Case T-99/04 AC-Treuhand AG v Commission of the European Communities [excerpt]

(Competition – Agreements, decisions and concerted practices – Organic peroxides – Fines – Article 81 EC – Rights of the defence – Right to a fair hearing – Meaning of perpetrator of an infringement – Principle of nullum crimen, nulla poena sine lege – Principle of legal certainty – Legitimate expectations)

Summary of the Judgment

1. *Competition – Administrative procedure – Observance of the rights of the defence – Undertaking concerned able to rely in full on those rights only after the notification of the statement of objections – Commission under an obligation to inform the undertaking of the subject-matter and purpose of the preliminary investigation when the first measure is taken in respect of that undertaking*

(Council Regulation No 17, Arts 11 and 14)

2. *Competition – Agreements, decisions and concerted practices – Imputed to an undertaking – Commission decision attributing joint liability to a consultancy firm which is not active on the market concerned but which contributed actively and intentionally to the cartel*

(Arts 3(1)(g) EC and 81(1) EC; Council Regulation No 17, Art. 15(2))

1. In the context of the administrative procedure under Regulation No 17, it is only after the notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence, because it is not until then that it is informed of all the essential evidence on which the Commission is relying at that stage of the procedure and that it has a right of access to the file in order to ensure that its rights of defence are effectively exercised. If those rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, hence the information that could still be concealed from it.

The fact nevertheless remains that the measures of inquiry adopted by the Commission during the preliminary investigation – in particular, the measures of investigation and requests for information under Articles 11 and 14 of Regulation No 17 – suggest, by their very nature, that an infringement has been committed and may have a significant impact on the situation of the undertakings suspected. Consequently, it is necessary to prevent the rights of the defence from being irremediably compromised during that stage of the administrative procedure since the measures of inquiry taken may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable.

It follows that when the first measure is taken in respect of an undertaking, including in requests for information under Article 11 of Regulation No 17, the Commission is required to inform the undertaking concerned, inter alia, of the subject-matter and purpose of the investigation underway. In that regard, the reasoning does not need to be so extensive as that required for decisions ordering investigation, owing to the more restrictive nature of the latter and the particular intensity of their impact on the legal situation of the undertaking concerned. That reasoning must, however, enable the undertaking to understand the purpose and the subject-

matter of that investigation, which means that the putative infringements must be specified and, in that context, the fact that the undertaking may be faced with allegations related to that possible infringement, so that it can take the measures which it deems useful for its exoneration and, thus, prepare its defence at the inter partes stage of the administrative procedure.

(see paras 48, 50-51, 56)

2. A Commission decision establishing that a consultancy firm shares liability for an infringement of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates does not exceed the limits of the prohibition laid down in that provision and, consequently, by imposing a fine on that firm, the Commission does not exceed the powers conferred on it under Article 15(2) of Regulation No 17.

A literal, contextual and teleological interpretation of the term 'agreements between undertakings' as used in Article 81(1) EC does not require a restrictive interpretation of the notion of perpetrator of the infringement, according to which the relationship of a firm of that kind with the cartel would merely have been one of non-punishable complicity. On the contrary, an undertaking may infringe the prohibition laid down in that provision where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active itself on that relevant market. Any other interpretation might restrict the scope of the prohibition laid down in Article 81(1) EC to an extent incompatible with its useful effect and its main objective, as read in the light of Article 3(1)(g) EC, which is to ensure that competition in the internal market is not distorted, since proceedings against an undertaking for actively contributing to a restriction of competition could be blocked simply on the ground that that contribution does not come from an economic activity forming part of the relevant market on which that restriction materialises or on which it is intended to materialise.

If the attribution of the infringement as a whole to such an undertaking is to be in line with the requirements of the principle of individual liability, two conditions – one objective, one subjective – must be met. The first condition is that the undertaking concerned must have contributed to the implementation of the cartel even if only in a subsidiary, accessory or passive role, since the potentially limited importance of that contribution may be taken into consideration for the purposes of determining the level of the penalty. The second condition is that the undertaking must have manifested its own intention, showing that it is in agreement, albeit only tacitly, with the objectives of the cartel. The latter condition constitutes the justification for holding that the undertaking concerned shares liability, since it intends to contribute through its own conduct to the common objectives pursued by the participants as a whole and is aware of the anti-competitive conduct of the other participants, or is in a position reasonably to foresee that conduct, and is ready to accept the attendant risk.

Even though, at the time of the alleged misconduct, the Community judicature had not made an explicit ruling on that question, such an interpretation of Article 81(1) EC is not contrary, either, to the principle of *nullum crimen, nulla poena sine lege*, which need not necessarily have the same scope as when it is applied to a situation covered by criminal law in the strict sense, because the procedure before the Commission under Regulation 17 is merely administrative in nature. Thus, any undertaking which has adopted collusive conduct, including consultancy firms which are not active on the market affected by the restriction of competition,

could reasonably have foreseen that the prohibition laid down in Article 81(1) EC was applicable to it in principle. Such an undertaking could not have been unaware, or was in a position to realise, that a sufficiently clear and precise basis was already to be found, in the former decision-making practice of the Commission and in the existing Community case-law, for expressly recognising that a consultancy firm is liable for an infringement of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates.

Lastly, even though the Commission's decision-making practice prior to the contested decision could appear to conflict with the above interpretation of Article 81(1) EC, the principle of the protection of legitimate expectations cannot stand in the way of the reorientation of the Commission's decision-making practice, based on a correct interpretation of the full implications of the prohibition laid down in Article 81(1) EC and even more foreseeable, given the existence of a precedent.

(see paras 112, 113, 117, 122-123, 127, 133-135, 149-150, 157, 163-164)

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

8 July 2008 (*)

(Competition – Agreements, decisions and concerted practices – Organic peroxides – Fines – Article 81 EC – Rights of the defence – Right to a fair hearing – Meaning of perpetrator of an infringement – Principle of nullum crimen, nulla poena sine lege – Principle of legal certainty – Legitimate expectations)

In Case T-99/04,

AC-Treuhand AG, established in Zurich (Switzerland), represented by M. Karl, C. Steinle and J. Drolshammer, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Bouquet, acting as Agent, and by A. Böhlke, lawyer,

defendant,

ACTION for annulment of Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – Organic peroxides) (OJ 2005 L 110, p. 44),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of M. Jaeger, President, J. Azizi and O. Czúcz, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2007,

gives the following

Judgment

Background to the dispute

1 Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – Organic peroxides) (OJ 2005 L 110, p. 44; 'the contested decision') concerns a cartel formed and implemented on the European market for organic peroxides – chemicals used in the plastics and rubber industry – by the AKZO group ('AKZO'), Atofina SA, successor to Atochem ('Atochem/Atofina'), and Peroxid Chemie GmbH & Co. KG, a company controlled by Laporte plc, now Degussa UK Holdings Ltd ('PC/Degussa'), inter alia.

2 It is apparent from the contested decision that the cartel was founded in 1971 by a written agreement ('the 1971 agreement'), amended in 1975 ('the 1975 agreement'), between three producers of organic peroxides, namely AKZO, Luperox GmbH, which later became Atochem/Atofina, and PC/Degussa ('the cartel'). The aim of that cartel was, inter alia, to preserve the market shares of those producers and to coordinate their price increases. Meetings were held regularly to ensure the proper functioning of the cartel. Under the cartel, Fides Trust AG ('Fides'), and subsequently, from 1993, the applicant, AC-Treuhand AG, were entrusted, on the basis of agency agreements with AKZO, Atochem/Atofina and PC/Degussa, with, inter alia, storing certain secret documents relating to the cartel, such as the 1971 agreement, on their premises; collecting and treating certain information concerning the commercial activity of the three organic peroxide producers; communicating to them the data thus treated; and completing logistical and clerical-administrative tasks associated with the organisation of meetings between those producers, particularly in Zurich (Switzerland), such as the reservation of rooms and the reimbursement of their representatives' travel costs. However, certain factual elements relating to the applicant's activities in relation to the cartel are contested between the parties.

3 The Commission had initiated an investigation into the cartel following a meeting on 7 April 2000 with AKZO's representatives, who informed it of an infringement of the Community competition rules in order to gain immunity under the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the Leniency Notice'). Subsequently, Atochem/Atofina and PC/Degussa also decided to cooperate with the Commission and provided it with additional information (recitals 56 to 63 in the preamble to the contested decision).

4 On 3 February 2003 the Commission sent a request for information to the applicant. In that request, the Commission essentially stated that it was in the process of investigating a putative infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area (EEA) by the European organic peroxide producers. It also requested the applicant to provide an organigram of its undertaking, to describe its activity and its development, including its takeover of the activity of Fides, its activity as the 'secretariat' for the organic peroxide producers and its turnover for 1991 to 2001. The applicant responded to that request for information by letter of 5 March 2003 (recital 73 of the contested decision).

5 On 20 March 2003 a meeting was held between the representatives of the applicant and the Commission's staff in charge of the case-file, at the end of which the latter stated that the applicant was also concerned by the proceedings initiated by the Commission, without however specifying the offences alleged against it.

6 On 27 March 2003 the Commission initiated the formal examination procedure and adopted a statement of objections which was subsequently served on the applicant, among others. The applicant submitted its observations on the objections on 16 June 2003 and attended the hearing on 26 June 2003. The Commission finally adopted the contested decision on 10 December 2003, which it served on the applicant on 9 January 2004, and by which it imposed a fine on it of EUR 1 000 (recital 454 and Article 2(e) of the contested decision).

7 The adoption and the notification of the contested decision were accompanied by a press release in which the Commission stated, inter alia, that, as a consultancy firm, the applicant had played, from the end of 1993, an essential role in the cartel by organising meetings and covering up evidence of the infringement. Therefore, the Commission concluded that the applicant had also infringed the competition rules and stated:

'The sanction taken [against the applicant] is of a limited amount due to the novelty of the policy followed in that area. The message is clear however: those who organise or facilitate cartels, thus not only their members, must henceforth fear being caught and having very heavy sanctions imposed on them'.

Procedure and forms of order sought by the parties

8 By application lodged at the Registry at the Court of First Instance on 16 March 2004, the applicant brought the present action.

9 By letter lodged at the Court Registry on 30 November 2005, the applicant requested, as regards the publication of the judgment of the Court of First Instance bringing the proceedings to an end, confidential treatment of the entire agreement which it had concluded with Fides, which forms part of the annex to the application, and of the name of Fides and of the applicant's former employee, Mr S.

10 By letter lodged at the Court Registry on 1 February 2006, the applicant stated that it wished to maintain its request for confidentiality and, in the alternative, requested that confidential treatment be granted to certain passages, rendered unreadable, of the text of the agreement cited in paragraph 9 above, of which it produced a non-confidential version at the Court's request.

11 Pursuant to Article 14 of the Rules of Procedure of the Court of First Instance and on the proposal of the Third Chamber, the Court decided, after hearing the parties in accordance with Article 51 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

12 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure.

13 At the hearing, which took place on 12 September 2007, the parties presented oral argument and answered the oral questions put by the Court.

14 The oral procedure was closed at the end of the hearing on 12 September 2007. Pursuant to Article 32 of the Rules of Procedure, since a member of the Chamber was prevented from taking part in the judicial deliberations, the most junior judge within the meaning of Article 6 of the Rules of Procedure accordingly abstained from taking part in the deliberations and the Court's deliberations were conducted by the three judges whose signatures the present judgment bears.

15 At the hearing, the applicant withdrew its request for confidential treatment in so far as it concerned mention of the name of Fides; formal note of this was taken in the minutes of the hearing.

16 The applicant claims that the Court should:

– annul the contested decision in so far as it concerns the applicant;

– order the Commission to pay the costs.

17 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

A – *Preliminary observations*

18 The Court of First Instance considers it necessary to address, first, the applicant's request for confidential treatment since it did not withdraw that request at the hearing (see paragraphs 9, 10 and 15 above).

19 As regards the name of the applicant's former employee, the Court took account of that request in accordance with its practice regarding publication in relation to the identity of natural persons in other cases (see, to that effect, Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraphs 31 and 33). However, the Court considers that the existence as such of the agreement between Fides and the applicant has, in any event, lost its potentially confidential character in the light of the identification of that agreement in the extract from the – publicly accessible – companies register of the canton of Zurich regarding the applicant's establishment, as produced in the annex to the application and in recitals 20 and 91 of the version of the contested decision published provisionally on the internet site of the Directorate-General for Competition of the Commission (see, to that effect, the order of the President of the Third Chamber, Extended Composition, of the Court of First Instance in Case T-289/03 *BUPA and Others* v *Commission* [2005] ECR II-741, paragraphs 34 and 35), no objection to that publication having been made by the applicant in accordance with the procedure laid down in Article 9 of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21).

20 Consequently, the request for confidential treatment must be rejected in so far as it concerns the existence of the agreement between Fides and the applicant.

– The concept of perpetrator for the purposes of Article 81 EC – now 101TFEU

85 The applicant states that the principle *nulla poena sine lege certa*, laid down in Article 7(1) of the ECHR (see paragraph 80 above), requires that a restrictive approach be adopted to the concept of perpetrator of an infringement for the purposes of Article 81(1) EC (see also, *X*, cited in paragraph 84 above, paragraph 25, and Case C-195/99 P *Krupp Hoesch* v *Commission* [2003] ECR I-10937, paragraph 86). That principle seeks to ensure that the penalty incurred for the infringement of a legal provision, such as the penalty provided for in Article 15(2) of Regulation No 17, is foreseeable for the person to whom that provision applies and that the decision-making power of the competent authority is delimited in such a way as to rule out the possibility of 'surprise' decisions. The Court of Justice has held that a penalty provided for under Community law, even where it is not a criminal penalty, cannot be imposed unless it rests on a clear and unambiguous legal basis (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11, and Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15).

86 Moreover, according to the applicant, the greater the adverse effects for the individual, the more precise the terms in which the act of Community law must be framed. The Court has ruled to that effect in stating that the requirement of legal clarity is imperative in a sector in which any uncertainty may well lead to the application of particularly serious penalties (Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, paragraph 46). In view of the particularly heavy fines which may be imposed under Article 15(2) of Regulation No 17, which is confirmed by the Commission's recent practice, the principle that penalties must have a proper legal basis justifies the application of a restrictive approach to the concept of perpetrator in the context of Article 81(1) EC. By the same token, the broad interpretation of Article 81(1) EC adopted by the Commission goes well beyond the mere gradual clarification, by means of judicial interpretation, of the rules governing criminal liability, since it is incompatible both with the generally recognised definition of the notion of 'agreement' and with the fundamental idea of autonomy which underlies the provisions in the field of competition.

87 The applicant submits that, in the present case, it was not the perpetrator of an infringement since it was neither a party to the cartel nor an association of undertakings. In reality, it merely colluded with AKZO, Atochem/Atofina and PC/Degussa, and such conduct does not constitute an infringement for the purposes of Article 81(1) EC. In the light of the national legislation referred to in paragraph 81 above, the distinction between the perpetrators of an infringement and the participants must be drawn on the basis of objective criteria. In order to be subject to punishment as the perpetrator of an infringement under Article 81(1) EC, it is necessary to belong to the categories of persons referred to in Article 81(1) EC and to commit the act referred to therein. By contrast, a person who, without satisfying the conditions relating to the constitution of an infringement for the purposes of Article 81(1) EC, knowingly facilitates, by either helping or assisting, the preparation or the commission of the infringement is merely complicit in the infringement and not subject to punishment.

88 The infringements specified in Articles 81 EC and 82 EC fall within a category known as 'special' offences since those articles restrict the circle of undertakings capable of being perpetrators of such infringements to those which satisfy specific requirements, namely, in the case of Article 81 EC, the undertakings which are contracting parties to the agreement restricting competition. That follows from the formulation 'agreements between undertakings' used in Article 81(1) EC and is confirmed by the case-law (*Krupp Hoesch* v *Commission*, cited

in paragraph 85 above, paragraph 86). Accordingly, only undertakings which are contracting parties to the agreement restricting competition are liable to a fine under Article 15(2) of Regulation No 17.

89 The applicant claims that the wording and purpose of Article 81(1) EC, which seeks to safeguard competition, make the status of perpetrator dependent on the question whether the undertaking in question is a competitor, hence exposed to competition and required to adopt certain competitive conduct. That provision applies only to undertakings which are subject to that specific obligation related to the objective of free competition. An agreement restricting competition can be concluded only between undertakings which have the status, on the market concerned, of competitors, or sources of supply or demand.

90 Consequently, an undertaking may be classed as the perpetrator of an infringement only where the agreement restricting competition comes into being in the context of its own sector of activity. The restriction of the circle of perpetrators of the infringement is also clear from the case-law relating to the requirement of 'autonomy' which underlies the Treaty competition rules, according to which each economic operator must determine autonomously the policy which it intends to follow on the common market. That requirement of autonomy thus strictly precludes any direct or indirect contact between operators, the purpose 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 which they contemplate adopting on the market (*Suiker Unie and Others* v *Commission*, cited in paragraph 24 above, paragraph 174, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 160).

– The applicant's complicit and non-punishable status

91 The applicant maintains that it was not a party to the agreement restricting competition entered into by the organic peroxide producers and that, in consequence, it did not infringe the requirement of autonomy which underlies competition law. It neither contacted its own competitors nor influenced or sought to influence their conduct on the market. Given that its economic activity is unrelated to the organic peroxide market, which was the subject of the infringement, the applicant does not satisfy the conditions laid down in Article 81(1) EC relating to the constitution of the infringement and cannot be considered to be a perpetrator of the infringement. Similarly, the Commission's submission that the 1971 agreement, together with the agency agreements between the applicant, on the one hand, and AKZO, Atochem/Atofina and PC/Degussa, on the other, form an alleged 'general and single agreement' implying the applicant's participation, is erroneous. The preamble to the 1971 agreement refers exclusively to the organic peroxide producers as the parties to that agreement (recital 80 of the contested decision).

92 As it is, the applicant has never been a party to that agreement (recital 339 of the contested decision), which formed the framework for the activities of the cartel between 1971 and 1999 (recitals 89, 90 and 316 of the contested decision); nor was it ever likely to become one since its economic activity is unrelated to the market concerned. However, by classing the applicant's participation in relation to certain aspects of the cartel as an infringement of Article 81(1) EC, the Commission fails to have regard to the wording of that provision. In addition, even supposing that the applicant had actually carried out the role which the Commission wrongly attributes to it (recital 334 of the contested decision), that role, in the absence of direct

participation in the agreement which was restrictive of competition on the market concerned, is not capable of infringing Article 81(1) EC but is one of non-punishable complicity.

– The Commission's former and contrasting decision-making practice

93 In addition, the applicant submits that the Commission's approach in the contested decision is at odds with its former decision-making practice, as followed since 1983, in accordance with which consultancy firms, which are not present on the market concerned by the infringement, are not considered to be parties to the agreement restricting competition or, consequently, as perpetrators of an infringement under Article 81(1) EC. The opposite approach, which was defended by the Commission in Decision 80/1334/EEC of 17 December 1980 relating to a proceeding under Article [81 EC] (IV/29.869 – Italian cast glass) (OJ 1980 L 383, p. 19; 'the Italian cast glass decision'), fails to have regard to the principle of *nullum crimen, nulla poena sine lege*, since the consultancy firm concerned was not a party to the agreement restricting competition, but merely complicit in that agreement. For that reason, the Commission was right to abandon that approach implicitly as of 1983. In Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article [81 EC] (IV/30.064 – Cast iron and steel rolls) (OJ 1983 L 317, p. 1; 'the cast iron and steel rolls decision'), the Commission classed only the undertakings which were present on the market concerned by the infringement and which were parties to the agreement restricting competition as perpetrators of an infringement for the purposes of Article 81(1) EC, and not the consultancy firm entrusted with managing, inter alia, the system for the exchange of information between the members of the cartel (recitals 10 et seq.). That approach was also followed by the Commission in Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81 EC] (IV/31.149 – Polypropylene) (OJ 1986 L 230, p. 1; 'the polypropylene decision'), (see recital 66); Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article [81 EC] (IV/31.866, LdPE) (OJ 1989 L 74, p. 21; 'the LdPE decision') (see recitals 11 and 19); and Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article [81 EC] (IV/C/33.833 – Cartonboard) (OJ 1994 L 243, p. 1; 'the cartonboard decision') (see recitals 2, 27 et seq., 33, 37, 61 et seq., 134 and 162).

94 The Commission cannot claim that the applicant played a more important role, in the present case, than the consultancy firms in the decisions cited above. On the contrary, unlike the consultancy firms involved in the cases which gave rise to the cast iron and steel rolls decision and the cartonboard decision, the applicant almost never attended the meetings with an anti-competitive purpose (see paragraph 72 et seq. above). In addition, the other facts complained of in respect of the applicant lack relevance and have nothing to do with the cartel. Thus, the market information system based on official statistics did not infringe Article 81(1) EC (Case C-179/99 P *Eurofer* v *Commission* [2003] ECR I-10725, paragraph 44, and Case T-136/94 *Eurofer* v *Commission* [1999] ECR II-263, publication by extracts, paragraph 186) since it did not involve the transfer between competitors of information covered by business secrets. In the light of the Commission's settled decision-making practice, that applies a fortiori where a consultancy firm merely uses the sales figures sent to it without itself participating in the exchange as such of sensitive information (recital 12 to Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article [81 EC] (IV/31.865 – PVC) (OJ 1994 L 239, p. 14); recital 11 to the LdPE decision; and recital 66 to the polypropylene decision). Finally, the auditing by independent expert accountants of the sales figures sent by the cartel members is not restrictive of competition for the purposes of Article 81(1) EC. Accordingly, the applicant's 'secretarial' activities, referred to above, which are related to the cartel, amount merely to acts of complicity.

– The absence of any control over the cartel on the part of the applicant and of a causal link between the applicant's activity and the restriction of competition

95 The applicant states that it had no control over the infringement. The decisions relating to the implementation, the management and the orientation of the cartel were taken exclusively by the three organic peroxide producers. Consequently, there is no causal link between the applicant's activity and the restriction of competition on the organic peroxide market. As an agent under the Swiss law of obligations, subject to the instructions of those producers and to an obligation of confidentiality, the applicant was merely a tool of the cartel members. However, even that is not sufficient reason for the applicant to be regarded as a co-perpetrator of the infringement on the same level as the organic peroxide producers. The applicant's lack of control over the infringement is also evident from the fact that it did not participate in the collusive activity proper, namely the exchange of information between the producers by fax, by mobile telephone and at meetings of the working group at which the applicant was not present (see paragraph 72 et seq. above).

96 In addition, the applicant claims that, contrary to the finding in recital 345 of the contested decision, as regards the services which it provided in the context of the cartel, such as the reimbursement of travel expenses, it could have been replaced at any moment by either the organic peroxide producers themselves or by another consultancy firm, without the functioning of the cartel being disrupted as it would have been if one of the producers had withdrawn.

97 In the light of all the foregoing, the applicant maintains that its relationship with the three organic peroxide producers involved in the cartel should be classed as one of non-punishable complicity. In that regard, it is irrelevant that the applicant had some knowledge of the cartel, since that knowledge is not sufficient to justify the conclusion that the applicant itself committed an infringement (Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 39, and the Opinion of Advocate General Mischo in that case, ECR I-9928, paragraph 80).

– The erroneous classification of the applicant as an 'association of undertakings'

98 Finally, the applicant disputes its classification as an 'association of undertakings' in Article 1 and recitals 347, 373 and 464 of the contested decision. By adopting a broad interpretation of that concept, the Commission infringed the prohibition against reasoning by analogy which is a corollary of the principle of *nullum crimen, nulla poena sine lege* laid down in Article 7(1) of the ECHR (see paragraph 83 above) and which also applies in the penalty-based administrative procedure laid down in Regulation No 17. A consultancy firm such as the applicant is not generally regarded as constituting an 'association of undertakings', that is to say, an organisational structure made up of member undertakings. Since it is not made up of member undertakings, the applicant is an independent undertaking controlled exclusively by natural persons as shareholders. Similarly, it is not linked to its clients by a structural link but by agency agreements which are purely contractual in nature.

99 The Commission's approach also runs counter to the meaning and purpose of the concept of 'association of undertakings'. The purpose of that concept is not to make it possible to penalise persons who are complicit in the conduct of cartel members, but merely to prevent undertakings from being able to circumvent the rules on competition simply by virtue of the form they adopt in order to coordinate their conduct on the market; and, consequently, to

encompass also institutionalised forms of cooperation through a collective structure or a common body (Opinion of Advocate General Léger in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 62). By contrast, in the present case, the organic peroxide producers did not act through a collective structure or a common body, but coordinated their conduct directly by fax, by telephone and through the meetings of the working group. In that regard, the applicant merely provided administrative or logistical assistance, which does not mean that it represents the 'collective structure' or the 'common body' of those producers.

100 The applicant concludes from this that, having played a role of non-punishable complicity in relation to AKZO, Atochem/Atofina and PC/Degussa, it is not guilty of infringing Article 81(1) EC and that the fact that the Commission imputed to it such an infringement is contrary to the principle of *nullum crimen, nulla poena sine lege*.

b) Arguments of the Commission

The factual context of the contested decision

101 As regards the relevant facts, the Commission essentially submits that the applicant does not question the fact that it stored in its safe, inter alia, copies of the 1971 and 1975 agreements belonging to Atochem/Atofina and PC/Degussa. In addition, the Commission disputes the fact that the applicant classed the official market information system as a separate issue and maintains that that system must be placed back in the context of the cartel. The collecting, preparing and monitoring of figures, and the establishing of statistics, in the framework of that system, in full knowledge of the reasons why and of the anticompetitive aims, constituted – together with the attending of meetings, the proposing of quotas and the calculating of the deviations from the agreed quotas – a *condicio sine qua non* for the functioning of the cartel.

102 In addition, it is not disputed that the applicant attended five meetings in Zurich between 1994 and 1998, of which four were 'summit' meetings, as well as the meeting with the AKZO representatives in Amersfoort. The applicant also admitted to having reserved meeting rooms for three 'unofficial' meetings in Zurich between 1997 and 1998. In the light of those facts, which are not disputed, the applicant cannot minimise its participation by using words such as 'rarely' or 'almost never'. The applicant also does not dispute that it calculated the deviations from the agreed quotas until at least 1995 or 1996. It also acted as a clearing house in order to ensure that the anticompetitive meetings were not traceable from the accounts of the participating undertakings. Thus, the applicant itself ensured, when making reimbursements, that no mention was made thereof in the internal payment orders filled in and signed by Mr S. Finally, the Commission disputes the applicant's argument that the contested decision is based on statements made by AKZO to which no credibility should be attributed. In that regard, the Commission points out that the various statements regarding the relevant facts, even those whose credibility is necessarily tenuous, may be regarded as mutually supportive (*Mannesmannröhren-Werke* v *Commission*, cited in paragraph 77 above, paragraph 86).

Infringement of the principle of *nullum crimen, nulla poena sine lege*

103 The Commission denies that the contested decision infringes the principle of *nullum crimen, nulla poena sine lege*. It rejects the applicant's premisses that, under Community competition law, following the example of the criminal laws of a number of Member States, a formal distinction must be made between perpetration, on the one hand, and instigation or complicity, on the other. Neither the relevant primary nor secondary legislation makes such a

distinction. In addition, as confirmed by Article 15(4) of Regulation No 17, the administrative procedure laid down in that regulation is not of a criminal-law nature (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235). Furthermore, it is not necessary to make such a formal distinction in Community competition law since, in determining the amount of the fine, account may be taken of the existence of different forms of participation and of the gravity of the contribution to the infringement (Opinion of Advocate General Stix-Hackl in *Krupp Hoesch* v *Commission*, cited in paragraph 85 above, ECR I-10941, footnote 15).

104 In the absence of a rule distinguishing the perpetrator from the participant, any person satisfying the conditions relating to the constitution of the infringement specified in Article 81(1) EC may be fined under Article 15(2) of Regulation No 17. The Commission adds that the imperative requirement, resulting from the principle of legal certainty, that Community legal acts be clear and that their application be sufficiently predictable for the persons concerned does not mean that it is never necessary to interpret those acts. The Eur. Court H. R. also recognises the need to strike a balance between, on the one hand, the obligation to be precise and the prohibition under Article 7(1) of the ECHR against reasoning by analogy in criminal law matters and, on the other, interpretation by the courts which is intended, in particular, to clarify the rules on criminal liability gradually, from one case to another (Eur. Court H. R., *S.W.* v *United Kingdom*, judgment of 22 November 1995, Series A no 335-B, § 36). Consequently, any person who satisfies the conditions laid down in Article 81(1) EC is a perpetrator of an infringement.

105 The Commission objects to the applicant's claim that it was not a party to the cartel and could not be one. The 1971 agreement, concluded between the organic peroxide producers, and the agency agreements, concluded between the applicant and those producers, should be regarded as essential elements of one and the same cartel. Given that the agency agreements served for the implementation of the 1971 agreement, they should be assessed together with that agreement as complementary and accessory agreements (recitals 339 and 340 of the contested decision; see also the Italian cast glass decision).

106 In that regard, it is not necessary, in the light of the wording of Article 81(1) EC, for the applicant, in its capacity as a consultancy firm, to be active on the market at issue as a competitor or on the side of supply or demand. Nor is it a requirement that the commercial autonomy of the undertakings concerned, and the competition between them, be restricted: rather, any restriction of competition within the common market is sufficient. That is consistent with the objective of Article 81 EC which, in accordance with Article 3(1)(g) EC, forms part of a system ensuring that competition in the internal market is not distorted (see also recital 9 to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1)).

107 Article 81(1) EC is applicable not only to 'horizontal' agreements but also to 'vertical' agreements restrictive of competition, concluded between undertakings situated at different stages of the distribution chain (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299), or concluded between undertakings active on different markets. In that regard, the notion of agreement seeks merely to enable a distinction to be made between coordination which is prohibited, and parallel conduct which is permitted (see, also, Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 89). Moreover, an infringement under Article 81(1) EC is in the nature of an *abstraktes Gefährdungsdelikt* (an offence consisting in the creation of a state of affairs which is dangerous, where no specific danger need be statutorily defined) since that provision also concerns the

restriction of competition, that is to say, the cartel poses a danger for competition, generally speaking and quite apart from the individual case.

108 Next, the Commission refers to case-law to the effect that, where an undertaking merely attends meetings with an anticompetitive purpose and tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, it thereby engages in a passive form of participation in the infringement which is capable of rendering that undertaking liable in the context of a single agreement (*Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraphs 83 and 84; Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 232; Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 98; and Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraphs 85 and 86). That is a fortiori the case where an undertaking actively participates in a cartel, whether or not that undertaking is active on the market at issue.

109 In the present case, the applicant's role in the cartel was not one of passive complicity: it participated actively in that cartel as an organiser and by fostering its proper implementation (recital 343 of the contested decision). Through its activities, the applicant was of considerable assistance in keeping the cartel alive and in concealing its existence; thus it contributed considerably to the serious and long-term restriction of competition on the organic peroxide market. According to the Commission, those are both necessary and sufficient elements on which to base the applicant's liability under Article 81(1) EC. In that regard, it is irrelevant whether or not a participant in an infringement derives a profit from it (*Krupp Hoesch* v *Commissio*n, cited in paragraph 85 above), since Article 81(1) EC is not based on the criterion of enrichment but on that of jeopardising competition.

110 In any event, the applicant directly benefited from the success of the cartel (recital 342 of the contested decision). According to the Commission, another factor which is not decisive is whether or not a participant is in a position to exert a direct influence on the prices and quantities which indicate the parameters of competition (see, by analogy, *Brugg Rohrsysteme* v *Commission*, cited in paragraph 23 above, paragraph 61). Otherwise, the useful effect of the prohibition laid down in Article 81(1) EC would be frustrated, as it would be possible to circumvent that prohibition by engaging 'specialists in the provision of collusive services', who could be entrusted with organising the cartel, keeping it alive and concealing its existence.

111 The Commission therefore contends that the present plea should be rejected.

2. *Findings of the Court*

a) Preliminary observations

112 It should be pointed out, first, that the applicant does not dispute as such the amount of the fine imposed on it in the contested decision. By the present plea, the applicant essentially submits that, by holding it liable for an infringement of Article 81(1) EC and by imposing a fine on it, the Commission oversteps the limits of the decision-making power conferred on it under Article 15(2) of Regulation No 17 and infringes the principle of *nullum crimen, nulla poena sine lege* for the purposes of Article 7(1) of the ECHR. In that regard, according to the applicant, the Commission should have taken account of the fact that the applicant merely played a role of non-punishable complicity in the cartel, and cannot therefore be classed as an

undertaking or association of undertakings which is the 'perpetrator' of an infringement, as referred to in Article 81(1) EC.

113 Next, it should be pointed out that the procedure before the Commission under Regulation 17 is merely administrative in nature (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 200; Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 717 and 718) and that, consequently, the general principles of Community law and, in particular, the principle of *nullum crimen, nulla poena sine lege*, as applicable to Community competition law (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 215 to 223) need not necessarily have the same scope as when they apply to a situation covered by criminal law in the strict sense.

114 In order to determine whether it is necessary to draw a distinction, in the light of the prohibition laid down in Article 81(1) EC and the principle of *nullum crimen, nulla poena sine lege*, between an undertaking which is a 'perpetrator' of an infringement and an undertaking whose role is one of non-punishable 'complicity', it is necessary to make a literal, contextual and teleological interpretation of Article 81(1) EC (see, as regards the methodology, Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraphs 72 et seq., and Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II-4065, paragraphs 41 et seq.).

b) The literal interpretation of Article 81(1) EC

115 Article 81(1) EC states that '[t]he following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and 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'.

116 It is appropriate to consider the full implications of the term 'agreements between undertakings'.

117 In that regard, it should be noted, first, that the Community judicature has yet to give an explicit ruling on the question whether the notions of agreement and undertaking as used in Article 81(1) EC are conceived in accordance with a 'unitary' perspective, so as to cover any undertaking which has contributed to the committing of an infringement, irrespective of the economic sector in which that undertaking is normally active or – as the applicant submits – in accordance with a 'bipolar' perspective, so that a distinction is drawn between undertakings which 'perpetrate' an infringement and those whose role is one of 'complicity' in the infringement. It should also be noted that, according to the applicant, there is a lacuna in the wording of Article 81(1) EC, in that, in referring to the 'undertaking' which is the perpetrator of the infringement and to its participation in the 'agreement', that provision covers only certain undertakings with particular characteristics and refers only to certain forms of participation. Consequently, it is only on the assumption that the notions of undertaking and agreement fall

to be so narrowly construed, and that the scope of Article 81(1) EC is accordingly so limited, that the principle of *nullum crimen, nulla poena sine lege* could be applied in such a way as to preclude a broad interpretation of the wording of that provision.

118 As regards the term 'agreement', it should be noted, first of all, that that term is merely another way of indicating coordinated/collusive conduct which is restrictive of competition, or a cartel in the wider sense, in which at least two distinct undertakings participate after expressing their joint intention of conducting themselves on the market in a specific way (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 79 and 112; Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraphs 67 and 173; and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* [2006] ECR II-3567, paragraphs 53 to 55). Furthermore, in order to constitute an agreement within the meaning of Article 81(1) EC, it is sufficient that an act or conduct, albeit apparently unilateral, be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive (Case C-74/04 P *Commission* v *Volkswagen* [2006] ECR I-6585, paragraph 37). That broad notion of agreement is confirmed by the fact that the prohibition laid down in Article 81(1) EC also covers concerted practice whereby there is a form of coordination between undertakings which does not lead to the conclusion of an agreement as such (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraph 115 and the case-law cited therein).

119 In the present case, the question arises whether, as claimed by the applicant, the cartel must concern a specific sector of activity, or even the same market for goods or services, so that only undertakings which are active in such a sector or market as competitors, or on the side of supply or demand, are capable of coordinating their conduct as undertakings which are the (co-)perpetrators of an infringement.

120 In that regard, it should be noted that Article 81(1) EC applies not only to 'horizontal' agreements between undertakings exercising a commercial activity on the same market for the relevant goods and services, but also to 'vertical' agreements which entail the coordination of conduct between undertakings active at different stages of the production and/or distribution chain, and, consequently, operating on markets for different goods or services (see, in that regard, *Cour Consten and Grundig* v *Commission*, cited in paragraph 107 above, pp. 339 and 340; Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23; Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173; *Commission* v *Volkswagen*, cited in paragraph 118 above; order of the Court of Justice in Case C-552/03 P *Unilever Bestfoods* v *Commission* [2006] ECR I-9091; Case T-112/99 *M6 and Others* v *Commission* [2001] ECR II-2459, paragraph 72 et seq.; see, also, Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) [EC] to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21) and Commission notice (2000/C 291/01) – Guidelines on Vertical Restraints (OJ 2000 C 291, p. 1)).

121 Similarly, it is apparent from the case-law that, to fall within the ambit of the prohibition laid down in Article 81(1) EC it is sufficient that the agreement at issue restricts competition on the neighbouring and/or emerging markets on which at least one of the participating undertakings is not (yet) present (see, to that effect, Case T-328/03 *O2 (Germany)* v *Commission* [2006] ECR II-1231, paragraphs 65 et seq.; see also, as regards the application of Article 82 EC, Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951).

122 In that regard, the formulations used in the case-law – the 'joint intention of conducting themselves on the market in a specific way' (*Bayer* v *Commission*, cited in paragraph 118 above, paragraph 67) or 'expression of the joint intention of the parties to the agreement with regard to their conduct in the common market' (*ACF Chemiefarma* v *Commission*, cited in paragraph 23 above, paragraph 112) – stress the element of 'joint intention' and do not require the relevant market on which the undertaking which is the 'perpetrator' of the restriction of competition is active to be exactly the same as the one on which that restriction is deemed to materialise. It follows that any restriction of competition within the common market may be classed as an 'agreement between undertakings' within the meaning of Article 81(1) EC. That conclusion is confirmed by the criterion of the existence of an agreement whose object is to restrict competition within the common market. That criterion implies that an undertaking may infringe the prohibition laid down in Article 81(1) EC where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market within the common market, and that does not mean that the undertaking has to be active on that relevant market itself.

123 It is clear from the foregoing that a literal interpretation of the term 'agreements between undertakings' does not require a restrictive interpretation of the notion of perpetrator of the infringement as argued by the applicant.

c) The contextual and teleological interpretation of Article 81(1) EC

The requirement of restricted commercial autonomy

124 In support of its plea, the applicant also claims that the notion of perpetrator of the infringement necessarily implies that the latter restricts its own commercial autonomy vis-à-vis its competitors and thus contradicts the requirement of autonomy which underlies Article 81(1) EC, according to which each economic operator must determine autonomously the policy which it intends to follow on the common market.

125 As pointed out by the applicant by reference to the relevant case-law, the requirement of autonomy was developed, inter alia, in the context of the case-law on the distinction between prohibited concerted practices and parallel conduct which is permitted between competitors (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 115 to 117 and the case-law cited therein, and *Adriatica di Navigazione* v *Commission*, cited in paragraph 107 above, paragraph 89). In addition, it is apparent from the distinction made by the case-law between the existence of an agreement restricting competition for the purposes of Article 81(1) EC, on the one hand, and the presence of a simple unilateral measure adopted by an undertaking seeking to impose a certain form of conduct on other undertakings, on the other, that the restriction of competition must result from the manifestation, sufficiently established, of a concurrence of wills between the undertakings involved as regards the implementation of a particular line of conduct (see, to that effect, *BAI and Commission* v *Bayer*, cited in paragraph 120 above, paragraphs 96 to 102 and 141, and *Commission* v *Volkswagen*, cited in paragraph 118 above, paragraph 37). It follows that, contrary to the applicant's submissions, the requirement of autonomy is not directly linked to the question – which is not relevant in the present case (see paragraphs 120 to 123 above) – whether or not the undertakings restricting their commercial freedom are active in the same sector of activity or on the same relevant market, but rather to the notions of 'concerted practice' and 'agreement', since those notions require proof of a sufficiently clear and precise manifestation of a concurrence of wills between the undertakings involved.

126 Furthermore, the applicant overestimates the importance of the criterion of restriction of commercial freedom in the context of assessing whether there is a restriction of competition for the purposes of Article 81(1) EC. As is apparent from settled case-law, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the ambit of the prohibition laid down in Article 81(1) EC. For the purposes of applying that provision to a particular case, account must first be taken of the overall context in which that agreement or that decision was arrived at or produces its effects and, more specifically, of its objectives (*Wouters and Others*, cited in paragraph 99 above, paragraph 97, and Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991, paragraph 42). In that regard, the Court has made it clear that it was not necessary to hold, wholly abstractly and without drawing any distinctions, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 81(1) EC but that, in assessing the applicability of Article 81(1) to an agreement, account must be taken of the actual conditions in which it functioned, in particular the economic and legal context in which the undertakings operated, the products or services covered by the agreement and the actual structure and operating conditions of the market concerned (see *M6 and Others* v *Commission*, cited in paragraph 120 above, paragraph 76 and the case-law cited therein).

127 As regards that contextual notion of restriction of competition, it is not therefore to be ruled out that an undertaking may participate in the implementation of such a restriction even if it does not restrict its own freedom of action on the market on which it is primarily active. Any other interpretation might restrict the scope of the prohibition laid down in Article 81(1) EC to an extent incompatible with its useful effect and its main objective, as read in the light of Article 3(1)(g) EC, which is to ensure that competition in the internal market is not distorted, since proceedings against an undertaking for actively contributing to a restriction of competition could be blocked simply on the ground that that contribution does not come from an economic activity forming part of the relevant market on which that restriction materialises or on which it is intended to materialise. It should be pointed out that, as submitted by the Commission, it is only by making all 'undertakings' within the meaning of Article 81(1) EC subject to liability that that useful effect can be fully guaranteed, since that makes it possible to penalise and to prevent the creation of new forms of collusion with the assistance of undertakings which are not active on the markets concerned by the restriction of competition, with the aim of circumventing the prohibition laid down in Article 81(1) EC.

128 The Court concludes from this that a reading of the term 'agreements between undertakings' in the light of the objectives pursued by Article 81(1) EC and by Article 3(1)(g) EC tends to confirm that the notions of a cartel and of an undertaking which is the perpetrator of an infringement are conceptually independent of any distinction based on the sector or the market on which the undertakings concerned are active.

The conditions in which the participation of an undertaking in a cartel constitutes an infringement of Article 81(1) EC

129 Next, it is necessary to note the case-law concerning the conditions which the participation of an undertaking in a cartel must satisfy for it to be possible to hold that undertaking liable as a co-perpetrator of the infringement.

130 In that regard, it is sufficient for the Commission to show that the undertaking concerned attended meetings at which anticompetitive agreements were concluded, without manifesting

its opposition to such meetings, to prove to the requisite legal standard that that undertaking participated in the cartel. In order to establish that an undertaking participated in a single agreement, made up of a series of unlawful acts over time, the Commission must prove that that undertaking intended, through its own conduct, to contribute to the common objectives pursued by the participants as a whole and that it was aware of the substantive conduct planned or implemented by other undertakings in pursuance of those objectives, or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk. In that regard, where an undertaking tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, the effect of its behaviour is to encourage the continuation of the infringement and to compromise its discovery. It thereby engages in a passive form of participation in the infringement which is therefore capable of rendering that undertaking liable in the context of a single agreement (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 83 and 87; *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraphs 81 to 84; and *Dansk Rørindustri and Others* v *Commission*, cited in point 113 above, paragraphs 142 and 143; see also *Tréfileurope* v *Commission*, cited in paragraph 108 above, paragraph 85 and the case-law cited therein). It is also apparent from the case-law that those principles apply *mutatis mutandis* in respect of meetings which are attended not only by competing producers, but also by their clients (see, to that effect, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraphs 62 to 66).

131 In addition, as regards the determination of the individual liability of an undertaking whose participation in the cartel is not as extensive or intense as that of the other undertakings, it is apparent from the case-law that, although the agreements and concerted practices referred to in Article 81(1) EC necessarily result from collaboration by several undertakings, all of whom are co-perpetrators of the infringement but whose participation can take different forms – according to, inter alia, the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged – the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to rule out its liability for the entire infringement, including conduct put into effect by other participating undertakings but sharing the same anti-competitive object or effect (*Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 78 to 80).

132 Accordingly, the fact that an undertaking did not take part in all aspects of an anti-competitive scheme, or that it played only a minor role in the aspects in which it did participate, is not material to the establishment of an infringement on its part. Although the limited importance, as the case may be, of the participation of the undertaking concerned cannot therefore call into question its individual liability for the infringement as a whole, it none the less has an influence on the assessment of the extent of that liability and thus on the severity of the penalty (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraph 90; *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 86; and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 145).

133 It is clear from the above considerations that, as regards the relationship between competitors on the same relevant market and the relationship between such competitors and their clients, the case-law recognises the joint liability of the undertakings which are co-perpetrators of an infringement under Article 81(1) EC and/or which have played an accessory role in such an infringement, in so far as it has been held that the objective condition

for the attribution of various anti-competitive acts constituting the cartel as a whole to the undertaking concerned is satisfied where that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role, for example by tacitly approving the cartel and by failing to report it to the administrative authorities, since the potentially limited importance of that contribution may be taken into consideration for the purposes of determining the level of the fine.

134 In addition, the attribution of the infringement as a whole to the participating undertaking depends on the manifestation of its own intention, which shows that it is in agreement, albeit only tacitly, with the objectives of the cartel. That subjective condition is inherent in the criteria relating to the tacit approval of the cartel and to the undertaking having publicly distanced itself from the content of the cartel (*Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 84; *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 143; and *Tréfileurope* v *Commission*, cited in paragraph 108 above, paragraph 85), in that those criteria imply a presumption that the undertaking concerned continues to endorse the objectives of the cartel and to support its implementation. That condition also constitutes the justification for holding the undertaking concerned to be liable together with the others, since it intended to contribute through its own conduct to the common objectives pursued by the participants as a whole and was aware of the anti-competitive conduct of the other participants, or could reasonably have foreseen that conduct, and was ready to accept the attendant risk (*Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 83 and 87, and *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 83).

135 If the attribution of the infringement as a whole to the undertaking concerned is to be in line with the requirements of the principle of individual liability, the conditions set out in paragraphs 133 and 134 above must be complied with (see, to that effect, *Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraph 84).

136 In the light of the considerations set out in paragraphs 115 to 127 above, the Court considers that those principles apply mutatis mutandis to the participation of an undertaking whose economic activity and professional expertise mean that it cannot but be aware of the anti-competitive nature of the conduct at issue and enable it to make a significant contribution to the committing of the infringement. In those circumstances, the applicant's argument that a consultancy firm cannot be regarded as a co-perpetrator of an infringement – because it does not carry out an economic activity on the relevant market affected by the restriction of competition and because its contribution to the cartel is merely subordinate – cannot be upheld.

The interpretation of Article 81(1) EC in the light of the principle of *nullum crimen, nulla poena sine lege*

137 However, the applicant submits, in essence, that such a 'unitary' conception of the perpetrator of an infringement under Article 81(1) EC is incompatible with the requirements flowing from the principle of *nullum crimen, nulla poena sine lege* under Article 7(1) of the ECHR, as well as with those flowing from the rules common to the legal systems of the Member States, concerning the distinction between perpetration and complicity, which are applicable to both criminal law and competition law.

138 In that regard, the Court notes, first, as was pointed out in paragraph 45 above, that fundamental rights are an integral part of the general principles of law whose observance the

Community judicature ensures by taking account, in particular, of the ECHR as a source of inspiration.

139 Next, the Community judicature has applied the principle of *nullum crimen, nulla poena sine lege* as a general principle of Community law in cases concerning competition law, in the light of the case-law of the Eur. Court H. R. (see *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraphs 215 et seq., and Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraphs 71 et seq. and the case-law cited therein). Generally speaking, that principle requires, inter alia, that any Community legislation, in particular where it imposes or permits the imposition of penalties, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly. By the same token, that principle must be observed in regard both to provisions of a criminal-law nature and to specific administrative instruments imposing or permitting the imposition of administrative penalties (see, to that effect, *Maizena*, cited in paragraph 85 above, paragraphs 14 and 15, and *X*, cited in paragraph 84 above, paragraph 25), such as penalties imposed under Regulation No 17.

140 In addition, it is apparent from the consistent interpretation which the Eur. Court H. R. has given to Article 7(1) of the ECHR that the principle of *nullum crimen, nulla poena sine lege*, which is laid down therein, requires, inter alia, that criminal law not be applied broadly, in particular by analogy, to the detriment of the defendant. It follows that an infringement must be clearly defined by the law, a condition which is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation – what acts or omissions would make him criminally liable. In that regard, the Eur. Court H. R. has stated that the concept of law used in Article 7 of the ECHR is the same as that to be found in other articles thereof and that it encompasses both law deriving from legislation and that deriving from case-law, and implies qualitative conditions, in particular those of accessibility and foreseeability (see Eur. Court H. R. *Kokkinakis* v *Greece*, judgment of 25 May 1993, Series A no. 260-A, § 40, 41 and 52; *S.W.* v *United Kingdom*, cited in paragraph 104 above, § 35; *Cantoni* v *France*, judgment of 15 November 1996, *Reports of Judgments and Decisions*, 1996-V, p. 1627, § 29; *Başkaya and Okçuoğlu* v *Turkey*, judgment of 8 July 1999, *Reports of Judgments and Decisions*, 1999-IV, p. 308, § 36; *Coëme and Others* v *Belgium*, judgment of 22 June 2000, *Reports of Judgments and Decisions*, 2000-VII, p. 1, § 145; *E.K.* v *Turkey*, no. 28496/95, § 51, 7 February 2002; see also *DanskRørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 216).

141 In the light of that case-law, the principle of *nullum crimen, nulla poena sine lege* cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability through interpretation by the courts (*Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 217). According to the case-law of the Eur. Court H. R., however clearly a legal provision is drafted, including a provision of criminal law, there is inevitably a need for interpretation by the courts and it will always be necessary to elucidate points of doubt and to adapt the wording to changing circumstances. Moreover, according to the Eur. Court H. R., it is well established in the legal traditions of the contracting parties to the ECHR that case-law, as a source of law, necessarily contributes to the progressive development of the criminal law (*S.W.* v *United Kingdom*, cited in paragraph 104 above, § 36). In that regard, the Eur. Court H. R. has recognised that even the wording of many statutes is not absolutely precise and that, because of the need to avoid excessive rigidity and to keep pace with changing circumstances, much legislation is inevitably couched in terms which, to a greater or lesser degree, are vague and their interpretation and application depend on practice (*Kokkinakis* v

Greece, cited in paragraph 140 above, § 52, and *E.K.* v *Turkey*, cited in paragraph 140 above, § 52, and *Jungbunzlauer* v *Commission*, cited in paragraph 139 above, paragraph 80). Thus, in addition to the actual wording of the legislation, the Eur. Court H. R. also takes account of the settled and published case-law when deciding whether the concepts used are definite or not (*G.* v *France*, judgment of 27 September 1995, Series A no. 325-B, § 25).

142 Nevertheless, although the principle of *nullum crimen, nulla poena sine lege* in principle enables the rules governing criminal liability to be gradually clarified through interpretation by the courts, it may preclude the retroactive application of a new interpretation of a rule establishing an offence. That is particularly true if the result of that interpretation was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation attributed to the provision in the case-law at the material time. Furthermore, the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it applies, and does not preclude the person concerned from taking appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in the case of persons engaged in a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can thus be expected to take special care in assessing the risks that such an activity entails (*DanskRørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraphs 217 to 219, referring to *Cantoni* v *France*, cited in paragraph 140 above, paragraph 35).

143 It is apparent from the above considerations that the interpretation of the full implications of Article 81(1) EC and, in particular, of the terms ‘agreement’ and ‘undertaking’, according to which any undertaking which has contributed to the implementation of the cartel falls within its scope even if that undertaking is not active on the relevant market affected by the restriction of competition, must have been sufficiently foreseeable, at the time of the perpetration of the alleged misconduct, in the light of the wording of that provision, as interpreted by the case-law.

144 In that regard, it should be pointed out that the terms ‘agreement’ and ‘undertaking’, within the meaning of Article 81(1) EC, constitute legal concepts which have not been delimited, the full implications of which fall ultimately to be determined by the Community judicature, and the application of which by the administration is subject to full judicial review. In those circumstances, the gradual clarification of the notions of ‘agreement’ and ‘undertaking’ by the Community judicature is of decisive importance in assessing whether their application in practice is definite and foreseeable.

145 First, the Court considers that, in the light of the settled case-law referred to in paragraphs 115 to 128 above, the term ‘agreements between undertakings’ in Article 81(1) EC constitutes a sufficiently precise expression of the notions of cartel and perpetrator of the infringement, as described in paragraph 128 above – in that that term covers any undertaking which acts in a collusive manner, irrespective of the sector of activity or of the relevant market on which it is active – to ensure that such an undertaking cannot be unaware, or even fail to recognise, that it is exposing itself to legal action if it adopts such conduct.

146 Second, as has been pointed out in paragraphs 129 to 135 above, settled case-law exists in relation to the shared liability under Article 81(1) EC of undertakings which are co-perpetrators of an infringement and/or which are complicit in the overall infringement, to which the anti-competitive conduct of the other participating undertakings is also attributed. That case-law, which is also based on a ‘unitary’ conception of the notions of cartel and

perpetrator of an infringement, states clearly and precisely the objective and subjective conditions which must be satisfied if it is to be possible to hold an undertaking liable in respect of an infringement committed by a number of co-perpetrators or complicit parties. In that regard, the mere fact that the Court of Justice did not define those principles of accountability until 1999 (*Commission* v *Anic Partecipazioni*, cited in paragraph 65 above, paragraphs 78 et seq.) cannot, in itself, detract from their foreseeability at the time material to the applicant (between 1993 and 1999), since the elements determining individual liability already emerged, with sufficient precision, from the broad conception of cartel and undertaking for the purposes of Article 81(1) EC and the earlier case-law of the Court of First Instance (see *Tréfileurope* v *Commission*, cited in paragraph 108 above, paragraph 85 and the case-law cited therein). Furthermore, the fact that the Community judicature has not given a ruling on the specific question whether a consultancy firm which is not active on the same market as the main participants in the cartel can be attributed a share of the liability for an infringement is not sufficient to support the conclusion that an administrative and jurisprudential practice establishing that such an undertaking shares liability – or, at the very least, that such shared liability is possible – is not reasonably foreseeable by professionals in the light of both the wording of Article 81(1) EC and the case-law cited above.

147 On the contrary, as regards the penalty-based administrative practice in that connection, it should be pointed out that, as the applicant itself admits, the Commission had already decided in 1980 to attribute an infringement of Article 81(1) EC to a consultancy firm which had actively participated, in a manner comparable to the way in which the applicant participated in the present case, in the implementation of the cartel in question (the Italian cast glass decision; see, in particular, point II. A. 4. at the end of the recitals). In that regard, the fact that the Commission no longer adopted that approach in a number of subsequent decisions does not justify the conclusion that such an interpretation of the full implications of Article 81(1) EC is not reasonably foreseeable. That is especially true in the case of a consultancy firm, which must be presumed, given the Commission's decision-making practice since 1980, to manage its economic activities with a very high degree of caution and to seek informed advice, in particular from legal experts, in order to assess the risks associated with its conduct (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 113 above, paragraph 219).

148 In that context, the applicant cannot legitimately claim that such an interpretation is contrary to the rules common to the Member States on the subject of individual liability, which draw a distinction between the perpetrators of an infringement and those whose role is one of complicity. The rules cited by the applicant (see paragraph 81 above) concern only national criminal law, and the applicant does not explain whether – and, if so, to what extent – those rules also apply, in the respective national legal systems, in the context of penalty-based administrative procedures and, in particular, to procedures designed to punish anti-competitive practices.

149 Moreover, it is not apparent from either the case-law of the Eur. Court H. R. or the decision-making practice of the former European Human Rights Commission that the principle of *nullum crimen, nulla poena sine lege* requires a distinction to be drawn, both in criminal proceedings and in the context of penalty-based administrative procedures, between the perpetrator of the infringement and a party whose role is one of complicity, so that the latter is not punishable where the relevant legal rule does not expressly provide for a penalty to be imposed in such a case. That means, on the contrary, that for that principle to be complied with, the conduct of the person to whom the misconduct is imputed must be covered by the definition

of perpetrator of the offence in question, such that it can be inferred from the wording of the provision at issue, where necessary in the light of the interpretation given in the case-law. If that definition is sufficiently broad to cover both the conduct of the main perpetrators of the infringement and that of the parties whose role is one of complicity, there can be no infringement of the principle of *nullum crimen, nulla poena sine lege* (see, for the reasoning a contrario, Eur. Court H. R. *E.K.* v *Turkey*, cited in paragraph 140 above, § 55 and 56, and Eur. Commission H. R., decision on admissibility *L.-G. R.* v *Sweden*, of 15 January 1997, application no 27032/95, p. 12).

150 In the light of all the above considerations, the Court concludes that any undertaking which has adopted collusive conduct, including consultancy firms which are not active on the market affected by the restriction of competition, could reasonably have foreseen that the prohibition laid down in Article 81(1) EC was applicable to it in principle. Such an undertaking could not have been unaware, or was in a position to realise, that a sufficiently clear and precise basis was already to be found, in the former decision-making practice of the Commission and in the existing Community case-law, for expressly recognising that a consultancy firm is liable for an infringement of Article 81(1) EC where it contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates.

d) The applicant's classification as a co-perpetrator of the cartel

151 Next, it must be determined whether, in the present case, the objective and subjective conditions for establishing that the applicant shares liability, in that the anti-competitive conduct of the other participating undertakings can be attributed to it, are satisfied. In that regard, it should be pointed out, first of all, that in order to be able to attribute the whole of an infringement to an undertaking, that undertaking must have contributed, even in a subordinate manner, to the restriction of competition at issue, and the subjective condition relating to the manifestation of that undertaking's intention in that regard must be met.

152 Independently of the question whether the applicant was a 'contracting' party to the 1971 and 1975 agreements and whether the agency agreements concluded with the three organic peroxide producers were an integral part of the cartel in the wider sense, the Court notes that it has become apparent that the applicant actively contributed to the implementation of that cartel between 1993 and 1999.

153 First, it is common ground that the applicant stored and concealed on its premises the originals of the 1971 and 1975 agreements of Atochem/Atofina and PC/Degussa, and in the latter case, until as late as 2001 or 2002 (recitals 63 and 83 of the contested decision). Second, the applicant admits to having calculated and communicated to the members of the cartel the deviations of the respective market shares from the agreed quotas, until 1995 or 1996 at the very least, an activity which was expressly provided for in the 1971 and 1975 agreements, and to having stored secret documents on its premises, pursuant thereto. Third, as regards the meetings between the organic peroxide producers which had some anti-competitive content, the applicant admitted to having organised and partly attended five of those meetings, as well as the meeting held in Amersfoort on 19 October 1998 to prepare a proposal regarding the allocation of quotas among the producers. Fourth, it is common ground that the applicant regularly reimbursed the travel expenses which the representatives of the organic peroxide producers incurred in attending meetings with an anti-competitive purpose, and it did so with

the manifest intention of covering up any traces of the implementation of the cartel in the books of those producers, or of not leaving any such traces (see paragraphs 63 and 102 above).

154 Without there being any need to assess in detail the points of dispute between the parties regarding the actual extent of the applicant's participation in the cartel, the Court concludes from the information set out in paragraph 153 above that the applicant actively contributed to the implementation of the cartel and that, contrary to its submissions, there was a sufficiently definite and decisive causal link between that activity and the restriction of competition on the organic peroxide market. At the hearing, the applicant did not dispute the existence of that causal link but merely challenged the legal classification of its contribution as an act of a perpetrator of the infringement, maintaining that its contribution could be classed only as an act of complicity which could have been carried out by any consultancy firm.

155 Accordingly, it is not relevant that the applicant was not formally and directly a contracting party to the 1971 and 1975 agreements. First, for the purposes of applying Article 81(1) EC, the question whether or not there is an agreement which is in writing, or otherwise explicit, between the participating undertakings is not decisive so long as they act in collusion (see paragraphs 115 to 123 above). Second, the applicant itself acknowledges that, by tacit agreement with the organic peroxide producers, it undertook – in its own name and on its own account – some of Fides' activities as specifically provided for under those agreements, such as the calculation and communication of the deviations from the agreed quotas. It should be added that, given that the Commission merely imposed on the applicant a fine of a minimal amount of EUR 1 000 and that that amount as such has not been called into question by the applicant, the Court is not required to give a ruling on the exact extent of the applicant's participation for the purposes of its effect on the lawfulness of the level of the fine imposed.

156 Moreover, in the light of all the objective circumstances characterising the applicant's participation, the Court finds that the applicant acted in full knowledge of the facts and intentionally when it made its professional expertise and infrastructure available to the cartel, in order to benefit from it, at least indirectly, in the course of implementing the individual agency agreements which linked it to the three organic peroxide producers. Quite apart from the question whether the applicant thus also knowingly infringed the rules of professional ethics by which it is bound as a commercial consultant, it clearly could not have been unaware, or indeed it knew, that the objective of the cartel to which it contributed was anti-competitive and unlawful, that objective having become apparent, inter alia, in the context of the 1971 and 1975 agreements which the applicant stored on its premises, from the meetings which were held with an anti-competitive aim and from the exchange of sensitive information in which the applicant actively participated, at least until 1995 or 1996.

157 In the light of all of the above considerations, the Court finds that, in so far as the contested decision establishes that the applicant shares liability for the infringement committed primarily by AKZO, Atochem/Atofina and PC/Degussa, that decision does not exceed the limits of the prohibition laid down in Article 81(1) EC and that, consequently, by imposing on the applicant a fine of EUR 1 000, the Commission did not exceed the powers conferred on it under Article 15(2) of Regulation No 17.

158 In those circumstances, the Court considers it unnecessary to give a ruling on the question whether the Commission could also have legitimately based the applicant's liability on the notion of a decision by an association of undertakings. As the Commission acknowledged at the hearing, the present case involves a purely alternative or secondary

assessment, which can neither confirm nor invalidate the legal legitimacy of the Commission's main approach, as based on the notions of 'cartel' and 'undertaking'. By the same token, it is unnecessary to assess whether the Commission correctly examined and evaluated certain evidence against the applicant which is not decisive for the outcome of the present dispute. In that regard, the applicant's arguments, as set out in paragraphs 77 to 79 above, seek merely to support the well-foundedness of the present plea and do not constitute a separate plea.

159 Consequently, the second plea must be rejected as unfounded.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders AC-Treuhand AG to pay the costs.**