Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

22 October 2015*

(Appeal — Competition — Agreements, decisions and concerted practices — European tin stabiliser and ESBO/esters heat stabiliser markets — Article 81(1) EC — Scope — Consultancy firm not operating on the relevant markets — Definition of 'agreement between undertakings' and 'concerted practice' — Calculation of the amount of fines — The 2006 Guidelines on the method of setting fines — Unlimited jurisdiction)

In Case C-194/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 17 April 2014,

AC-Treuhand AG, established in Zurich (Switzerland), represented by C. Steinle, I. Bodenstein and C. von Köckritz, Rechtsanwälte,

applicant,

the other party to the proceedings being:

European Commission, represented by H. Leupold, F. Ronkes Agerbeek and R. Sauer, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça (Rapporteur), A. Arabadjiev, C. Lycourgos and J.-C. Bonichot, Judges,

Advocate General: N. Wahl,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 4 March 2015,

after hearing the Opinion of the Advocate General at the sitting on 21 May 2015,

gives the following

* Language of the case: German.

Judgment

1 By its appeal, AC-Treuhand AG ('AC-Treuhand') seeks to have set aside the judgment of the General Court of the European Union of 6 February 2014 in Case T-27/10 (EU:T:2014:59) ('the judgment under appeal'), by which that court dismissed its action 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 (COMP/38589 — Heat Stabilisers) ('the contested decision') or, in the alternative, a reduction of the fines imposed on it by that decision.

Legal context

Regulation (EC) No 1/2003

2 Under the heading 'Fines', Article 23 of 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) states in paragraphs 2 and 3 thereof as follows:

'2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [81 EC] or Article [82 EC]; …

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

…

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

3 Article 31 of Regulation No 1/2003, entitled 'Review by the Court of Justice', is worded as follows:

'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

The 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

4 Points 4 to 6, 13, 36 and 37 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines') state as follows:

'4. … Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles [81 EC] and [82 EC] (general deterrence).

5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. …

6. The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. …

…

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates [such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products] in the relevant geographic area within the [European Economic Area (EEA)]. ...

…

36. The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.

37. Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology …'

Background to the dispute

5 By the contested decision, the Commission found that a number of undertakings had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) by participating in a set of anticompetitive agreements and concerted practices covering the EEA and relating to, first, the tin stabiliser sector and, second, the epoxidised soybean oil and esters sector ('the ESBO/esters sector').

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

7 AC-Treuhand, whose principal place of business is in Zurich, is a consultancy firm which offers a range of services to national and international associations and interest groups, including business management and administration for Swiss and international professional associations and federations and non-profit organisations, the collection, processing and assessment of market data, presentation of market statistics and the audit of the reported figures at the premises of the participants.

8 Article 1 of the contested decision found AC-Treuhand liable for having participated, between 1 December 1993 and 21 March 2000, in the tin stabilisers sector and, between 1 December 1993 and 26 September 2000, in the ESBO/esters sector, in a series of agreements and concerted practices within the EEA consisting 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.

9 The Commission held AC-Treuhand liable in that it played an essential and similar role in both the infringements at issue by organising a number of meetings which it attended and in which it actively participated, collecting and supplying to the producers concerned data on sales on the relevant markets, offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises, for which it received remuneration.

10 Article 2 of the contested decision imposed two fines on AC-Treuhand, both in the sum of EUR 174 000.

The procedure before the General Court and the judgment under appeal

11 By application lodged at the Registry of the General Court on 27 January 2010, AC-Treuhand sought the annulment of the contested decision or, in the alternative, a reduction of the fines imposed on it.

12 In support of its application, AC-Treuhand relied on nine pleas in law, only the third, fourth and fifth of which are of any relevance to the present appeal. The General Court presented those pleas in paragraphs 36 and 268 of the judgment under appeal as follows:

> '36. With a view to securing the annulment of the contested decision, the applicant puts forward … pleas … alleging infringement of Article 81 EC and breach of the principle that offences and penalties must be defined by law (third 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 … pleas based on [inter alia, infringement of] the Commission's obligation to impose only a symbolic fine in the circumstances of the present case (fourth plea); … [and] breach of the 2006 Guidelines with respect to the calculation of the basic amount of the fine (fifth plea); …'

13 By the judgment under appeal, the General Court dismissed the action in its entirety.

Forms of order sought by the parties

14 AC-Treuhand claims that the Court should:

— set aside the judgment under appeal and annul the contested decision;

— in the alternative, reduce the amount of the fines imposed or refer the case back to the General Court, and

— order the Commission to pay the costs.

15 The Commission contends that the Court should:

— dismiss the appeal; and

— order AC-Treuhand to pay the costs.

The appeal

16 AC-Treuhand relies on four grounds of appeal.

The first ground of appeal, alleging infringement of Article 81 EC and the principle that offences and penalties must be defined by law

Arguments of the parties

17 By its first ground of appeal, AC-Treuhand maintains that the General Court infringed Article 81 EC and 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 of Fundamental Rights of the European Union ('the Charter'), by finding, at paragraphs 43 and 44 of the judgment under appeal, with reference to its judgment in *AC-Treuhand* v *Commission* (T-99/04, EU:T:2008:256, 'AC-Treuhand I'), first, that the conduct of a consultancy firm which provides assistance to a cartel by supplying services falls within the scope of Article 81(1) EC and, second, that that interpretation was reasonably foreseeable at the time the infringements were committed.

18 In that regard, AC-Treuhand contends that the requirements of precision attaching to the principle that offences and penalties must be defined by law preclude any conclusion that it participated in an 'agreement between undertakings' or a 'concerted practice' which restricted competition for the purpose of Article 81 EC. It is apparent from the wording of that provision that the prohibition laid down therein is directed only at the parties to such agreements or concerted practices themselves, not at conduct that may be categorised as mere collusion.

19 However, AC-Treuhand's conduct cannot be categorised as participation in the cartels in question, which involved only the producers of heat stabilisers. It observes in that regard that, according to the Court's case-law, the concept of an 'agreement between undertakings' requires at least two parties to have expressed their concurrent intention to conduct themselves on the market in a particular manner.

20 That concept therefore presupposes that the parties have some kind of relationship on the markets affected by the restriction of competition. AC-Treuhand enjoys no such relationship since its intention was purely that of providing services with a view to facilitating the cartels on the basis of contracts that had no direct link with the restrictions of competition identified by the Commission. Moreover, AC-Treuhand claims that it was not active on the markets upstream or downstream of the markets affected by the cartels or on neighbouring markets and did not restrict its own conduct on the market — an aspect which is the very essence of cartels.

21 As it did not relinquish its independence in its commercial conduct in favour of coordination with other undertakings, the conduct for which AC-Treuhand was censured did not satisfy the requirements for classification as a 'concerted practice' within the meaning of the case-law established by the Court.

22 Moreover, AC-Treuhand maintains that its conduct could have been penalised in accordance with the requirements of foreseeability deriving from the principle that offences and penalties must be defined by law if, at the time the infringements were committed, 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. However, there was no case-law prior to the judgment in AC-Treuhand I censuring the conduct at issue in the present case.

23 Furthermore, prior to Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 [EEA] (Case COMP/E-2/37.857 — Organic peroxides) (OJ 2005 L 110, p. 44) ('the organic peroxides decision'), which gave rise to the judgment in AC-Treuhand I, no consultancy firm which had provided services to a cartel would have been held liable under Article 81(1) EC. The Commission also accepted in that decision that to address a decision to an undertaking which had played such a specific role was, to some extent, a new development.

24 In those circumstances, according to the appellant, the General Court cannot rely on considerations of expediency with regard to competition policy in order to justify the interpretation adopted in the judgment under appeal.

25 The Commission disputes AC-Treuhand's line of argument.

Findings of the Court

26 It is necessary to determine in the present case whether a consultancy firm may be held liable for infringement of Article 81(1) EC where such a firm actively contributes, in full knowledge of the relevant facts, to the implementation and continuation of a cartel among producers active on a market that is separate from that on which the undertaking itself operates.

27 With regard, first, to Article 81(1) EC, which provides that agreements between undertakings, decisions by associations of undertakings and concerted practices which have particular characteristics are incompatible with the common market and prohibited, it should be noted that there is nothing in the wording of that provision that indicates that the prohibition laid down therein is directed only at the parties to such agreements or concerted practices who are active on the markets affected by those agreements or practices.

28 It should also be noted that, according to the Court's case-law, in order for there to be an 'agreement', there must 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, to that effect, judgment in *Commission* v *Volkswagen*, C-74/04 P, EU:C:2006:460, paragraph 37).

29 As regards the term 'concerted practice', it is apparent from the Court's case-law that Articled 81(1) EC makes a distinction between that term and, in particular, the terms 'agreement' and 'decision by an association of undertakings', with the sole intention of catching various forms of collusion between undertakings which, from a subjective point of view, have the same nature and are distinguishable from each other only by their intensity and the forms in which they manifest themselves (see, to that effect, judgment *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 112, and *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 23).

30 When, as in the present case, the infringement involves anticompetitive agreements and concerted practices, it is apparent from the Court's case-law that the Commission must demonstrate, in order to be able to find that an undertaking participated in an infringement and was liable for all the various elements comprising the infringement, that the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (see, to that effect, judgments in *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 86 and 87, and *Aalborg Portland and Others* v *Commission*, 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, EU:C:2004:6, paragraph 83).

31 In that connection, the Court has held in particular that passive modes of participation in the infringement, such as the presence of an undertaking in meetings at which anticompetitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion capable of rendering the undertaking liable under Article 81(1) EC, since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery (see, to that effect, 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, paragraphs 142 and 143 and the case-law cited).

32 It is true that the Court has stated, when called upon to determine whether there was an 'agreement' within the meaning of Article 81(1) EC, that the issue was whether the parties had expressed their concurrent intention to conduct themselves on the market in a particular manner (see, to that effect, inter alia, judgment in *ACF Chemiefarma* v *Commission*, 41/69, EU:C:1970:71, paragraph 112). The Court has also held that the criteria of coordination and cooperation which are constituent elements of a 'concerted practice' within the meaning of that provision must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, to the effect that each economic operator must determine independently the policy which he intends to adopt on the common market (see, inter alia, judgment in *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 116)

33 However, it cannot be inferred from those considerations that the terms 'agreement' and 'concerted practice' presuppose a mutual restriction of freedom of action on one and the same market on which all the parties are present.

34 Moreover, it cannot be inferred from the Court's case-law that Article 81(1) EC concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed the markets upstream or downstream of that market or neighbouring markets or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice.

35 Indeed, it is apparent from the Court's well established case-law that the text of Article 81(1) EC refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question (see, to that effect, judgments in *LTM*, 56/65, EU:C:1966:38, p. 358; *Consten and Grundig* v *Commission*, 56/64 and 58/64, EU:C:1966:41, p.p. 492 and 493; *Musique Diffusion française and Others* v *Commission*, 100/80 to 103/80, EU:C:1983:158, paragraphs 72 to 80; *Binon*, 243/83, EU:C:1985:284, paragraphs 39 to 47; and *Javico*, C-306/96, EU:C:1998:173, paragraphs 10 to 14).

36 It should also be noted that the main objective of Article 81(1) EC is to ensure that competition remains undistorted within the common market. The interpretation of that provision advocated by AC-Treuhand would be liable to negate the full effectiveness of the prohibition laid down by that provision, in so far as such an interpretation would mean that it would not be possible to put a stop to the active contribution of an undertaking to a restriction of competition simply because that contribution does not relate to an economic activity forming part of the relevant market on which that restriction comes about or is intended to come about.

37 In the present case, according to the findings of fact made by the General Court in paragraph 10 of the judgment under appeal, AC-Treuhand played an essential and similar role in both the infringements at issue by organising a number of meetings which it attended and in which it actively participated, collecting and supplying to the producers of heat stabilisers data on sales on the relevant markets, offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises, for which it received remuneration.

38 It follows that the conduct adopted by AC-Treuhand is directly linked to the efforts made by the producers of heat stabilisers, as regards both the negotiation and monitoring of the implementation of the obligations entered into by those producers in connection with the cartels, the very purpose of the services provided by AC-Treuhand on the basis of service contracts concluded with those producers being the attainment, in full knowledge of the facts, of the anticompetitive objectives in question, namely — as is apparent from paragraph 4 of the judgment under appeal — price-fixing, market-sharing and customer-allocation and the exchange of commercially sensitive information.

39 In those circumstances, contrary to what is claimed by AC-Treuhand, even though those service contracts were formally concluded separately from the commitments entered into by the producers of heat stabilisers among themselves, and notwithstanding the fact that AC-Treuhand is a consultancy firm, it cannot be concluded that the action taken by AC-Treuhand in that capacity constituted mere peripheral services that were unconnected with the obligations assumed by the producers and the ensuring restrictions of competition.

40 With regard, in the second place, to General Court's alleged infringement of the principle that offences and penalties must be defined by law, it should be observed that, according to the Court's case-law, that principle requires the law to give a clear definition of offences and the penalties which they attract. That requirement is satisfied where the individual concerned is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (judgment in *Evonik Degussa* v *Commission*, C-266/06 P, EU:C:2008:295, paragraph 39 and the case-law cited).

41 The principle that offences and penalties must be defined by law cannot therefore be interpreted as precluding the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time (see, to that effect, 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, paragraphs 217 and 218).

42 The scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it covers and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take 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 relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. Such persons can therefore be expected to take special care in evaluating the risk that such an activity entails (judgment in *Dansk Rørindustri and Othe*rs 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, paragraphs 219 and the case-law cited).

43 In that context, even though at the time of the infringements which gave rise to the contested decision, the courts of the European Union had not yet had the opportunity to rule specifically on the conduct of a consultancy firm such as the conduct characterising the action taken by AC-Treuhand, that firm should have expected, if necessary after taking appropriate legal advice, its conduct to be declared incompatible with the EU competition rules, especially in the light of the broad scope of the terms 'agreement' and 'concerted practice' established by the Court's case-law.

44 Moreover, that conclusion is confirmed by the Commission's administrative practice. Indeed, already in Commission Decision 80/1334/EEC of 17 December 1980 relating to a proceeding under Article 85 of the EEC Treaty (Case IV/29.869 — Italian cast glass) (OJ 1980 L 383, p. 19) that institution was of the view that a consultancy firm which had participated in the implementation of a cartel had infringed Article 81(1) EC. There is nothing in any subsequent decision to suggest that the Commission revised that interpretation of the scope of that provision.

45 The requirements necessary for a valid finding that AC-Treuhand is liable as a result of its participation in the agreements and concerted practices at issue are therefore satisfied in the present case.

46 It follows from all the foregoing considerations that the General Court was correct to find, at paragraphs 43 and 44 of the judgment under appeal, that AC-Treuhand's conduct was caught by the prohibition laid down in Article 81(1) EC and that that interpretation could reasonably have been foreseen at the time the infringements were committed.

47 Consequently, it must be concluded that the first ground of appeal is unfounded.

The second ground of appeal, alleging infringement of the principle that offences and penalties must be defined by law, the principle of equal treatment and the obligation to state reasons

Arguments of the parties

48 By its second ground of appeal, AC-Treuhand submits that the General Court infringed the principle that offences and penalties must be defined by law enshrined in Article 49(1) of the Charter, in so far as it rejected the fourth plea in law in the action for annulment of the contested decision, relating to the amount of the fines, by merely referring to considerations set out in the judgment under appeal concerning the foreseeability of the application of Article 81(1) EC to AC-Treuhand's conduct. According to AC-Treuhand, that principle requires both the fact that a particular action is prohibited and the associated risk of a penalty being imposed to be reasonably foreseeable at the time the offence was committed. Accordingly, those two aspects should have been distinguished and assessed separately by the General Court.

49 Moreover, AC-Treuhand maintains that the General Court infringed the principle of equal treatment in finding, with regard to the Commission's power to derogate from its previous decision-making practice in the determination of the amount of fines, that that institution was not under any obligation to impose symbolic fines in the circumstances of the present case. AC-Treuhand argues in this regard that no fundamental distinction can be made between the conduct for which it is criticised in the present case and the conduct censured in the organic peroxides decision, in which the Commission imposed a symbolic fine on AC-Treuhand by way of penalty.

50 Furthermore, AC-Treuhand contends that the General Court failed to have regard to its duty to state reasons in so far as the judgment under appeal does not set out objective reasons which justify the different treatment to which it was subject in the two cases in question.

51 The Commission disputes AC-Treuhand's line of argument.

Findings of the Court

52 The examination of the documents submitted to the Court reveals that AC-Treuhand merely claimed before the General Court, as set in the fourth plea in law at first instance, that the Commission was under an obligation to impose symbolic fines on it because it was not foreseeable that Article 81 EC was applicable to its conduct at the time the infringements in question were committed. In that regard, first, AC-Treuhand simply referred to its arguments concerning the unprecedented nature of the interpretation that the conduct of a consultancy firm falls within the scope of that provision. Second, AC-Treuhand contended that the Commission's decision to impose a fine that is not symbolic is at odds with the principle that offences and penalties must be defined by law since the infringements covered by that decision had ceased by the time of the adoption of the organic peroxides decision, in which that institution imposed only a symbolic fine on it. On the other hand, AC-Treuhand did not argue that that approach is also at odds with the principle of equal treatment.

53 It follows that, in the ground of appeal under consideration, AC-Treuhand has put forward new grounds of complaint, alleging that the high amount of the fine imposed on it in the present case was unforeseeable, independently of whether the application of Article 81 EC to its conduct was also foreseeable, and infringement of the principle of equal treatment.

54 In that regard, according to settled case-law, to allow a party to put forward for the first time before the Court of Justice pleas and arguments which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the Court's jurisdiction is thus confined to examining the assessment by the General Court of the pleas and arguments aired before it. It follows that those grounds of complaint must be rejected as inadmissible.

55 With regard to AC-Treuhand's complaint that the General Court failed to state reasons in connection with the requirements attaching to the principle of equal treatment, it is sufficient to point out the General Court cannot be criticised for not adjudicating on a plea that was not raised before it (see, to that effect, inter alia, judgment in *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 70). That ground of complaint must therefore be rejected as unfounded.

56 Consequently, the second ground of appeal must be rejected as in part inadmissible and in part unfounded.

The third ground of appeal, alleging infringement of Article 23(2) and (3) of Regulation No 1/2003, the 2006 Guideline and the principles of legal certainty, equal treatment and proportionality

Arguments of the parties

57 By its third ground of appeal, AC-Treuhand submits that the General Court infringed Article 23(2) and (3) of Regulation No 1/2003 and the 2006 Guidelines by concluding, when examining the fifth plea in law in support of its action, first, that AC-Treuhand cannot plead breach of those guidelines and, second, that the Commission was entitled to set the fines as a lump sum on the basis of point 37 of those guidelines rather than rely, for that purpose, on the amount of the fees charged for the services it provided to the producers in question. According to AC-Treuhand, as it was held liable for its participation in the cartels in question, those fees represent the turnover to which the infringements directly or indirectly relate and could therefore be used, in accordance with point 13 of the 2006 Guidelines, as the basis of the calculation for the fines. It also argues in that regard that the setting of the fines as a lump sum infringed the principles of legal certainty, equal treatment and proportionality.

58 Furthermore, AC-Treuhand maintains that the General Court was incorrect to consider that the Commission gave sufficient reasons in law to substantiate the contested decision in so far as concerns the criteria adopted in setting the fines imposed.

59 The Commission disputes AC-Treuhand's line of argument.

Findings of the Court

60 The Court finds, first, that the grounds of complaint put forward by AC-Treuhand alleging infringement of the principles of legal certainty, equal treatment and proportionality must be dismissed as inadmissible on the grounds set out in paragraph 54 above. Indeed, it is apparent from an examination of the documents submitted to the Court that those grounds were raised for the first time in the present appeal, AC-Treuhand having simply argued by its fifth plea in law at first instance that there was nothing particular about the present case that could warrant the fines being calculated as a lump sum.

61 As regards the argument that the General Court was incorrect to consider that AC-Treuhand cannot plead infringement of the 2006 Guidelines, it is sufficient to note that, at paragraphs 298 and 299 of the judgment under appeal, in accordance with the Court's case-law on the legal effects of guidelines adopted by the Commission for the calculation of fines (see, inter alia, 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, paragraphs 209 to 213), the General Court verified, in the light of the complaints raised by AC-Treuhand in that regard, whether the Commission was entitled to depart from the 2006 Guidelines in the particular circumstances of the present case.

62 In so far as AC-Treuhand maintains that the General Court erred in law in taking the view that the Commission was not required to fix the fines imposed on the basis of the fees which it charged, it should be noted that it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement (see, inter alia, judgment in *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 50).

63 Thus, point 13 of the 2006 Guidelines states that '[i]n determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly … relates in the relevant geographic area within the EEA'. Point 6 of those Guidelines states that '[t]he combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'.

64 It follows that point 13 of the 2006 Guidelines pursues the objective of adopting, in principle, as the starting point for the setting of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it (judgment in *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 53).

65 However, point 37 of the 2006 Guidelines states that '[a]lthough these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology.'

66 In the present case, it is common ground that the only markets affected by the infringements established are the tin stabilisers market and the ESBO/esters market, on which AC-Treuhand, as a consultancy firm, was not present. As a consequence, no portion of that firm's turnover may be accounted for by the goods in respect of which the infringements were committed. Accordingly, to determine the fines imposed on the basis of the fees charged by AC-Treuhand for the services provided to producers would amount to taking account of a sum which, while providing an indication of the amount of profit it made as a result of the infringements, would accurately reflect neither the economic importance of the infringements in question nor the extent of AC-Treuhand's individual participation in those infringements, contrary to the objective of point 13 of the 2006 Guidelines.

67 As a consequence, the General Court did not err in law in finding, at paragraphs 302 to 305 of the judgment under appeal, that the Commission was entitled to depart from the method of calculating fines set out in the 2006 Guidelines by fixing, on the basis of point 37 of those guidelines, the basic amount of the fines imposed as a lump sum. AC-Treuhand's complaint alleging infringement of the 2006 Guidelines in that regard must therefore be rejected as unfounded.

68 In so far as AC-Treuhand claims that the General Court was wrong to take the view that the Commission gave adequate reasons for its decision as regards the criteria adopted in setting the fines imposed, it should be observed that, in the determination of the amount of the fine in a case of infringement of the competition rules, the Commission fulfils its obligation to state reasons when it indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration, and it is not required to indicate the figures relating to the method of calculating the fines (see, to that effect, inter alia, judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 181).

69 In the present case, it should be noted, in particular, that paragraphs 747 to 750 of the contested decision set out the factors relating to the gravity and duration of the infringements committed by AC-Treuhand which were taken into account by the Commission in order to calculate the amount of the fines to be imposed on that firm. It follows that the General Court cannot be criticised for finding, at paragraphs 306 and 307 of the judgment under appeal, that the Commission had fulfilled the requirements pertaining to its duty to state reasons. It follows that the complaint under consideration is unfounded.

70 Consequently, the third ground of appeal must be rejected as in part inadmissible and in part unfounded.

The fourth ground of appeal, alleging infringement of Article 261 TFEU, the principle of effective judicial protection and of Articles 23(3) and 31 of Regulation No 1/2003

71 By its fourth ground of appeal, AC-Treuhand contends that the judgment under appeal is vitiated by an error of law in so far as the General Court failed to exercise its powers of unlimited jurisdiction in such a way as to ensure effective judicial protection for the purposes of the first paragraph of Article 47 of the Charter.

72 AC-Treuhand submits that it is apparent from paragraph 308 of the judgment under appeal that the General Court had regard only to the gravity of the infringements established when examining whether the amount of the fines was appropriate. However, the General Court should also have had regard to the principle that offences and penalties must be defined by law and the principles of proportionality and equal treatment, since those principles would preclude, in the circumstances of the present case, the imposition of fines of any other than a symbolic amount or fines calculated on any other basis than that of the fees which it charged for the services provided to the producers in question. In any event, it is incumbent on the General Court to give the reasons that justify the difference between the treatment it received in the present case and that to which it was subject in the case giving rise to the organic peroxides decision and the judgment in AC-Treuhand I. The General Court should also have taken account of the duration of the infringements at issue.

73 The Commission disputes AC-Treuhand's line of argument.

Findings of the Court

74 With regard to judicial review of decisions made by the Commission imposing a fine or periodic penalty payment for infringement of the competition rules, in addition to the review of legality provided for by Article 263 TFEU, the European Union judicature has the unlimited jurisdiction which it is afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU, and which empowers it to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed (see, to that effect, judgment in *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 36 and the case-law cited).

75 However, it should be noted in that regard that the exercise of powers of unlimited jurisdiction provided for in Articles 261 TFEU and Regulation No 1/2003 does not amount to a review of the Court's own motion and that proceedings before the Courts of the European Union are inter partes. With the exception of pleas involving matters of public policy, which the Courts are required to raise of their own motion, it is therefore for the applicant to raise pleas in law against the contested decision and to adduce evidence in support of those pleas (see judgment in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 213 and the case-law cited).

76 On the other hand, in order to satisfy the requirements of the principle of effective judicial protection enshrined in the first paragraph of Article 47 of the Charter and bearing in mind that Article 23(3) of Regulation No 1/2003 provides that the amount of the fine must be fixed by reference to the gravity and duration of the infringement, the courts of the European Union are bound, in the exercise of the powers conferred by Articles 261 TFEU and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (see, to that effect, judgment in *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 75 and the case-law cited).

77 With regard to the present case, it is apparent from paragraphs 52, 53 and 60 above that AC-Treuhand's complaints alleging infringement of the principle that offences and penalties must be defined by law and the principles of equal treatment and proportionality were not raised at first instance. In accordance with the case-law cited in paragraph 75 above, the General Court cannot therefore be criticised for not examining those complaints of its own motion in the exercise of its powers of unlimited jurisdiction.

78 Moreover, it should be noted that in paragraphs 268 to 314 of the judgment under appeal, the General Court examined all the complaints put forward by AC-Treuhand relating to the determination of the amount of the fines imposed, including the complaint alleging an error of assessment as to the duration of the infringements in question, and addressed the arguments put forward to the requisite legal standard. The General Court thereby exercised its powers of review with regard to the contested decision in a manner consonant with the requirements of the principle of effective judicial protection enshrined in the first paragraph of Article 47 of the Charter.

79 It follows form all the foregoing considerations that the fourth ground of appeal is unfounded.

80 Since AC-Treuhand's grounds of appeal are in part inadmissible and in part unfounded, the appeal must be dismissed in its entirety.

Costs

81 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs.

82 Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, 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 Commission has applied for costs to be awarded against AC-Treuhand and AC-Treuhand has been unsuccessful, it must be ordered to pay the costs of the appeal proceedings.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

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

[Signatures]