



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 21 May 2015¹

Case C-194/14 P

AC-Treuhand AG

v

European Commission

(Appeal — Agreements, decisions and concerted practices — European heat stabiliser market — Price fixing, market sharing and exchange of commercially sensitive information — Decision finding infringements of Article 81 EC (now Article 101 TFEU) and Article 53 of the EEA Agreement — Decision addressed to a consultancy firm not constituting a competitive constraint on the relevant markets)

1. The rules applicable to undertakings under Articles 81 EC and 82 EC (now Articles 101 TFEU and 102 TFEU) are intended to prohibit restrictions on free competition. The identification of a restriction of competition presupposes that it has been established, following an economic analysis, that, by its conduct, the undertaking in question has fully or partially ceased to constitute a constraint — the defining feature of effective competition — for the other operators on the market or markets concerned, to the detriment, ultimately, of economic efficiency and consumer welfare. Conduct that does not restrict competition in the way described above, on the other hand, however morally or ethically reprehensible it may be, cannot be caught by the prohibitions laid down in European Union (EU) law, in particular the prohibition on agreements, decisions and concerted practices laid down in Article 81(1) EC.

2. In my view, this case provides a most appropriate opportunity to reiterate that fundamental rule.

3. By its appeal, AC-Treuhand AG ('AC-Treuhand') is seeking to have set aside the judgment of the General Court of the European Union in *AC-Treuhand v Commission*² dismissing its application for annulment of Commission Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/38589 — Heat stabilisers) ('the contested decision'),³ or, in the alternative, a reduction in the amount of the fines imposed on it.

¹ — Original language: French.

² — T-27/10, EU:T:2014:59, 'the judgment under appeal'.

³ — Summarised in *Official Journal of the European Union*, 2010, C 307, p. 9.

4. Among the questions raised by this case, one not previously addressed merits attention. The Court has been asked for the first time⁴ to determine whether a consultancy firm not trading on the relevant markets or on related markets may be the subject of proceedings for infringement of the competition rules on the ground that it facilitated the implementation of the cartel. The case thus raises an important, and still topical,⁵ issue that requires the Court to give a ruling on the scope of the prohibition on cartels laid down by the Treaty rules on competition and, thus, on the nature of conduct capable of being caught by that prohibition.

I – Background to the proceedings

5. The background to the proceedings, as set out in paragraphs 1 to 24 of the judgment under appeal, may be summarised as follows :

‘2 By the [contested] decision, the Commission ... found that a number of undertakings had infringed Article 81 EC and Article 53 of the [EEA] Agreement by participating in two sets of anti-competitive agreements and concerted practices covering the EEA and relating to, first, the tin stabilisers sector and, second, the epoxidised soybean oil and esters sector (“the ESBO/esters sector”).

...

4 According to Article 1 of the contested decision, each of those infringements consisted of price fixing, allocation of markets through sales quotas, allocation of customers and exchange of commercially sensitive information, in particular on customers, production and sales.

5 The contested decision states that the undertakings concerned participated in those infringements during various periods between 24 February 1987 and 21 March 2000, in respect of tin stabilisers, and between 11 September 1991 and 26 September 2000, in respect of the ESBO/esters sector.

6 The applicant, AC-Treuhand ..., whose principal place of business is in Zurich (Switzerland), is a consultancy firm which offers “a full spectrum of services tailored to national and international associations and interest groups”, while the contested decision also states that that company described its services as follows: “Business management and administration for Swiss and international professional associations and federations, non-profit organisations; collection, processing and assessment of market data, presentation of market statistics; audit of the reported figures at the premises of the participants” ...

...

10 The contested decision holds the applicant liable in that it played an essential and similar role in both the infringements at issue by organising meetings for the cartel participants which it attended and in which it actively participated, collecting and supplying to the participants data

4 — It should be pointed out that the judgment of the General Court of 8 July 2008 in *AC-Treuhand v Commission* (T-99/04, EU:T:2008:256, ‘the judgment in *AC-Treuhand I*’), by which the General Court ruled for the first time on the application of Article 81 EC to a consultancy firm which had contributed to the commission of an infringement, was not appealed against. It is worth noting in this regard that, although, in the case giving rise to that judgment, AC-Treuhand had been held liable for an infringement of Article 81 EC, it was fined only EUR 1 000, a purely symbolic sum compared with the amount of the fines imposed on the undertakings to which the contested decision in that case was addressed (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)).

5 — In a recent decision of 4 February 2015, the European Commission imposed a fine of EUR 14.96 million on ICAP, a financial sector broker based in the United Kingdom, for having facilitated six of the seven cartels identified in the yen-denominated interest rate derivatives sector by way of various actions which had contributed towards the anti-competitive objectives pursued by the members of those cartels. An action against that decision was brought before the General Court on 14 April 2015 (Case T-180/15, currently pending).

on sales on the relevant markets, offering to act as a moderator in case of tensions between the undertakings concerned and encouraging the parties to find compromises, for which it received remuneration ...

...

- 20 Article 1 of the contested decision holds the applicant liable for its participation in the tin stabilisers infringement from 1 December 1993 until 21 March 2000 and in the ESBO/esters infringement from 1 December 1993 until 26 September 2000.

...

- 24 Article 2 of the contested decision reads as follows:

“For the infringement(s) in the tin stabiliser sector ..., the following fines are imposed:

...

(17) AC-Treuhand is liable for: EUR 174 000;

...

For the infringement(s) in the ESBO/esters sector ..., the following fines are imposed:

...

(38) AC-Treuhand is liable for: EUR 174 000;

...”

II – Procedure before the General Court and the judgment under appeal

6. By application lodged at the Registry of the General Court on 27 January 2010, the applicant sought the annulment of the contested decision or, in the alternative, a reduction in the amount of the fines imposed on it.

7. In support of its action, the applicant raised nine pleas in law, which the General Court, having noted the applicant’s withdrawal of the ninth plea, summarised as follows in paragraphs 36 and 268 of the judgment under appeal:

- ‘36 With a view to securing the annulment of the contested decision, the applicant puts forward four pleas and also the first part of a fifth plea, alleging, first, infringement of Article 81 EC and breach of the principle that offences and penalties must be defined by law (third plea); second, that the Commission’s power to impose fines was time-barred, in application of Article 25(5) of Regulation No 1/2003 (second plea); third, breach of the rights of the defence owing to the late notification of the investigation procedure initiated against it (eighth plea); fourth, breach of the “reasonable time” principle owing to the duration of the administrative procedure (seventh plea) and, fifth, infringement of Article 23(2) of Regulation No 1/2003 (first part of the sixth plea).

...

268 In support of its alternative claims for variation of the contested decision as regards the amount of the fines imposed on it, the applicant puts forward four pleas and also the second part of a fifth plea, based, first, on error of assessment as to the duration of the infringements (first plea); second, on the duration of the administrative procedure (seventh plea); third, on the Commission's obligation to impose only a symbolic fine in the circumstances of the present case (fourth plea); fourth, on breach of the 2006 Guidelines with respect to the calculation of the basic amount of the fine (fifth plea); and, fifth, on breach of those Guidelines as regards the calculation of the applicant's ability to pay (second part of the sixth plea).'

8. Having rejected all the pleas in law put forward, the General Court dismissed the action in its entirety.

III – Forms of order sought and procedure before the Court of Justice

9. By its appeal, the appellant claims that the Court should:

- set aside the judgment under appeal;
- annul the contested decision in so far as it concerns the appellant or, in the alternative, reduce the fines imposed on it;
- in the further alternative, refer the case back to the General Court;
- order the Commission to pay the costs of the proceedings before the General Court and the Court of Justice.

10. The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

11. The parties set out their positions in writing and presented oral argument at the hearing on 4 March 2015.

IV – Analysis of the appeal

12. In support of its action, the appellant raises four grounds of appeal, alleging, respectively, (I) infringement of Article 81 EC and breach of the principle that offences and penalties must be defined by law, as enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), inasmuch as the General Court held that the acts in which the appellant had engaged constituted an anti-competitive agreement, (II) breach of the latter principle and of the principle of equal treatment and the obligation to state reasons in so far as concerns the imposition of fines, (III) infringement of Article 23(2) and (3) of Regulation (EC) No 1/2003⁶ and of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003⁷ and (IV) infringement of Article 261 TFEU and Article 23(3) and Article 31 of Regulation No 1/2003 in so far as concerns the exercise by the General Court of its unlimited jurisdiction.

6 — Council Regulation of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

7 — OJ 2006 C 210, p. 2, 'the 2006 Guidelines'.

13. As I indicated in the introduction to this Opinion, the first ground of appeal raises a question of principle on which I will focus my analysis after briefly setting out the arguments put forward by each of the parties with specific respect to this ground of appeal. The question that arises is whether a company not trading on the market forming the subject of a cartel may constitute, in relation to that cartel, an undertaking which has participated in an anti-competitive agreement within the meaning of Article 81 EC and may, therefore, be found to have infringed that provision and, where appropriate, be ordered to pay a fine on that account.

A – Arguments of the parties

14. The first ground of appeal concerns paragraphs 43 to 45 of the judgment under appeal, by which the General Court rejected the third plea in law raised by the applicant at first instance, as well as a number of paragraphs from the judgment in *AC-Treuhand I* to which the judgment under appeal refers.

15. The *appellant* criticises the General Court for having held, on the one hand, that Article 81 EC could apply to its conduct and, on the other hand, that such a broad interpretation was reasonably foreseeable at the time of the facts constituting the infringement. Consequently, it submits, the General Court infringed Article 81 EC and failed to take into account the requirements of precision and foreseeability arising from the principle that offences and penalties must be defined by law (*nullum crimen, nulla poena sine lege*), enshrined in Article 49(1) of the Charter.

16. In that context, the appellant argues, first of all, that the judgment of the European Court of Human Rights in *A. Menarini Diagnostics S.r.l. v. Italy* of 27 September 2011 clearly established that procedures entailing the imposition of fines under anti-trust law are in the nature of criminal law. It is therefore appropriate to apply the high level of protection afforded by the criminal-law principle that offences and penalties must be defined by law. The appellant also argues that the Court of Justice itself⁸ takes the view that the requirement of legal clarity is imperative in a sector where, like that at issue here, particularly serious penalties are likely to be imposed.

17. Next, the appellant argues that it is not itself party to an agreement or a concerted practice within the meaning of Article 81 EC.

18. The appellant submits that it is clear from the wording of that article that the mere act of lending assistance to a cartel does not fall within the scope of that provision, since it is directed only at the parties to the agreement or concerted practice themselves. In this instance, the anti-competitive agreement consisted of a cartel among producers designed to fix prices and share and allocate delivery quotas and customers. The appellant's conduct is not capable of being classified as participation in such a convergence of wills, since it was geared exclusively towards supplying services to the cartel in question. According to the case-law of the Court, the existence of an agreement presupposes the concurrence of wills of at least two parties.⁹

19. The appellant also argues that, according to the Court's case-law, the existence of an agreement requires a common intention to behave on the market in a specific way. In this case, however, the service contracts concluded between the appellant and each of the producers lacked the market connection required by the Court. There is no direct link between those contracts and the restriction of competition identified, which was the result exclusively of the agreement between the producers. Moreover, the appellant was not active on markets upstream of, downstream from, or neighbouring the markets affected by the cartel.

8 — Judgment in *Commission v United Kingdom*, 32/79, EU:C:1980:189, paragraph 46.

9 — Judgments in *Commission v Anic Participazione* (C-49/92 P, EU:C:1999:356, paragraph 79) and *Commission v Volkswagen* (C-74/04 P, EU:C:2006:460, paragraph 37).

20. The appellant also considers that it cannot be accused of having participated in a ‘concerted practice’. It did not relinquish or restrict its autonomous conduct on the market following coordination or cooperation with the producers, as case-law requires.

21. The appellant further submits that its ‘collusion’ could, at most, have been penalised, in accordance with the requirements of the principle that offences and penalties must be defined by law, if, at the time of the cartel, there had been a body of settled case-law from which it would have been possible to infer with sufficient clarity that an offence had been committed.¹⁰ It points out, however, that, before the judgment in *AC-Treuhand I*, there was no case-law to that effect. Furthermore, it follows both from that judgment and from the Commission decision giving rise to that judgment¹¹ that the fact that the Commission chose to take action against a consultancy firm constituted a reorientation of its previous decision-making practice.

22. Finally, the appellant expresses the view that considerations of expediency in matters of competition must not have as their consequence that the principle that offences and penalties must be defined by law is disregarded by means of a broad interpretation of Article 81(1) EC. The only question in the present case is whether the services of assistance provided by the appellant are punishable under Article 81(1) EC, not whether they deserve to be punished.

23. The *Commission* considers that the first ground of appeal must be rejected as unfounded.

24. It argues, first of all, that the principle that offences and penalties must be defined by law enshrined in Article 49(1) of the Charter encompasses the principle of *nulla poena sine lege certa*, the prohibition on reasoning by analogy and the principle of non-retroactivity. None the less, since the combined provisions of Article 23(2) of Regulation No 1/2003 and Article 81 EC do not form part of the ‘hard core’ of criminal law, the principles of criminal law do not necessarily have to be applied with full stringency here. That proposition does not contradict the judgment in *A. Menarini Diagnostics S.r.l. v. Italy* cited above, since that judgment classified the procedure for imposing fines under anti-trust law as being administrative in nature before noting that the penalties imposed may be akin to criminal-law measures.

25. In any event, the Commission submits, the principle of *nulla poena sine lege certa* and the prohibition on reasoning by analogy do not preclude a gradual clarification by case-law of the precise content of the rules of criminal law. Furthermore, although the principle of non-retroactivity may preclude the retroactive application of a new and not reasonably foreseeable interpretation of a rule of criminal law, the question whether an interpretation is foreseeable depends, inter alia, on the content of the rule in question, the field in which it applies and the persons to whom it is addressed. Moreover, where a rule of criminal law already satisfies the principle of *nulla poena sine lege certa* as a result of the clarity of its wording, there is no need to resort to interpretative case-law in order to ensure that that principle is observed.¹²

26. Next, the Commission contends that the appellant’s arguments, which seek to obtain an excessively restrictive interpretation of the criterion of ‘an agreement between undertakings’ laid down in Article 81 EC, cannot be accepted, since the targeted transfer of functions from a cartel to a service-providing undertaking for the purposes of ensuring the effective implementation of the cartel falls squarely within the prohibition contained in that provision.

10 — Judgment in *Evonik Degussa v Commission*, C-266/06 P, EU:C:2008:295.

11 — Decision 2005/349.

12 — Judgment in *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 217 et seq.

27. In this regard, the Commission argues, first, that the wording of Article 81 EC is very broad and may include any concurrence of wills or any coordinated or collusive conduct on the part of at least two undertakings.¹³ Since the services provided by the appellant operated objectively and subjectively to lend support to two cartels on the markets in heat stabilisers, there is between the appellant and the other members of the cartels a concurrence of wills as required for the existence of an agreement.

28. Secondly, it makes little difference whether the restriction of competition on the markets in heat stabilisers constitutes the main objective or an ancillary aim of the appellant's conduct, or whether or not there is a direct link between that conduct and the restriction of competition. Although an 'agreement' is regularly described by case-law as the 'joint intention to behave on the market in a specific way', this none the less does not mean that the required concurrence of wills must necessarily represent for all the parties a market-related objective or that it must be directed towards restricting the freedom of action of all the parties. Nor does it make any difference that the appellant did not trade either on the markets covered by the cartel or on neighbouring or emerging markets, since its collusive services operated objectively and subjectively to restrict competition through the heat stabiliser cartels.

29. Thirdly, as regards the question whether the interpretation adopted was reasonably foreseeable by the appellant at the time of the cartel, the Commission argues that, in a decision adopted as long ago as 1980,¹⁴ that is to say before the start of the infringements at issue in this case, it found that collusive services provided by a management company infringed Article 81 EC.

30. Fourthly, the Commission submits that, relying on the purpose and the protective intention of competition law, the General Court, far from extending the application of Article 81 EC beyond the limits of its wording, decided, on the contrary, against a teleological restriction of that provision and did not err in law in setting out considerations relating to the practical Article 81 EC.

B – Assessment

31. The examination of the first ground of appeal prompts two questions.

32. The first is whether Article 81(1) EC may be applied to an undertaking which, like the appellant, is not active on the relevant market or on related markets and which has not, *sensu stricto*, concluded an anti-competitive agreement or engaged in concerted practices on those markets.

33. The second, which is contingent on the first and makes sense only if it were to be concluded that the appellant's conduct is caught by the prohibition contained in Article 81(1) EC, seeks to determine whether, in this instance, the appellant could reasonably have foreseen that the prohibition contained in Article 81(1) EC was in principle applicable to it.

34. For the reasons which I will set out below, I am firmly of the opinion that the first question should be answered in the negative — and that there is therefore no need to answer the second question. I will first look at the scope to be given to Article 81(1) EC and then go on to consider the very specific situation of the appellant.

13 — Judgment in *Consten and Gründig v Commission*, 56/54 and 58/64, EU:C:1966:41.

14 — Commission Decision 80/1334/EEC of 17 December 1980 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.869 — Italian cast glass) (OJ 1980 L 383, p. 19).

1. The scope of the prohibition on cartels laid down in the Treaties: the prohibition on collusive conduct shown, on the basis of economic analysis, to have a restrictive impact on competition

35. It is, in my view, worth recalling that the assertion that it is possible to penalise an undertaking in the appellant's situation is justified by the General Court, in paragraphs 43 and 44 of the judgment under appeal, by reference to the considerations on which it relied in the case which had given rise to the judgment in *AC-Treuhand I*.

36. By that judgment, the General Court endorsed the principle that AC-Treuhand was liable for an infringement of Article 81(1) EC. The conduct of which the appellant stood accused was very similar to that at issue in this case. It was claimed that it had played a key role in the organic peroxides cartel by organising meetings between producers, storing certain secret documents relating to the cartel, collecting and processing certain figures and carrying out certain logistical and secretarial functions associated with the organisation of meetings.

37. The reasons given by the General Court in the judgment in *AC-Treuhand I* are, in essence, as follows.

38. First, the term 'agreement' in Article 81 EC should be understood broadly. The presence of a 'joint intention' to behave on the market in a specific way is sufficient and it is not necessary for the relevant market on which the undertaking which is the 'perpetrator' of the restriction of competition is active to be exactly the same as that on which that restriction is deemed to come about. Any conduct coordinated with that of other undertakings the purpose of which is to restrict competition on a relevant market is thus capable of infringing the prohibition laid down in Article 81(1) EC (see paragraphs 117 to 122 of the judgment in *AC-Treuhand I*).

39. Secondly, it is not to be ruled out that an undertaking may participate in the implementation of a restriction of competition 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 practical effect, since proceedings against an undertaking for actively contributing to a restriction of competition could be blocked (see paragraphs 124 to 128 of the judgment in *AC-Treuhand I*).

40. Thirdly, in order to establish that an undertaking has participated in a cartel and to hold it liable for such conduct, it is sufficient for the Commission to show that the undertaking intended, through its own conduct, even in a subsidiary, accessory or passive role, to contribute to the common objectives pursued, and that the undertaking in question was aware of the substantive conduct planned or implemented by other undertakings or that it could reasonably have foreseen that conduct and that it was ready to accept the attendant risk. 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 (see paragraphs 129 to 136 of the judgment in *AC-Treuhand I*).

41. Fourthly and finally, the General Court held, in paragraph 164 of the judgment in *AC-Treuhand I*, that the practice followed by the Commission for more than 20 years, whereby it simply refrained from censuring or penalising consultancy firms involved in cartels, without ruling out the possibility that such firms might be held liable for infringement, could not give rise to a legitimate expectation that the Commission would in future abstain from bringing an action against and penalising consultancy firms when they participate in a cartel. The fact that the amount of the fine imposed in that case was very small is not decisive for the present case, for, as the Commission correctly observes, that fine served to penalise entities, in particular consultancy firms, which the Commission had previously decided not to penalise for any involvement in cartel activities.

42. To my mind, those considerations, all of which serve to support the argument that Article 81 EC ultimately attaches few limits to the nature of collusive conduct capable of being caught by the prohibition laid down in paragraph 1 of that article, disregard entirely the scope of that prohibition and the objective it seeks to attain.

43. Article 81(1) EC provides 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*'.¹⁵

44. At the risk of stating what in many respects might seem obvious, Article 81 EC, like Article 82 EC, lays down a number of rules addressed to *undertakings* with a view to prohibiting conduct which has been shown, or, on the basis of economic analysis, may legitimately be presumed, to have an adverse effect on competition.

45. The overall objective of the competition rules is to ensure that the effects of freedom of competition, which are the counterpart of the opening up of markets, are not distorted by measures, in the broadest sense of that term, which have the consequence of favouring or putting at a disadvantage certain undertakings and, ultimately, operate to the detriment of consumers.

46. Whether such conduct is regarded as having an anti-competitive object or, conversely, an anti-competitive effect, the prohibition on the conduct referred to in the Treaty rules directed at undertakings is based on the idea that such conduct has harmful effects on the proper functioning of normal competition.

47. In order for an undertaking to be held liable for an infringement of Article 81(1) EC, it must be determined to what extent it has colluded with other undertakings with a view to ceasing to be a competitive constraint for them.

48. In this regard, the Court pointed out at a very early stage the need for an economic analysis taking into account, in particular, the position and importance of the parties on the market in the goods or services in question.¹⁶ With regard to the methodology for identifying collusive conduct the object of which is anti-competitive, the Court recalled only very recently the importance to be attached to economic analysis and experience¹⁷ for the purposes of identifying competitive constraints on undertakings.

49. Similarly, both the Commission¹⁸ and the Court have repeatedly stated that, in order for the provisions of the Treaty prohibiting anti-competitive cartels to be applicable, the position of third parties 'on the market' must be appreciably affected.

15 — Emphasis added.

16 — See the judgment in *LTM*, 56/65, EU:C:1966:38, which, while pointing out that Article 85(1) of the EC Treaty (now Article 81(1) EC) made no distinction as to whether the parties are at the same level in the economy (so-called 'horizontal agreements') or at different levels (so-called 'vertical agreements'), stated that the competition alleged to have been harmed must be understood within the actual context in which it would occur in the absence of the agreement in issue (see, in particular, pp. 249 and 250 of the judgment).

17 — See the judgment in *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51.

18 — See, inter alia, Section I.2. of the Commission Notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community (OJ 1986 C 231, p. 2), according to which 'only those agreements are prohibited which have an appreciable impact on market conditions, in that they appreciably alter the market position, in other words, the sales or supply possibilities, of third undertakings and of users'. The Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [EC] (the *De Minimis* Notice) (OJ 2001 C 368, p. 13) sets out similar criteria in Section I and states, inter alia, that '[t]he Court of Justice ... has clarified that [Article 81(1) EC] is not applicable where the impact of the agreement on trade between Member States or on competition is not appreciable'.

50. In order to be caught by the prohibition laid down by the Treaties in that regard, the conduct by undertakings referred to in the Treaties must therefore at the very least be *liable to eliminate a constraint or a barrier which in principle exists on the market*. Although it ultimately makes little difference what means undertakings actually employ,¹⁹ those means must none the less create economic pressure such as to restrict competition.²⁰

51. In other words, in order to be a party to a cartel the object or effect of which is to restrict competition, the undertaking in question must also be under normal market conditions, a competitive constraint for the other cartel members. It is only where the undertaking in question represents a competitive pressure worth constraining that it is capable of constituting such a constraint.

52. It is from this point of view that the definition of the relevant market is of central importance when it comes to applying both Article 82 EC and Article 81(1) EC. While the definition of the relevant market is rarely a matter of dispute when it comes to applying Article 81 EC, its purpose is none the less to identify systematically the constraints that competition imposes on the undertakings in question.²¹

53. In this regard, while it is true to say that EU competition law does not require that all participants in a cartel should be engaged in economic activity on the market affected by the cartel, it does, on the other hand, require a determination as to how the contested agreement has the object or effect of restricting competition on a specific relevant market.

54. The question is not only whether undertakings capable of entering into a cartel prohibited under Article 81 EC may operate on separate markets, but also whether they are able to constitute competitive constraints for each other. While it is true that the competition mentioned in Article 81(1) EC means not only any possible competition between the parties to the agreement, but also any possible competition between one of them and third parties,²² the entity in question must also have been able to receive or give commitments of an anti-competitive nature.

55. To my mind, that requirement follows not only from a teleological interpretation of Article 81(1) EC but also from the relevant case-law developed by the Court, in particular as regards restrictions of a vertical nature since the judgment in *Consten and Grundig v Commission*.²³ The Court, while recalling that Article 85 of the Treaty (now Article 81 EC) refers generally to all agreements which distort competition within the common market and does not make any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels, indicated, in the further course of its reasoning, the extent to which the conduct at issue in that case, namely exclusive concession agreements between a grantor and its concessionaire, could have the effect of restricting competition in respect of the products concerned between the concessionaires and their third party competitors. The situation created by those agreements had the effect, inter alia, of partitioning the national markets for the products in question and made it possible to charge for those products prices that were sheltered from effective competition.

19 — In this regard, it is well established that Article 81 EC covers very diverse forms of collusion — which manifest themselves in agreements of varying degrees of formality or even in concerted practices not ratified by any agreement as such. It is thus sufficient that the anti-competitive conduct in question should 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 (see, inter alia, the judgment in *Commission v Volkswagen*, C-74/04 P, EU:C:2006:460, paragraph 37).

20 — Opinion of Advocate General Mayras in *Suiker Unie and Others v Commission* (40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:78).

21 — See in this regard the judgment in *Erste Group Bank and Others v Commission* (C-125/07 P, C-133/07 P and C-137/07 P, EU:C:2009:576, paragraph 60).

22 — Judgment in *Italy v Council and Commission* (32/65, EU:C:1966:42).

23 — 56/64 and 58/64, EU:C:1966:41, p. 339.

56. I will examine the situation at issue in this case in the light of those considerations.

2. Application to the present case

57. In this instance, the Court is asked to resolve the question of whether Article 81 EC may be applied to the conduct of ‘cartel facilitators’, that is to say operators which help to implement an agreement restricting competition, inter alia, by organising meetings between competitors and providing services in connection with anti-competitive agreements.

58. In paragraph 381 of the contested decision, the Commission described the role played by the appellant as follows:

‘Based on the facts mentioned in recitals 356 to 359, AC-Treuhand played a significant role in the organisation and conduct of the meetings. AC-Treuhand had a precise knowledge of the anti-competitive arrangements and in fact, drafted and disseminated in a very professional way all the information on prices, quotas and customers. It was entrusted with the power to conduct audits with the cartel participants. Only the data ultimately approved by AC-Treuhand became the basis of negotiations and arrangements. AC-Treuhand made available its location to conceal the cartels. In both cartels, its role was that of preventing the detection of both infringements. As moderator, its role was that of encouraging compromises with a view to concluding the anti-competitive agreements. AC-Treuhand provided its services, its professional expertise and infrastructure to both cartels in order to benefit from them ...’.

59. It should be noted that, although the allegations against the appellant relate to conduct involving a variety of activities, its role has not been legally and clearly identified as being that of a perpetrator (participant) or even that of an accomplice (or facilitator).²⁴

60. Described in this way, the appellant’s situation prompts the question, first of all and by extension from what has been said above, as to whether an undertaking not present on the market or on a neighbouring market may have proceedings instituted against it as the perpetrator of an infringement of Article 81(1) EC and, next, whether proceedings may conceivably be instituted against such an entity for colluding in anti-competitive conduct.

a) Can a company not trading on the relevant market or on related markets be the *perpetrator* of an infringement of the prohibition on cartels?

61. As I mentioned above, Article 81(1) EC prohibits only agreements and concerted practices which have the object or effect of restricting competition.

62. In order to have the capacity to restrict competition, the person or entity proceeded against must be able, under normal circumstances, to constitute, for the operators present on the market, a competitive constraint which can be eliminated or reduced through collusion.

63. Consequently, irrespective of whether the undertaking in question operates on the same market or at the same level as the members of the cartel, it is necessary to determine the extent to which competition on the market for the products concerned has potentially been restricted or eliminated as a result of that undertaking’s participation.

²⁴ — Recital 668 to the contested decision, concerning the determination of the amount of the fines, none the less states that AC-Treuhand was held liable for its ‘direct participation’ in the cartels in the periods in question.

64. In this instance, there can scarcely be any doubt that AC-Treuhand may broadly be classified as an undertaking, in the sense that it constitutes an economic entity consisting in a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis. As stated in paragraph 6 of the judgment under appeal, it is indeed a company pursuing an economic activity, consisting, *inter alia*, in the offering of services on the consultancy market.²⁵

65. It is clear, however, that, in this case, AC-Treuhand cannot be considered to be an undertaking active on the relevant market or a related market. In the situation at issue here, it acted in its capacity as a consultant but it did not give or receive any anti-competitive commitments. It is not, even potentially, active on the relevant markets, which are markets for very specific products, that is to say heat stabilisers of a certain type, and is active only in its own field of activity, namely the provision of consultancy services.

66. It would appear that the only agreements to which AC-Treuhand may be a party are the agreements for the provision of services which it concluded with the undertakings participating in the heat stabilisers cartel. It cannot, however, be considered to be a full member of the cartel identified in Article 1 of the contested decision, that is to say a set of agreements and concerted practices relating to specific heat stabilisers and consisting, in essence, in price-fixing, allocation of markets and customers and the exchange of commercially sensitive information.

67. The object of the agreements concluded between AC-Treuhand and the undertakings trading on the market was simply to supply services which were, it is true, connected with the implementation of the cartel but which, as such, are separate from the conduct for which the cartel members are censured.

68. Moreover, the Commission has not claimed, or still less proved, that AC-Treuhand constituted a constraint which is exerted, in principle, by competition, on the members of the cartel. Since it did not constitute such a constraint for the members of the cartel identified in the heat stabilisers sector, AC-Treuhand's conduct could not, as such, restrict competition or, therefore, be caught by the prohibition on cartels contained in Article 81(1) EC.

69. Even if it had been established that the action taken by AC-Treuhand had a positive effect on the operation of the cartel, by making it more effective and concealing it, the effects of that action on competition stem *exclusively* from the conduct of the cartel members. Here again, if AC-Treuhand does not, under normal circumstances, constitute a constraint which is exerted by competition on the undertakings at issue, its action is not such as to restrict competition.

70. Consequently, however general the terms used in the Treaty may be, agreements which do not themselves have as their object or effect the restriction of competition, but which relate to services intended to make it easier for the parties to an agreement that *is* restrictive of competition to engage in unlawful conduct, cannot be said to be caught by the prohibition contained in Article 81(1) EC.²⁶ The mere intention of an undertaking to restrict competition is not sufficient if that undertaking does not have the capacity actually to impose such a restriction.

25 — See to that effect, *inter alia*, the judgment in *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 47 and the case-law cited.

26 — As the Court pointed out at a very early stage, although the generality of the words used in the Treaty is evidence of an intention to include without distinction all the categories of agreements, the restrictive nature of Article 81(1) EC is incompatible with an extension of the prohibition for which it provides beyond the three categories of agreement exclusively enumerated therein (see the judgment in *Parke, Davis and Co.*, 24/67, EU:C:1968:11, page 71).

71. A decision by the Court to adopt the approach advocated by the Commission in the present case and endorsed by the General Court would seriously upset the methodology used to identify the anti-competitive conduct contemplated by the Treaties. To my mind, it would remove the connection between the conduct in question and the need to identify a restriction of competition, within the economic meaning of that term, in such a way as to render entirely superfluous the delimitation of the relevant market and the identification of the constraints imposed, in principle, on that market.

72. The removal of that connection could prove problematical not only when detecting collusive conduct falling within the scope of Article 81(1) EC, but also, by analogy, in cases of abuses of a dominant position caught by the prohibition in Article 82 EC. After all, there is no reason why the conduct of a facilitator, consisting, for example, in the provision of strategic advice or economic expertise, may not also be penalised under Article 82 EC.

73. For the purposes of applying Article 81 EC, for example, it might thus be sufficient to establish that an undertaking has, to a greater or lesser extent, facilitated or assisted undertakings having engaged in collusive conduct on a given market, without there being any need, irrespective of its presence or otherwise on that market, for it to have actually been able to exert any kind of competitive pressure on undertakings operating or wishing to operate on that market, that is to say without assessing the economic power of the cartel.²⁷ By the same token, one or more trading partners might be accused of having participated in an abuse of a dominant position without any examination being carried out as to whether it actually held such a position on a clearly defined market and whether it was actually able to restrict competition on a given market.

74. In endorsing the conclusion arrived at by the Commission in this regard, the General Court failed, in my view, to have regard to the terms of Article 81(1) EC, read in the light of the principle that offences and penalties must be defined by law.

75. In those circumstances, there is in principle no need, as the Commission submits, to determine whether the appellant could reasonably have foreseen that the prohibition contained in Article 81(1) EC was in principle applicable to it.

76. In the light of all the foregoing considerations, I take the view that the Commission was not entitled to hold AC-Treuhand directly liable for an infringement of Article 81(1) EC.

77. Could it be held liable on any another ground? That is what I propose to examine below.

b) Can a company not constituting a competitive constraint for the members of a cartel be an *accomplice* to an infringement of the prohibition on cartels?

78. Although a company such as AC-Treuhand cannot, in my opinion, be held liable as the principal perpetrator, since it was not active on the relevant market or markets linked to the cartel, the question remains as to whether it may be held liable for collusion, it being understood that, unlike in the judgment in *AC-Treuhand I* (see, inter alia, paragraph 133), neither the contested decision nor the judgment under appeal makes any express reference to liability on that ground.

79. At first sight, this is a compelling idea. Collusion is generally understood to be any contribution towards the commission of an infringement, inter alia by aiding or assisting the perpetrator of that infringement. In that context, an accomplice is, in the criminal law of a good number of Member States, any person who, while not satisfying the constituent elements of the offence, has, through positive and, most commonly, intentional conduct, aided or facilitated the commission of that offence.

²⁷ — For an illustration of that risk see, inter alia, the judgments in *Deltafina v Commission* (T-29/05, EU:C:2010:355, paragraph 45 et seq.) and *Gütermann v Commission* (T-456/05 and T-457/05, EU:T:2010:168, paragraph 53).

80. The acts of which AC-Treuhand stands accused (organising meetings, distributing and storing documentation, measures of assistance and various actions designed to conceal the cartel) could, on the face of it, fall within that classification, since that company's conduct clearly consisted in assisting the cartel members in setting up and implementing the cartel.

81. The fact remains, however, that, since the conduct deemed objectionable in this case has not been precisely identified and classified, such a conclusion is not readily conceivable. In this regard, moreover, it has not at any point been argued that the role played by AC-Treuhand was secondary or ancillary to that played by the cartel members to whom the contested decision is addressed.

82. Furthermore, and most importantly, although, to my knowledge, there is an almost unanimous consensus on the distinction applicable in the field of criminal justice between the 'perpetrator' of, and the 'accomplice' to, an offence, such a distinction seems to me to be largely unknown in the sphere of administrative law. As the Court has confirmed on numerous occasions, albeit, perhaps, controversially, European Union competition law is administrative in nature. Recourse to the concept of collusion does not therefore, in principle, make sense in this context. In the law of the Member States, while there are many situations where consideration has been given to the possibility of penalising persons or entities that have assisted in the commission of an infringement of the competition rules, the examples I have been able to find are rare, involve specific provisions of national law²⁸ or flow directly from the judgment in *AC-Treuhand I*.²⁹

83. In any event, such an offence is not provided for in the text of Article 81 EC or in the rules adopted to implement it.

84. In the light of all the foregoing considerations, it is my view that, as EU law currently stands, there is no legal basis for instituting proceedings against AC-Treuhand under Article 81(1) EC.

85. That does not rule out the possibility that the collusion of which AC-Treuhand stands accused may in future be penalised on the basis of a specific provision.

86. In that regard, it seems worth pointing out that, in certain Member States, the legislature has chosen to adopt specific rules, more often than not within the sphere of criminal law, enabling penalties to be imposed for conduct as a 'facilitator'. In my view, the United Kingdom provides a good illustration of the intrinsic limits of the competition rules for dealing with actions entailing the provision of assistance to persons engaged in anti-competitive conduct, since it was as a result of the creation of a specific (criminal cartel) offence in Section 188 of the Enterprise Act 2002,³⁰ which came into force in June 2003, that the decision was taken to penalise a facilitator in the 'Marine Hose Cartel'.³¹

28 — See, inter alia, a judgment of the cour d'appel de Paris (Paris Court of Appeal) of 26 September 1991 in which consideration was given to the possibility of penalising a lawyer for giving legal advice relating to a concerted practices mechanism while at the same time considering that advice to be legally privileged. It should be noted first, that Article L.420.1 of the French Commercial Code, which concerns cartels, does not require as a condition for its application that the parties should be undertakings and, second, that Article L.420.6 of that Code provides for the possibility of imposing a penalty in the form of a fine or a custodial sentence on 'any natural person who fraudulently plays a personal and decisive role in the conception, organisation or implementation of the [anti-competitive] practices referred to in Articles L.420-1 and L.420-2'.

29 — The Nederlandse Mededingingsautoriteit (Netherlands competition authority), now the Autoriteit Consument & Markt (Authority for Consumers and Markets), on 12 June 2009, penalised an engineering company for its role as a facilitator in the paints sector (<https://www.acm.nl/en/publication/publication/6366/Nma-imposes-fine-on-two-cartels-and-cartel-facilitator-in-Dutch-painting-industry/>). More recently, it imposed a fine of EUR 5 000 on a facilitator in the agricultural sector (<https://www.acm.nl/en/publication/publication/6749/NMa-fines-two-cartels-in-agricultural-industry/>).

30 — That Section provides as follows: 'An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings.'

31 — Under the decision adopted by the UK Office of Fair Trading, a number of individuals were sentenced to terms of imprisonment of up to three years for having participated in that cartel.

87. To my mind, it is for the EU legislature alone to make provision for an offence aimed at those who collude in infringements of competition law. I am at pains to emphasise in this regard that the desire on the part of the institutions to ensure the effectiveness of the policies they intend to pursue must be reconciled with the requirements of the principle that offences and penalties must be defined by law, and the principle of legal certainty. As one writer has pointed out, principle of ‘effect utile’ must not prompt the Court to interpret Treaty provisions in such a way as to give maximum scope to the powers of the institutions, but must enable the relevant rules to be interpreted in accordance with their aim and their purpose.³²

88. For all the reasons set out above, I take the view that the first ground of appeal is well founded and that the judgment under appeal must be set aside, there being no need to rule on the other grounds of appeal.

89. Since, in my view, the case has reached a stage permitting a final decision, I would also suggest that the Court annul the contested decision in so far as it relates to AC-Treuhand.

V – Conclusion

90. In the light of the foregoing considerations, I propose that the Court:

- (1) set aside the judgment of the General Court of the European Union of 6 February 2014 in *AC-Treuhand v Commission* (T-27/10, EU:T:2014:59);
- (2) annul Commission Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/38589 — Heat stabilisers) in so far as it relates to AC-Treuhand AG;
- (3) order the European Commission to pay the costs of the proceedings at first instance and the appeal proceedings.

32 — See P. Pescatore, ‘Monisme et dualisme et ‘effet utile’ dans la jurisprudence de la Court de Justice de la Communauté européenne’, in *Une communauté de droit*, 2003, p. 340.