
Minato-ku
Tokyo 105-8517
Japan

5. Tokai Carbon Co. Ltd
Aoyama Building
2-3, Kita — Aoyama, 1 — Chome
Minato-ku
Tokyo 107
Japan

6. Nippon Carbon Co. Ltd
6-1, Hatchobori, 2 — Chome
Chuo-ku
Tokyo 1047-0032
Japan

7. SEC Corporation
Doi Building
5, Misonomachi
Amagasaki
Hyogo HY 660
Japan

8. The Carbide Graphite Group Inc.
One Gateway Center, 19th Floor
Pittsburgh, PA 15222-1416
USA.

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 18 July 2001.

For the Commission

Mario MONTI

Member of the Commission