Facilitators of Cartels Are Now at Risk in Competition Cases in Europe

On October 22, 2015, the Court of Justice of the European Union ("CJEU") confirmed in its judgment, AC-Treuhand AG v Commission (C-194/14 P) ("AC-Treuhand"), that facilitators of a cartel are now capable of falling within the scope and definition of an infringer under European competition law pursuant to Article 101 of the Treaty of the Functioning of the European Union (the "TFEU").[1]

This landmark ruling means that it is now established law in the EU that facilitators of cartels fall within the jurisdiction of the European Commission's ("the Commission") enforcement powers against cartels, and are exposed to any consequences that flow from being found to have participated in a cartel.

What is a facilitator of a cartel?

A facilitator of a cartel is an individual or company that has been engaged by the participants of a cartel to ensure the smooth operation and functioning of the cartel. The facilitator need not have any commercial interest in the relevant product market in which the cartel operates. This lack of direct commercial interest in the relevant market was the main point of contention raised in AC-Treuhand's appeal to the CJEU.

European Commission AC-Treuhand Decision

AC-Treuhand is a Swiss consultancy firm whose services include: “business management and administration for Swiss and international professional associations and federations, non-profit organizations; collection, processing and assessment of market data, presentation market statistics; audit of the reported figures at the premises of the participants.”[2]

On November 11, 2009, the Commission issued an infringement decision in relation to the participants of a cartel who traded in the heat stabilizers market (the “Cartel”), and also named AC-Treuhand as an addressee to the decision, fining it a total of €348,000 for its role acting as a facilitator to the Cartel.[3] In stark contrast, the participants of the Cartel were fined several million euros combined for their active participation in the Cartel.

According to the decision, AC-Treuhand provided its services in order to facilitate the participants of the Cartel, which fixed prices and shared and allocated delivery quotas and customers. It did so, among other activities, by (a) organizing a number of meetings for the Cartel in which it attended and actively participated; (b) collecting and supplying data on sales on the relevant markets to the Cartel; and (c) offering to act as a moderator in the event of tensions between the participants of the Cartel for which it also received remuneration.[4]
The Commission had previously fined AC-Treuhand €1,000 in 2003 as a facilitator in relation to a separate cartel regarding organic peroxide, although the fine was merely symbolic in that the Commission at the time viewed the role of a facilitator as "a novelty."[5] On that occasion, AC-Treuhand unsuccessfully appealed the Commission's decision to the EU General Court.

AC-Treuhand appealed the Commission's heat stabilizer decision to the General Court, which affirmed, declaring that a consultancy firm can be liable under Article 101 TFEU when it “contributes actively and intentionally to a cartel between producers which are active on a market other than that on which the consultancy firm itself operates.”[6]

The CJEU agreed with the prior decisions that AC-Treuhand’s participation and contribution towards the operation of the Cartel was sufficient for it to fall within the scope of Article 101 TFEU. In its short judgment, the CJEU held that there is nothing in the wording of the statute that prevents an undertaking from being in breach of Article 101 TFEU even though it is not active in the markets affected by those agreements.[7] The CJEU summarized its approach on the implication of facilitators to a cartel in accordance with Article 101 TFEU at paragraph 36 of the judgment:

“[T]he main objective of [Article 101(1) TFEU] 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.”

At no point in the judgment did the CJEU restrict itself to the circumstances presented in the case before it. Therefore, this judgment sets a precedent for any undertaking that has facilitated the operation of a cartel, and is not just limited to the particular actions of consultancy firms such as AC-Treuhand.

**Potential Consequences of the Judgment**

Given that it is now established case law that a Member State cannot make a finding in competition law that is incompatible with a finding by the Commission,[8] a national court in a Member State cannot derogate from an infringement decision that holds a facilitator of a cartel to be in breach of Article 101 TFEU.

This raises two potentially significant risks for cartel facilitators, beyond the obvious risk of fines being imposed by the Commission. First, national competition authorities may now start to investigate and issue decisions against facilitators of a cartel on a domestic level. Second, facilitators of a cartel could now face actions for damages in the courts of the Member States insofar as they are jointly and severally liable with the cartelists who operate on the market(s) affected.

In particular, facilitators of a cartel in the UK now risk both civil and criminal liability for their participation in the operation of the cartel. Since 2003, the relevant national authorities in the UK have had the statutory power to prosecute individuals involved in the operation of a cartel under s188 Enterprise Act 2002.[9] It was confirmed that these powers included facilitators of a cartel, when the Office of Fair Trading used these powers to bring criminal proceedings against Peter Whittle for his consultancy company's participation in facilitating the marine hose cartel. Mr. Whittle was found guilty of facilitating the process of big-rigging which had been present within the marine hose market. He ultimately received a prison sentence of 2 ½ years, with senior employees of one of the cartel list companies, Bryan Allison and David Brammar, receiving 2 years and 20 months respectively. Cartel facilitators have much to be nervous about.

**Footnotes**

[1]Article 101 TFEU replaced Article 81 EC once the TFEU was ratified, but no changes were made to the provisions.


[6] AC-Treuhand v Commission of the European Communities, Judgment of the Court of First Instance, paragraph 150


[8] British Airways plc v Commission, Case – T-56/11, paragraph 40


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