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

8 July 2008 *

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),

* Language of the case: German.

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.

21 Next, the Court points out that, in support of its action, the applicant relies on five pleas in law: (i) infringement of the rights of the defence and of the right to a fair hearing; (ii) infringement of the principle of *nullum crimen, nulla poena sine lege*; (iii) infringement of the principle of the protection of legitimate expectations; (iv) in the alternative, infringement of the principle of legal certainty and the principle of *nulla poena sine lege certa*; and (v) infringement of the principle of legal certainty and the principle of *nulla poena sine lege certa* as regards the second paragraph of Article 3 of the contested decision.

B — *The first plea, alleging infringement of the rights of the defence and of the right to a fair hearing*

1. *Arguments of the parties*

(a) Arguments of the applicant

22 The applicant maintains that the Commission was late in informing it — three years after the start of the investigation — of the proceeding which had been initiated and the complaints made against it. It first learned of this when the formal investigation procedure was initiated and the statement of objections of 27 March 2003 adopted. Before that, the applicant had received only the request for information dated 3 February 2003, to which it had duly responded by letter of 5 March 2003. It was not until 20 March 2003, at the meeting with the Commission, that the applicant learned that it was also concerned by the investigation, without, however, receiving any precise information on the extent of the accusations made against it.

23 In the applicant's view, under Article 6(3)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed at Rome on 4 November 1950, anyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. That right is a corollary of the fundamental right to a fair hearing laid down in Article 6(1) of the ECHR and is an integral part of the rights of the defence, as recognised by the case-law as general principles of Community law applicable to the penalty-based administrative procedures laid down in Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) (Cases 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 172 to 176;

C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 25 and 26; C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraphs 37 and 38; and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 63 and 64; see also Case T-15/99 *Brugg Rohrsysteme* v *Commission* [2002] ECR II-1613, paragraphs 109 and 122, and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 220), and is confirmed by Article 6(2) EU and by Article 48(2) of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 at Nice (OJ 2000 C 364, p. 1).

24 Under Article 15(2) of Regulation No 17, the fines which may be imposed on undertakings do, in fact — notwithstanding what is stated in Article 15(4) of that regulation — have a 'criminal law character' given their deterrent and punitive objective (Opinion of Judge Vesterdorf, acting as Advocate General in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867; see also the Opinion of Advocate General Roemer in Case 14/68 *Wilhelm* [1969] ECR 1, points 17 and 24; Opinion of Advocate General Mayras in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663; Opinion of Advocate General Léger in Case C-185/95 P *Baustahlgewerbe* v *Commission* [1998] ECR I-8417, I-8422, point 31; and the Opinions of Advocate General Ruiz-Jarabo Colomer in Case C-204/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-133, point 26; Case C-205/00 P *Irish Cement* v *Commission* [2004] ECR I-171, point 32; Case C-213/00 P *Italcementi* v *Commission* [2004] ECR I-230, point 26; Case C-217/00 P *Buzzi Unicem SpA* v *Commission* [2004] ECR I-267, point 29; and in Case C-219/00 P *Cementir* v *Commission* [2004] ECR I-342, point 25). That conclusion is also to be inferred from the case-law of the European Court of Human Rights ('Eur. Court H. R.') (*Engel and others* v. *the Netherlands*, judgment of 8 June 1976, Series A No 22 (1977), § 82; *Oztürk* v. *Germany*, judgment of 21 February 1984, Series A No 73, § 53; and *Lutz* v. *Germany*, judgment of 25 August 1987, Series A No 123, § 54).

25 In that regard, the applicant disputes the Commission's statement that no offence is imputed to undertakings during the investigation stage of the administrative

proceedings. On the contrary, according to the applicant, the Commission takes measures during that stage which suggest that an infringement has been committed and which have a significant impact on the situation of the undertakings suspected (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 182). The fact that, under the procedure laid down in Regulation No 17, the persons concerned are not the subject of any formal accusation until they receive the statement of objections (Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 79) is not decisive and does not rule out the possibility that, during the investigation stage, the applicant may already have become 'a person charged' for the purposes of Article 6(3) of the ECHR, as interpreted by the Eur. Court H. R. In the light of that case-law, a formal indictment is not necessary but the initiation of an investigation procedure of criminal law character is sufficient (Eur. Court H. R. *Delcourt* v. *Belgium*, judgment of 17 January 1970, Series A No 11, p. 13, § 25; *Ringeisen* v. *Austria*, judgment of 17 July 1971, Series A No 13, p. 45, § 110; *Deweer* v. *Belgium*, judgment of 27 February 1980, Series A No 35, p. 22, § 42; *Viezzer* v. *Italy*, judgment of 19 February 1991, Series A No 196-B, p. 21, § 17; *Adolf* v. *Austria*, judgment of 26 March 1982, Series A No 49, p. 15, § 30; and *Imbrioscia* v. *Switzerland*, judgment of 24 November 1993, Series A No 275, p. 13, § 36).

26 The applicant submits that it is apparent from the objective of Article 6(3)(a) of the ECHR that, in the context of criminal proceedings, a person charged with an offence must be informed immediately of the initiation and purpose of the investigation concerning him, so that he is not left in a state of uncertainty for longer than necessary. By contrast, a notification only at the formal indictment stage, which often does not take place until after a series of long investigations, is not sufficient and risks seriously compromising the fairness of the remainder of the proceedings and depriving the right guaranteed by Article 6(3)(c) of the ECHR of its useful effect. Where, as in the present case, the Commission carries out the investigation secretly for approximately three years before adopting the statement of objections, it gains an unfair start in terms of collecting evidence which is incompatible with Article 6 of the ECHR. That stems from the fact that, in view of the time which has elapsed, it is difficult — or even virtually impossible — for the undertakings concerned to reconstruct the facts and to provide evidence to the contrary.

27 In addition, the obligation to notify immediately the undertakings concerned stems from the importance, or decisive nature, of the investigation procedure for the Commission's future decision (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 15, and *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 63). After a long investigation, carried out with the support of the applicants for immunity or clemency, which precedes the adoption of the statement of objections, the Commission has a tendency to believe that the facts have already been established and is subsequently not very inclined to review the conclusions which it has drawn from that investigation. The risk of the forthcoming decision being biased is all the greater given that the Commission alone acts as investigator, prosecutor and judge. In the circumstances of the present case, the Commission was no longer an impartial judge and the applicant no longer had an adequate and sufficient opportunity (see Eur. Court H. R., *Delta* v. *France*, judgment of 19 December 1990, Series A No 191-A, p. 16, § 36) to contest the false allegations made by AKZO, the main witness for 'the prosecution'. Thus, at the stage of notification of the statement of objections, the undertaking concerned finds itself in a situation in which its chances of convincing the Commission of the erroneous nature of the presentation of the facts in that statement are significantly reduced, which seriously impairs the effectiveness of its defence.

28 The applicant points out that, in the present case, the Commission based its complaints almost exclusively on the witness statement of the applicant for immunity, AKZO, with which it has had close contact since the year 2000. Accordingly, the applicant maintains that, in the eyes of the Commission, AKZO was more credible than any undertaking, such as the applicant, which did not undertake to cooperate under point B(d) of the Leniency Notice and which the staff in charge of the case-file did not know personally. Consequently, the Commission attributed more weight to AKZO's false statements concerning the applicant's role than to the information provided by the applicant, without giving the applicant the opportunity to defend itself in an effective manner against AKZO's statements and to rectify them.

29 In the present case the Commission should have informed the applicant of the nature and the reasons for the suspicions against it when, on 27 June 2000, AKZO sent

it a description of the applicant's alleged role in the cartel — given that, as of that moment, the Commission's future decision risked being biased as a result of AKZO's false allegations — and, at the latest, on 18 June 2001, when AKZO submitted its final witness statement to the Commission. The contested decision was based, as far as concerns the applicant, almost exclusively on that witness statement. Consequently, by not informing the applicant as soon as the inquiry was launched against it, the Commission infringed the applicant's right to a fair hearing and its rights of defence under Article 6(1) and (3)(a) of the ECHR.

30 In the applicant's view, that illegality must lead to the annulment of the contested decision (Opinion of Advocate General Mischo in Case C-250/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, ECR I-8503, point 80). In order to ensure the useful effect of the right guaranteed under Article 6(3)(a) of the ECHR, which is an elementary procedural guarantee in a society governed by the rule of law, the undertaking concerned cannot be required to show that the Commission's decision would have been different if it had been informed in good time. The act of informing the accused in good time and in an exhaustive manner constitutes the *condicio sine qua non* of a fair hearing and is mandatory. Accordingly, any decision imposing a fine which has been adopted in infringement of that procedural guarantee must be annulled.

31 In the alternative, the applicant claims that, if the Commission had respected the right guaranteed under Article 6(3)(a) of the ECHR and had informed it without delay of the nature and purpose of the investigation against it, it could have reconstructed the relevant facts more easily and more exhaustively than it had been able to in 2003. In particular, it could have drawn the Commission's attention to the erroneous nature of AKZO's witness statement concerning its role in the cartel. That challenge to the evidence would have led the Commission to seek further information from AKZO and, where necessary, to carry out an investigation under Article 14 of Regulation No 17.

32 However, in the absence of timely information, the applicant was deprived of the possibility of exercising decisive influence over the conduct of the investigation or over the Commission's internal decision-making process. Otherwise, the Commission would have concluded that the applicant had not actually committed an infringement and that its relationship to the organic peroxide producers involved in the cartel was one of non-punishable complicity. Thus, at that decisive stage of the procedure, the Commission deprived the applicant of the opportunity to defend itself quickly and effectively against AKZO's allegations.

33 Accordingly, the contested decision should be annulled for infringement of the rights of the defence and of Article 6(3)(a) of the ECHR.

34 In that regard, the applicant none the less acknowledged at the hearing, in response to a specific question put by the Court, that, in its view, even if it had been informed at the stage of the request for information of 3 February 2003 and had thus had the opportunity to defend itself more effectively, that would not have changed the Commission's findings concerning the applicant in the contested decision. Formal note to that effect was taken in the minutes of the hearing.

(b) Arguments of the Commission

35 The Commission disputes that it is required, prior to notifying the statement of objections, to inform the applicant of the nature of and the reasons for the investigation concerning it.

36 First, as is expressly confirmed in Article 15(4) of Regulation No 17, neither the administrative procedure nor the possibility of imposing fines under that regulation is of a criminal law nature. Second, that procedure is divided into two stages, namely a preliminary investigation stage and an inter partes stage which covers the period from notification of the statement of objections to adoption of the final decision. Although the inter partes stage enables the Commission to give a final decision on the infringement concerned (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraphs 182 to 184), no offence is imputed to the undertakings concerned during the investigation stage. That stage enables a search to be made for the factual evidence which enables the Commission to determine whether or not it is appropriate to take action against an undertaking. To that end, the Commission can require information and the undertakings are under an obligation to cooperate actively in providing all information relating to the subject-matter of the inquiry (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 27).

37 At the time when such measures of inquiry are adopted, the Commission is not yet in a position to impute offences to undertakings because it is still seeking the evidence which might lead a statement of objections to be adopted. Accordingly, the mere fact that an undertaking is the subject of measures of inquiry on the part of the Commission cannot be assimilated to an accusation of that undertaking (Opinion of Advocate General Mischo in Case C-250/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraphs 41 to 46). Consequently, the applicant's argument that it should already have been informed at the investigation stage in order to be able to draw up its defence cannot be upheld.

38 The Commission acknowledges that the rights of the defence, as fundamental rights, form an integral part of the general principles of law, whose observance the Community judicature must ensure (*Krombach*, cited in paragraph 23 above, paragraphs 25 and 26, and *Connolly* v *Commission*, cited in paragraph 23 above, paragraphs 37 and 38). In addition, it is true that the Commission has to ensure that those rights are not impaired during the investigation stage, which may be decisive in providing evidence

of the unlawful nature of conduct engaged in by undertakings such that they may incur liability (*Hoechst* v *Commission*, cited in paragraph 27 above, paragraph 15, and *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 63). However, that obligation relates only to certain rights of the defence, such as the right to legal representation and the privileged nature of correspondence between lawyer and client, whereas other rights relate only to the inter partes proceedings initiated following the adoption of a statement of objections (*Hoechst* v *Commission*, cited in paragraph 27 above, paragraph 16).

39 In any event, the alleged right to be informed immediately of the nature of and the reasons for the investigation does not exist, nor does it result from Article 6(3)(a) of the ECHR, because there is no element of 'accusation' during the investigation stage. Such formal 'accusation' occurs only at the stage of the notification of the statement of objections (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, cited in paragraph 25 above, paragraph 79). That statement implies the initiation of the procedure under Article 3 of Regulation No 17 and demonstrates the Commission's intention to adopt a decision finding an infringement (see, to that effect, Case 48/72 *Brasserie de Haecht* [1973] ECR 77, paragraph 16). At the same time, that statement serves as a means of informing the undertaking of the subject-matter of the procedure which is initiated against it and of the conduct imputed to it by the Commission (Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 132, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, cited in paragraph 25 above, paragraph 80).

40 That is confirmed in the case-law according to which there is no right under Community competition law to be informed of the state of the administrative procedure before the statement of objections is formally issued; an interpretation to the contrary would give rise to a right to be informed of an investigation in circumstances

where suspicions exist in respect of an undertaking, which would seriously hamper the work of the Commission (Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 110).

41 The Commission adds that, although the case-law of the Eur. Court H. R. in relation to Article 6 of the ECHR may, where necessary, play a role in the context of investigation procedures which have a criminal law character — as regards, for example, the calculation of a 'reasonable time' within the meaning of Article 6(1) of the ECHR — there is nothing to suggest that that is also the case for Article 6(3)(a) of the ECHR. In order to be taken into account, failure to respect the guarantees under Article 6(3)(a) of the ECHR at the investigation stage must seriously compromise the fair nature of the proceedings (Eur. Court H. R. *Imbroscia* v *Switzerland*, judgment of 24 November 1993, Series A no. 275, § 36, and the case-law cited therein), account being taken of the implementation of the procedure as a whole.

42 In the present case, the inter partes stage of the administrative procedure laid down in Regulation No 17 is particularly important in that regard since it aims precisely to inform the person concerned of the nature and grounds of the accusation made against him. However, the applicant has not brought any complaint regarding the proper conduct of that stage of the procedure. Thus, the applicant cannot assert for the first time in its reply that it was not given the opportunity, during the inter partes stage of that procedure, to voice its point of view, in an appropriate and sufficient manner, on the version of the facts adopted by the Commission. In any event, the applicant's false allegation cannot call into question either the inter partes nature of that stage of the administrative procedure, or its fairness.

43 Consequently, the present plea must be rejected as unfounded.

2. *Findings of the Court*

44 By its first plea, the applicant claims in essence that the Commission infringed its rights of defence and, in particular, its right to a fair hearing, as recognised by Article 6(3)(a) of the ECHR, by failing to inform it, very early on in the investigation procedure, of the nature of and the reasons for the accusation made against it and, in particular, by failing to send it AKZO's witness statements earlier.

45 It should be pointed out, at the outset, that the Court has no jurisdiction to assess the lawfulness of an investigation under competition law in the light of provisions of the ECHR, inasmuch as those provisions do not as such form part of Community law. That said, the fact remains that the Community judicature is called upon to ensure the observance of the fundamental rights which form an integral part of the general principles of law and, for that purpose, it draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights, on which the Member States have collaborated and to which they are signatories. In that regard, the ECHR has special significance, as confirmed by Article 6(2) EU (see, to that effect, Case T-112/98 *Mannesmannröhren-Werke* v *Commission* [2001] ECR II-729, paragraphs 59 and 60 and the case-law cited therein). That has also been reaffirmed in the fifth recital in the preamble to the Charter of Fundamental Rights of the European Union, and Articles 52(3) and 53 thereof.

46 In that regard, it is settled case-law that the rights of the defence in any proceedings in which penalties, especially fines or penalty payments, may be imposed, such as those provided for in Regulation No 17, are fundamental rights forming an integral

part of the general principles of law, whose observance the Community judicature ensures (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 64, and Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 68).

47 It should also be pointed out that the administrative procedure under Regulation No 17, which takes place before the Commission, is divided into two distinct and successive stages, each having its own internal logic, namely a preliminary investigation stage and an inter partes stage. The preliminary investigation stage, during which the Commission uses the powers of investigation provided for in Regulation No 17 and which covers the period up until the notification of the statement of objections, is intended to enable the Commission to gather all the relevant information confirming or not the existence of an infringement of the competition rules and to adopt an initial position on the course of the procedure and how it is to proceed. By contrast, the inter partes stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the infringement concerned (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraphs 181 to 183, and Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 38).

48 First, as regards the preliminary investigation stage, the Court has stated that the starting point of that stage is the date on which the Commission, in exercise of the powers conferred on it by Articles 11 and 14 of Regulation No 17, takes measures which suggest that an infringement has been committed and which have a significant impact on the situation of the undertakings suspected (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraph 182, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraph 38). Second, it is apparent from the case-law of the Court of Justice that it is not until the beginning of the inter partes administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has

a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, 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 (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraphs 315 and 316; *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraphs 66 and 67; *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraph 47; and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 59). 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 (*Dalmine* v *Commission*, cited in paragraph 40 above, paragraph 60).

49 Accordingly, the applicant's argument that respect for the rights of the defence and the right to a fair hearing implies that it be granted access to AKZO's witness statements during the preliminary investigation stage must be rejected.

50 The fact nevertheless remains that, as is apparent from the case-law cited in paragraph 48 above, the measures of inquiry adopted by the Commission during the preliminary investigation stage — 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.

51 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 (see, to

that effect, *Hoechst* v *Commission*, paragraph 27 above, paragraph 15). As regards the observance of a reasonable period of time, the Court has thus held, in essence, that an excessively lengthy preliminary investigation may have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of the defence where those rights are relied on during the inter partes stage. The more time that elapses between a measure of investigation and the notification of the statement of objections, the greater the likelihood that exculpatory evidence can no longer be obtained or only obtained with difficulty. For that reason, examination of any interference with the exercise of the rights of the defence must not be confined to the actual phase in which those rights produce their full effects, that is to say, the inter partes stage of the administrative procedure, but must extend to the entire procedure and be carried out by reference to its total duration (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraphs 49 and 50).

52 The Court considers that those considerations apply by analogy to the question whether and, if so, to what extent the Commission is required to provide the undertaking concerned, as of the preliminary investigation stage, with certain information on the subject-matter and purpose of the investigation, which enable its defence in the inter partes stage to be effective. Even though, in formal terms, the undertaking concerned does not have the status of 'a person charged' during the preliminary investigation stage, the initiation of the investigation in its regard, by the adoption of a measure of inquiry concerning it, cannot generally be dissociated, in substantive terms, from the existence of suspicion, hence from an implied imputation of misconduct for the purposes of the case-law cited in paragraph 48 above, which justifies the adoption of that measure (see also, to that effect, Eur. Court H. R., *Casse* v. *Luxembourg*, No 40327/02, § 29 to 33, 71 and 72, 27 April 2006).

53 As regards the scope of that duty to inform, it should be noted that, in a request for information — whether informal for the purposes of Article 11(2) of Regulation No 17 or in the form of a decision under Article 11(5) thereof — the Commission is

required, under Article 11(3) and in order, inter alia, to respect the rights of defence of the undertakings concerned, to state the legal basis and the purpose of that request. Thus, the necessity, for the purposes of Article 11(1) of Regulation No 17, of the information requested by the Commission must be assessed by reference to the purpose of the inquiry, as compulsorily stated in the request for information itself. In that regard, the Court has pointed out that the Commission is entitled to require only the disclosure of information which may enable it to investigate putative infringements which justify the investigation and which are set out in the request for information as such (see, to that effect, Case T-39/90 *SEP* v *Commission* [1991] ECR II-1497, paragraph 25, and Case T-34/93 *Société générale* v *Commission* [1995] ECR II-545, paragraphs 39, 40, 62 and 63).

54 Next, it should be noted that the Commission is required to point out in a decision ordering investigation, under Article 14(3) of Regulation No 17, the subject-matter and purpose of that investigation. That requirement constitutes a fundamental guarantee of the rights of defence of the undertakings concerned, with the result that the scope of the obligation to state the reasons on which decisions ordering investigations are based cannot be restricted on the basis of considerations concerning the effectiveness of the investigation. In that regard, it is apparent from the case-law that, although it is true that the Commission is not required to communicate to the addressee of a decision ordering investigation all the information at its disposal concerning the putative infringements or to make a precise legal analysis of those infringements, it must nevertheless clearly indicate the presumed facts which it intends to investigate (see, to that effect, *Hoechst* v *Commission*, cited in paragraph 27 above, paragraph 41; Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraphs 8 and 9; judgment of 12 July 2007 in Case T-266/03 *CB* v *Commission,* not published in the ECR, paragraph 36; see, by analogy, *Société générale* v *Commission*, cited in paragraph 53 above, paragraphs 62 and 63). By the same token, in the context of an investigation based on Article 14(2) of Regulation No 17, the Commission's inspectors must produce written authorisation specifying the subject-matter and purpose of the investigation.

55 The Court considers that the requirements set out in paragraphs 53 and 54 above apply independently of the question whether the request for information, which is sent to an undertaking suspected of having committed an infringement, is a formal

decision for the purposes of Article 11(5) of Regulation No 17, or an informal letter for the purposes of Article 11(2) thereof. In addition, in the context of the preliminary investigation stage, the opportunity for the undertaking concerned to prepare its defence effectively cannot vary depending on whether the Commission adopts a measure of inquiry under Article 11 or Article 14 of Regulation No 17, since all those measures suggest that an infringement has been committed and may have a significant impact on the situation of the undertakings suspected (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 25 above, paragraph 182, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraph 38).

56 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 (see, in relation to the Commission's powers of investigation, *CB* v *Commission*, cited in paragraph 54 above, paragraph 71). 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.

57 Consequently, in the present case, the Commission was required, when it sent the request for information of 3 February 2003, to inform the applicant, inter alia, of the putative infringements concerned by the investigation and of the fact that, in that context, the Commission might have to impute to it unlawful conduct. It is apparent solely from that request that the Commission was in the process of investigating a putative infringement of Article 81 EC committed by European organic peroxide

producers as a result of certain conduct, mentioned therein by way of example and in a general manner, but without any indication that the investigation also concerned a possible infringement attributed to the applicant. It appears that it was not until the meeting of 20 March 2003 — that is to say, several weeks before initiation of the formal investigation procedure — that the officials of the Commission in charge of the case-file pointed out that the applicant was also covered by the investigation. As matters stood, the need to give prior notice to the applicant was all the greater since, as the Commission itself stated, its decision to investigate a consultancy firm constituted a reorientation of its former decision-making practice and, consequently, the applicant could not necessarily expect to be directly concerned by the statement of objections.

58 However, that circumstance cannot, in itself, lead to the annulment of the contested decision. It is also necessary to establish whether the irregularity committed by the Commission was capable of actually compromising the applicant's rights of defence in the procedure in question (see, to that effect, *Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraphs 71 et seq., and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 47 above, paragraphs 55 and seq.).

59 In the present case, the applicant has not produced any concrete evidence to establish that the irregularity in question adversely affected the efficiency of its defence during the inter partes stage of the administrative procedure and that the progress of that procedure, as a whole, and the content of the Commission's decision could have been influenced by a more efficient defence. On the contrary, at the hearing, the applicant admitted that prior information regarding the allegations against it, in particular at the stage of the request for information of 3 February 2003, would not have had any influence on the conclusions reached by the Commission in its regard in the contested decision, and formal note of that acknowledgement was taken in the minutes of the hearing. The possibility of any such influence is even less likely since there was a gap of only seven weeks or thereabouts between the request for information, on the one hand, and the notification of the initiation of the formal investigation procedure and the notification of the statement of objections, on the other.

60 Consequently, the present plea must be rejected as unfounded.

C — *The second plea, alleging infringement of the principle of nullum crimen, nulla poena sine lege*

1. *Arguments of the parties*

(a) Arguments of the applicant

General part

61 The applicant maintains that it has not infringed Article 81 EC since its relationship to the cartel members — AKZO, Atochem/Atofina and PC/Degussa — was merely one of non-punishable complicity. It claims that the Commission itself acknowledged, in recital 339 of the contested decision, that the applicant was not a contracting party to the cartel concluded by those organic peroxide producers. None the less, the Commission reached the very vague conclusion, in recital 349 of the contested decision, that the applicant 'was party to the agreement and/or took decisions as an undertaking and/or as an association of undertakings'. Next, the Commission acknowledged, in recital 454 of that decision, that 'addressing a decision to an undertaking and/or association of undertakings having a role of this kind in a cartel is to a certain extent a novelty'. In the applicant's view, the Commission

thus overstepped the limits of the power conferred on it by Article 15(2) of Regulation No 17, read in conjunction with Article 81(1) EC, and infringed the principle of *nullum crimen, nulla poena sine lege*. In addition, the Commission's imprecise legal assessment is based on erroneous findings of fact concerning the applicant's role in the cartel.

The challenge of the facts found in the contested decision

62 The applicant essentially disputes the importance attributed by the Commission, in the contested decision, to its activity in the cartel (recitals 95, 105, 332, 333 and 345 of the contested decision). In reality, the applicant, as a consultancy firm and an agent subject to the instructions of AKZO, Atochem/Atofina and PC/Degussa, merely provided those undertakings with clerical-administrative services, the vast majority of which had nothing to do with the cartel.

63 First, between the end of 1993 and the end of 1999, the applicant was linked, by virtue of the Swiss law of obligations and without any anti-competitive intention, to those three organic peroxide producers by service contracts termed 'agency agreements'. On the basis of those agency agreements and on the instructions of those producers, it (i) established market statistics; (ii) organised four official meetings of those producers in Zurich while attending the official part of those meetings; (iii) reserved a meeting room for four unofficial meetings of those producers in Zurich, but without attending — or only partly — those meetings or being aware of their content; (iv) reimbursed the representatives of those producers the travel costs incurred in attending those meetings; and (v) kept hold of certain documents — some of which were anti-competitive — on behalf of PC/Degussa and Atochem/Atofina.

64 In addition, contrary to the finding in recital 340 of the contested decision, those agency agreements did not restrict competition; only the agreements between the producers, in particular the 1971 agreement, to which the applicant was never a party (recital 339 of the contested decision), provided for restrictions of competition on the organic peroxide market. Thus, the statement in recital 335 of the contested decision that the applicant's activity 'formed the basis to realise the cartel' is also incorrect, since that cartel was created in 1971 by AKZO, Atochem/Atofina and PC/Degussa without the applicant's assistance. In essence, the applicant states that, in so far as those of its activities characterised as misconduct were linked to the cartel, such as the reservation of meeting rooms and the reimbursement of travel costs, for the three organic peroxide producers they were merely of a logistical and clerical-administrative nature.

65 Second, the applicant essentially claims that, in referring — in recitals 87, 109 et seq. and, in particular, in recital 209 of the contested decision — to 'Fides/AC-Treuhand' as a single unity, the Commission wrongly attributed to it the acts committed by Fides during the period from 1971 to 1993. In so doing, the Commission infringes the principles of culpability and individual liability and adversely affects the applicant's reputation (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145). The applicant, which was founded in 1993, is not liable for Fides' conduct and there is no structural link, in terms of company law, between the two. At the end of 1993, the applicant acquired from Fides only the department in charge of providing management advice to associations, and then concluded new agency agreements with Fides' former clients. In addition, Fides' letter of November 1993, in which it advised its former clients to continue their commercial relations with the applicant, is not evidence which is relevant to show the alleged 'personal continuity' between Fides and the applicant. It is common practice in the context of company takeovers that, for marketing reasons, the seller sends such 'letters of recommendation' concerning the possible transfer of agency to the company which has taken over. The applicant concludes from this that it cannot be held liable for Fides' conduct, a fact which should have led the Commission to attribute significantly less importance to its role during the decisive period from 1994 to 1999.

66 In that regard, the applicant states that, unlike Fides, it did not participate in the anti-competitive exchange of information between the three organic peroxide producers. The description of the applicant's role in recitals 91 et seq. of the contested decision does not take account of the fact that, in 1993, those producers substantially modified the manner of operation of the cartel by abandoning thereafter the practice of communicating to one another, with the participation of Fides, sales and price figures in meetings. After 1993 that system was replaced by a system run by AKZO, in which the applicant did not participate and of which it was not even aware, under which information was exchanged by fax and in meetings referred to as 'working groups' (recital 136 of the contested decision). In that context, AKZO established detailed statistics to be presented at the meetings of the working group, ran those meetings, ensured that market shares were being respected and insisted that the other producers increase their prices.

67 Third, as regards the storage of the originals of the 1971 and 1975 agreements, the applicant asserts that it stored in its safe only the copies of Atochem/Atofina and PC/Degussa, which were free to take them away or consult them at any time. Furthermore, the applicant admits to having calculated until 1995 or 1996, on behalf of the organic peroxide producers, the deviations from the quotas agreed between them. The members of the cartel were also free to consult the documents relating to that calculation at any time. The conservation of documents of a third party by the applicant does not constitute, in itself, conduct which is prohibited under the competition rules.

68 Fourth, the applicant disputes the allegation that it collected information on the sale of organic peroxide and provided the 'relevant statistics' to the members of the cartel (recital 92 of the contested decision). The applicant claims that those statistics were lawful and had nothing to do with the cartel, as has been confirmed, according to the applicant, by AKZO, Atochem/Atofina and PC/Degussa. Following the implementation by Fides, at the request of those producers, of an official information system on the organic peroxide market, the applicant concluded tacitly, at the end of 1993, new agency agreements with them which concerned the drawing up of 'neutral' market statistics. Those statistics were based on past sales figures (in tons),

as provided by those producers, and neither the prices charged by them nor the names of their clients were identified in those statistics. They were accompanied by a list of the categories of relevant goods which the Commission wrongly designated as 'code AC-Treuhand' (recital 105 of the contested decision). However, that list was merely a working tool for the applicant to enable it to establish the market statistics and for the company in charge of auditing the sales volumes communicated by the producers. The statistics established in that manner indicated, for the categories of organic peroxide concerned, merely the total volume of the market for the preceding year or the preceding quarter, the sales volume for each producer and its market share, but no information concerning competitors.

69 In that regard, the applicant points out that, between 1993 and 1999, the exchange between the organic peroxide producers of sales volumes and prices by country and by client and, consequently, the coordination of their conduct, no longer followed the rules agreed in 1971 and in 1975, but was made by fax or at separate meetings of the working group and, occasionally, following official meetings in Zurich, but without the applicant's participation (recitals 128 and 136 of the contested decision). The applicant concludes from this that, contrary to the impression created in recital 92 of the contested decision, the market statistics which the applicant established did not serve to coordinate the conduct of the producers. Nor did the preparation and the review of the data from the market information system constitute the basis of the infringement. From 1993 onwards, the statistics established by the applicant were not related to its attendance at the meetings of the cartel or proposing of quotas. That link was broken, at the latest, in 1996 when the applicant stopped calculating the deviations from the agreed quotas.

70 The applicant states that the auditing of the sales figures of the organic peroxide producers had nothing to do with the cartel. The applicant neither 'undertook nor approved' the auditing in that regard (recital 333 of the contested decision); nor was it the cartel's 'accountant' (recital 404 of the contested decision). That erroneous assessment is a result of: (i) bracketing together the functioning of the lawful market information system and that of the cartel's system; and (ii) a confusion with the duties of the company acting as sub-agent for the applicant, which audited the

sales volumes communicated to the applicant by the producers, every three to six months, concerning each category of products. On that basis, the applicant calculated the respective market shares in order to send the 'total market figures' back to the producers. Finally, the auditing of the sales volumes communicated to the applicant met the wishes of the three producers and is a common and lawful practice in the context of professionally competent market information systems which has nothing to do with the cartel.

71 Fifth, the applicant disputes the Commission's assertion that it attended 'at least at one instance' a working group meeting (recital 92 of the contested decision), or even a number of those meetings (recital 99 thereof). In reality, the applicant almost never attended the meetings of the three organic peroxide producers which were held for anti-competitive purposes. Out of the 63 meetings which took place from the end of December 1993, as set out in table 4 of the contested decision (p. 28 et seq.), of which only nine were held in Zurich, only five were partly attended by employees of the applicant, namely the meetings in Zurich on 25 October 1994, 16 February 1995, 16 January and 19 April 1996 and 23 November 1998. To that list it is appropriate to add the meeting in Amersfoort (Netherlands) on 19 October 1998, which was attended only by representatives of AKZO and a former employee of the applicant, Mr S. However, the applicant disputes, in a very detailed manner, the significance attributed by the Commission, in the contested decision, to the attendance of Mr S. In any event, it is for the Commission to prove that the applicant actually attended meetings which had an anti-competitive purpose (*Aalborg Portland and Others* v *Commission*, cited in paragraph 23 above, paragraph 78).

72 The applicant states that, with the exception of the meeting of 16 January 1996, all the meetings were so-called 'summit' meetings consisting of an 'official' part and an 'unofficial' part. The applicant's employees attended only the official part of those meetings in the context of which only issues relating to official market statistics, product classification and product safety were addressed. In that context, the applicant's role was limited to clerical-administrative activities, such as sending out letters of invitation setting out the agenda, reserving meeting rooms and, where necessary, hotel rooms, welcoming participants and taking minutes of the official meetings. On instruction, the applicant also made a telephone booking to reserve a hotel confer-

ence room for the 'unofficial' meetings in Zurich on 23 October 1997, 17 April 1998 and 27 October 1998, but without attending those meetings itself.

73 Accordingly, AKZO's assertion, as reproduced in recital 127 of the contested decision, that the applicant was 'continuously' involved in the yearly meetings — for example, when market shares needed to be adapted — is manifestly erroneous. The applicant's attendance was not necessary for that purpose, since each of the organic peroxide producers knew the 'official' market shares owing to the exchange between them of their sales volumes by fax or at working group meetings (recital 128 of the contested decision).

74 Sixth, the applicant submits that it was neither the chairman nor the moderator of the cartel (recitals 92, 99, 102 and 336 of the contested decision). Firstly, there was no 'chairperson' at the few meetings of the three organic peroxide producers which the applicant attended between 1994 and 1999 and during which its role was limited to welcoming the participants and taking minutes of the official part of the meeting. Secondly, the applicant neither acted as 'moderator' in the case of tension between the members of the cartel nor encouraged the latter to reach a compromise: the participants always came to the conclusion by themselves that abandoning the discussions would only make the situation worse. Furthermore, in view of the fact that the applicant did not attend the unofficial meetings (see paragraph 72 above), it could not have acted as moderator in the case of tension between the members of the cartel.

75 In that regard, the applicant disputes having declared in its response to the statement of objections that it had 'acted as an intermediary' (recitals 92, 94 and 99 of the contested decision). In reality, the applicant had stated that, as secretary, Mr S had merely played an 'organisational role in the meetings', which means, inter alia, that he opened with a few words of welcome the four official and lawful 'summit' meetings held between 1994 and 1999 (see paragraph 72 above) and that he announced the lunch break. However, Mr S never or almost never attended, during that same

period, the unofficial meetings of the three organic peroxide producers. Point 10 of the 1971 agreement, under the title 'Arbitration', shows that the producers themselves played the role of moderators, which was confirmed by Atochem/Atofina in relation to AKZO's role as moderator at numerous meetings. The applicant concludes from this that AKZO made false accusations against it in order to turn attention away from the role which AKZO itself played as moderator.

76 Seventh, the applicant reaffirms that it carried out the task of calculating the deviations from the agreed quotas and sending them to the organic peroxide producers, under the terms of its mandate and on instruction, only until 1995 or 1996. From 1997 at the latest the calculation of those deviations was made by the three producers themselves, under the supervision of AKZO, on the basis of their sales statistics which they exchanged at the meetings of the working group or by fax (see paragraph 69 above). AKZO then established, on that basis, the overall statistics consisting of the sales statistics of all the organic peroxide producers and presented them at the next meeting of the working group. In addition, the documents produced by AKZO with the intention of proving that, in 1996 or in 1997, the applicant continued to calculate the deviations from the agreed quotas originated from AKZO itself and not from the applicant.

77 Finally, the applicant submits that the Commission's assessment of the evidence is unlawful because it fails to have regard to the presumption of innocence (*Baustahlgewerbe* v *Commission*, cited in paragraph 24 above, paragraph 58) or the fundamental right to a fair hearing, as laid down in Article 6(1) of the ECHR and Article 47(2) of the Charter of Fundamental Rights of the European Union. The Commission endorsed AKZO's erroneous witness statement without investigating whether it was well founded in the light of the witness statements provided by Atochem/Atofina, PC/Degussa and the applicant contradicting that statement. It is apparent from Article 6(1) of the ECHR that statements made by a cooperating party can be regarded as credible only when they are supported by additional and independent evidence (Eur. Commission H. R., *X* v. *United Kingdom*, No 7306/75, decision of 6 October 1976, *Decisions and Reports*, No 7, p. 119, 122). In addition, credibility is the sole relevant criterion for assessing the evidence produced (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, referring to the Opinion of Judge Vesterdorf, acting as Advocate General in *Rhône-Poulenc* v

Commission, cited in paragraph 24 above, ECR II-869; see also, to that effect, Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, paragraph 29, and Joined Cases T-141/99, T-142/99, T-150/99 and T-151/99 *Vela and Tecnagrind* v *Commission* [2002] ECR II-4547, paragraph 223).

78 A cooperating party has every reason not to tell the truth and the Commission is required, of its own motion, to call its statement into question, especially if it is decisive for the final decision and is contradicted by another statement (see also recital 85 in the preamble to Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article [81 EC] (IV/31.371 — Roofing felt) (OJ 1986 L 232, p. 15), and recital 278 of the contested decision). In the present case, the Commission infringed those principles by accepting numerous false accusations made by AKZO against the applicant without producing other independent evidence to that effect (see also, to that effect, judgment of 14 October 1994 in Case T-44/02 *Dresdner Bank* v *Commission,* not published in the ECR, paragraph 74). As it is, a particularly critical examination of AKZO's statements was necessary in the light, first, of the danger that AKZO was exaggerating the role and importance of the applicant in order to turn attention away from its own decisive role in the implementation of the cartel and, second, of the fact that AKZO was late in making some of its unfounded accusations against the applicant.

79 If AKZO had admitted in its letter of 17 February 2003 that it was itself responsible for the proposal of new quotas and not the applicant, the Commission would have had no choice but to take note of AKZO's decisive role in the cartel, which — pursuant to point B(e) of the Leniency Notice — would have prohibited it from exempting AKZO from a fine. According to the applicant, the risk of being refused immunity from the fine and the scale of the fine with which AKZO was faced confirm the fact that AKZO had an incentive to testify against the applicant. Consequently, in basing its decision on AKZO's erroneous statements in the absence of additional and independent evidence in support of its complaints and without questioning the credibility of those statements or taking account of all the facts exculpating the applicant, the Commission failed to have regard to the requirements of the fundamental right to a fair hearing and to the presumption of innocence.

The infringement of the principle of *nullum crimen, nulla poena sine lege*

— The effects of the principle of *nullum crimen, nulla poena sine lege* on the distinction in Community competition law between perpetration and complicity

80 The applicant points out that, under Article 15(2)(a) of Regulation No 17, the Commission may impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81(1) EC. However, undertakings which, without participating in the cartel within the meaning of that latter provision, merely facilitate the infringement of Community law committed by the members of the cartel or encourage such an infringement to be committed do not infringe Article 81(1) EC and are not liable to a fine under Article 15(2) of Regulation No 17. Consequently, by finding, in the contested decision, that the applicant had infringed Article 81(1) EC and by imposing a fine on it, the Commission infringed the principle of *nullum crimen, nulla poena sine lege* as laid down in Article 7(1) of the ECHR. In addition, according to the applicant, the broad interpretation of Article 81(1) EC adopted by the Commission means that the constituent element of the infringement laid down in Article 81(1) EC may be discerned in all manner of conduct and thus fails to have regard for the principle of *nulla poena sine lege certa*.

81 The applicant submits that, under Community competition law, a distinction must be made between, on the one hand, perpetration of an infringement and, on the other, instigation of or complicity in an infringement. That distinction forms part of the general principles of Community law, in view of the similarity between the rules to that effect contained in the national legal orders, such as those laid down in Article 27(1) of the *Strafgesetzbuch* (German penal code), Article 48 of the *Wetboek van Strafrecht* (Netherlands penal code), Article 67 of the *code pénal belge* (Belgian penal code), Article 121-7 of the *code pénal français* (French penal code), Section 8 of the Accessories and Abettors Act 1861 (United Kingdom penal code),

Article 28(2)(b) and Article 29 of the *Código penal* (Spanish penal code) relating to complicity, Articles 46 and 47 of the *Poinikos Kodikas* (Greek penal code), Articles 66 and 67 of the *code pénal luxembourgeois* (Luxembourg penal code), Articles 26 et seq. of the *Código penal* (Portuguese penal code), Chapter 23, section 4, of the *Brottsbalk* (Swedish penal code) and Chapter 5 of the *Rikoslaki* (Finish penal code). It is also confirmed by Article 2(1) of the Convention on the protection of the European Communities' financial interests of 26 July 1995 (OJ 1995 C 316, p. 49), and by Article 11 of the Corpus Juris introducing penal provisions for the purpose of protecting the financial interests of the European Union (established under the responsibility of Mireille Delmas-Marty, Economica, 1997).

82 Consequently, where penalties are imposed under Regulation No 17, it is also necessary to distinguish perpetration of an infringement from instigation of the infringement or complicity therein. According to the applicant, in Community competition law there is no legislative provision making it possible to penalise instigation of or complicity in an infringement. Thus, only a person who, as the perpetrator of an infringement, satisfies the condition laid down in Article 81(1) EC concerning the constitution of the infringement may be penalised. Instigation of an infringement or complicity therein is not punishable.

83 A contrary and broad interpretation of Article 81(1) EC, such as that adopted by the Commission in the present case, infringes the principle of *nullum crimen, nulla poena sine lege* within the meaning of Article 7(1) of the ECHR and Article 49(1) of the Charter of Fundamental Rights of the European Union. The Eur. Court H. R. has acknowledged that Article 7 of the ECHR enshrines both that principle and the principle that the criminal law may 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 itself (*Streletz and Others* v. *Germany*, judgment of 22 March 2001, *Reports of Judgments and Decisions*, No 34044/96 inter alia, ECHR 2001-II, § 50 and the case-law cited therein).

84 The applicant maintains that the principle of *nullum crimen, nulla poena sine lege*, as a general principle of Community law, also applies to the penalty-based administrative procedure under Regulation No 17 and, in particular, to the fines provided for in Article 15(2) of that regulation. That follows clearly from both Article 6(2) EU and the case-law (Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25; *Brugg Rohrsysteme* v *Commission*, cited in paragraph 23 above, paragraphs 109 and 122; and *LR AF 1998* v *Commission*, cited in paragraph 23 above, paragraphs 209 and 210). In addition, it is a principle intrinsic to the rule of law which ensures effective protection against arbitrary prosecution and punishment (Eur. Court H. R. *Streletz and Others* v. *Germany*, cited in paragraph 83 above, § 50 and the case-law cited therein).

— The concept of perpetrator for the purposes of Article 81 EC

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, point 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 anti-competitive 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 anti-competitive 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 anti-competitive 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 *Dansk Rørindustri 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 (*Dansk Rørindustri 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.

D — *The third plea, alleging infringement of the principle of the protection of legitimate expectations*

1. *Arguments of the parties*

160 The applicant maintains that, in view of the established decision-making practice of the Commission since 1983, it could legitimately expect that the Commission would

assess its conduct in the same way as it assessed comparable conduct on the part of other consultancy firms in previous cases. Accordingly, the contested decision runs counter to the principle of protection of legitimate interests. According to the applicant, although the decisions of the Commission are binding only on those to whom they are addressed, they none the less constitute — particularly where they establish consistent decision-making practice — legal acts which are relevant to comparable situations. The possibility for the individual to rely on the continuance of a certain decision-making practice merits protection a fortiori because the application of Article 81 EC is dependent on a great number of undefined legal terms, the practical implications of which it is vital to specify through decision-making practice.

161 The applicant submits that the principle of protection of legitimate expectations, as recognised in the case-law (Case 112/77 *Töpfer and Others* [1978] ECR 1019, paragraph 19, and Case T-266/97 *Vlaamse Televisie Maatschappij* v *Commission* [1999] ECR II-2329, paragraph 71) precludes the Commission from abandoning, without warning, its own decision-making practice in relation to Article 81 EC, or from retroactively classifying as an infringement, and imposing a fine for, conduct which has hitherto been regarded as falling outside the scope of that provision. Since 1983, contrary to its approach in the Italian case glass decision, the Commission has no longer regarded as an infringement assistance provided by consultancy firms which are not party to the agreement restricting competition (see, inter alia, the cast iron and steel rolls decision of 1983; the polypropylene decision of 1986; the LdPE decision of 1988; and the cartonboard decision of 1994). Thus, at the time of its establishment at the end of 1993, the applicant could legitimately expect that the assistance provided to the three organic peroxide producers was also not classed as an infringement of Article 81(1) EC. According to the applicant, its activity did not go beyond that of other consultancy firms in the cases which gave rise to the cast iron and steel rolls decision or the cartonboard decision. Consequently, the Commission should not have held the applicant liable for an infringement of Article 81(1) EC or imposed a fine on it.

162 The Commission contends that the present plea should be rejected.

2. *Findings of the Court*

163 The Court considers that, in the light of the recognition under Community competition law of the principle that a consultancy firm which has participated in a cartel shares liability for the infringement, the principle of the protection of legitimate expectations cannot stand in the way of the reorientation of the Commission's decision-making practice in the present case. As is apparent from paragraphs 112 to 150 above, that reorientation is based on a correct interpretation of the full implications of the prohibition laid down in Article 81(1) EC. Since the interpretation of the undefined legal concept of 'agreements between undertakings' ultimately falls to be determined by the Community judicature, the Commission does not have any leeway enabling it, where relevant, to forgo bringing an action against a consultancy firm which satisfies the criteria for shared liability. On the contrary, by virtue of its duty under Article 85(1) EC, the Commission is required to ensure the application of the principles laid down in Article 81 EC and to investigate, on its own initiative, all cases of suspected infringement of those principles, as interpreted by the Community judicature. Accordingly, since — notwithstanding the Italian cast glass decision — the Commission's decision-making practice prior to the contested decision could appear to conflict with the above interpretation of Article 81(1) EC, that practice was not capable of giving rise to legitimate expectations on the part of the undertakings concerned.

164 Furthermore, as is apparent from paragraphs 147 and 148 above, the current reorientation of the Commission's decision-making practice was even more foreseeable for the applicant given the existence of a precedent, namely the Italian cast glass decision of 1980. Also, as is apparent from paragraph 163 above, the Commission's post-1980 decision-making practice could not reasonably be construed as a definitive abandonment of the initial approach followed in the Italian case glass decision. Furthermore, although, in the polypropylene decision of 1986, the Commission did not class Fides Trust as a perpetrator of the infringement, it none the less clearly censured the information exchange system established and managed by that company as being incompatible with Article 81(1) EC (the polypropylene decision, recital 106 and Article 2; see also the cartonboard decision, recital 134). In those circumstances, the Commission's post-1980 decision-making practice — which does not censure or penalise the

consultancy firms involved, but goes no further, that is to say, it does not disavow, as a matter of law, the approach initially followed in the Italian cast glass decision — was even less capable of giving rise to a legitimate expectation on the part of the applicant that the Commission would in future abstain from bringing actions against consultancy firms where they participate in a cartel.

165 The present plea must therefore be rejected as unfounded.

E — *The fourth plea raised in the alternative, alleging infringement of the principle of legal certainty and of the principle of nulla poena sine lege certa*

1. *Arguments of the parties*

166 The applicant submits that, in so far as it is concerned, the Commission's legal analysis is so vague and contradictory that it infringes the principle of legal certainty and the principle of *nulla poena sine lege certa*. The Commission refrains from indicating with the necessary clarity the parameters and limits of unlawful and punishable conduct on the part of a consultancy firm such as the applicant, and thus deprives the applicant of the legal certainty required in a society governed by the rule of law.

167 The applicant points out that the principle of *nulla poena sine lege certa*, as laid down in Article 7(1) of the ECHR and recognised as a general principle of Community

law, is a corollary of the principle of legal certainty (*X*, cited in paragraph 84 above, paragraph 25). The latter is a fundamental principle of Community law (Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 44; Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 10; and Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11), which requires, in particular, that Community legislation must be certain and its application foreseeable by those subject to it. The applicant states that the decisions of the Commission adopted under Article 81 EC, which may impose very heavy fines, must be particularly precise and certain (Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, paragraph 46), so that the undertakings concerned can review and determine their conduct in the light of and in accordance with criteria which are sufficiently clear and concrete in terms of indicating the unlawful nature of certain conduct.

168 Contrary to those requirements, in the contested decision the Commission devoted almost five pages to setting out the reasons why it considers that the applicant infringed Article 81(1) EC (recitals 331 et seq. of that decision). Nevertheless, that reasoning does not clearly show which aspects of the applicant's conduct actually fall within the scope of Article 81(1) EC, and which do not (see, inter alia, recitals 339, 343, 344 and 349 of the contested decision). The applicant adds that the Commission mistakenly alleges that it gave legal advice (recital 339 of the contested decision). Even if that were to be established, the fact of dispensing legal advice cannot be regarded as an infringement of the competition rules. In any event, the Commission cannot maintain that legal advice and supportive action given by the applicant, as described in the contested decision, collectively constitute an infringement of Article 81(1) EC when such acts do not amount to an infringement when considered individually. Otherwise, it would be impossible to predict at what precise moment a lawful act slides into illegality. Next, the applicant criticises the Commission's mode of expression in recitals 332 et seq. of the contested decision as vague, incomprehensible and contradictory as regards the applicant's alleged participation in the cartel. As regards the Commission's contention that the present plea is not autonomous, the applicant objects that, even supposing that it were guilty of an infringement of competition

law, the grounds of the contested decision do not show, with the requisite clarity and precision, which of the specific acts imputed to it constitute an infringement of Article 81(1) EC.

169 In the absence of a clear answer to the question why and how the applicant infringed Article 81(1) EC, the contested decision should be annulled for infringement of the principle of *nulla poena sine lege certa* and the principle of legal certainty.

170 The Commission contends that the present plea should be rejected in so far as it merely constitutes a repetition of the second plea.

2. *Findings of the Court*

171 It should be noted, first of all, that, in the context of the present plea, the applicant essentially raises the same arguments as in the context of the second and third pleas. It is thus sufficient to refer to the considerations set out in paragraphs 112 to 159 above in order to conclude that the contested decision contains sufficient information establishing the active and intentional participation of the applicant in the cartel, thus making it possible for the applicant to be held liable for an infringement of Article 81(1) EC, independently of the real extent of that participation in detail.

172 Even supposing that the present plea had also to be understood as alleging an infringement of the duty to give reasons under Article 253 EC, it is also apparent from those considerations that the contested decision contains all the relevant information for the purposes of making it possible for the applicant to dispute its well-foundedness and for the Court to review the lawfulness of the decision in accordance with the case-law established in that regard (see Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* [2006] ECR II-4665, paragraph 138 and the case-law cited therein).

173 Accordingly, the present plea must also be rejected as unfounded.

F — *The fifth plea, alleging that the second paragraph of Article 3 of the contested decision infringes the principle of legal certainty and the principle of nulla poena sine lege certa*

1. *Arguments of the parties*

174 According to the applicant, in the absence of a clear and precise indication of the unlawful acts imputed to it, both the legal analysis and the second paragraph of Article 3 of the contested decision are contrary to the principle of legal certainty and the principle of *nulla poena sine lege certa*. The grounds of the contested decision do not show, in a precise manner, the specific acts by virtue of which the applicant is deemed to have infringed Article 81(1) EC. Consequently, it is also impossible for the applicant to know which of its acts are concerned by the obligation laid down

in Article 3 of that decision. It follows that Article 3 infringes the 'requirement of certainty and predictability' of Community legislation, which must be observed all the more strictly in the case of rules liable to entail financial consequences, so that those concerned may know precisely the extent of the obligations thereby imposed on them (Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraphs 17 and 18; Case 325/85 *Ireland* v *Commission* [1987] ECR 5041, paragraph 18; Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24; Joined Cases 92/87 and93/87 *Commission* v *France and United Kingdom* [1989] ECR 405, paragraph 22; Case C-30/89 *Commission* v *France* [1990] ECR I-691, paragraph 23; Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 57; and Case C-177/96 *Banque Indosuez and Others* [1997] ECR I-5659, paragraph 27).

175 The lack of precision in the legal analysis and in the obligation laid down in Article 3 of the contested decision is exacerbated by the fact that, under that article, the applicant is also required to refrain from any agreement or any concerted practice with a 'similar' object or effect, and any infringement of that article may lead to the imposition of a fine, which may be very heavy by virtue of Article 15(2) of Regulation No 17. Moreover, the Commission admitted that it had addressed a 'new aspect' of law (recital 454 of the contested decision). That being so, the precision of the requirement to refrain from repeating the infringement should have to satisfy particularly strict requirements in order to enable interested undertakings to assess the true and full implications of the prohibition laid down in Article 81 EC. The ensuing legal uncertainty poses a threat to the commercial activity of consultancy firms such as the applicant, as regards the drawing up of market statistics and administering federations.

176 As regards the Commission's contention that the present plea is directed against the requirement that the infringement be brought to an end (first paragraph of Article 3 of the contested decision), the applicant states that its action concerns only

the requirement to refrain from repeating the infringement (second paragraph of Article 3 of the contested decision). The first requirement does not affect it adversely since the infringement had already ceased by the end of 1999 or the beginning of 2000 (recital 91 of the contested decision).

177 The applicant maintains that Article 3 of the contested decision should therefore be annulled in so far as it concerns the applicant.

178 The Commission contends that the present plea is unfounded and should be rejected.

2. *Findings of the Court*

179 The Court considers that the present plea constitutes merely a reformulation of the fourth plea — which also alleges infringement of the principle of legal certainty and of the principle of *nulla poena sine lege certa* — and cannot therefore be assessed differently.

180 In so far as the present plea refers to the second paragraph of Article 3 of the contested decision, it is sufficient to point out that the Commission is empowered, on the basis of Article 3(1) of Regulation No 17, to impose on the addressees of a decision taken pursuant to Article 81(1) EC a binding instruction to put an end to

the unlawful conduct and to refrain in future from practices which may have the same object or effect, or a similar object or effect (*Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in paragraph 39 above, paragraphs 1252 and 1253).

181 Accordingly, the present plea must also be rejected as unfounded.

182 It follows that the action must be dismissed as unfounded in its entirety.

Costs

183 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

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.

Jaeger Azizi Czúcz

Delivered in open court in Luxembourg on 8 July 2008.

E. Coulon M. Jaeger

Registrar President

Table of contents