

ANTITRUST | 30 October 2015

## Facilitating a Cartel May Lead to Substantial Fines for Firms Even If They Are Not Active on the Affected Market

The Court of Justice has confirmed that consultancy firms may be held liable and fined for cartel infringements where they contribute to the implementation and continuation of cartels even if they are not active on the affected market(s).

### Background

In 2009, the Commission fined a number of suppliers of heat stabilisers that had been found to have infringed Article 101 TFEU by participating in various anti-competitive agreements and concerted practices concerning both tin stabilizer and ESBO/esters.<sup>1</sup> AC-Treuhand, a consultancy firm offering a range of services to associations and interest groups, was also held liable for these infringements and two fines of EUR 174 000 each were imposed on AC-Treuhand for its role in facilitating the cartel(s).

AC-Treuhand sought to annul the Commission decision (both in terms of the infringement and the fine imposed): first before the General Court and then, on appeal, before the Court of Justice.

On 22 October 2015, the Court of Justice dismissed the appeal in its entirety.<sup>2</sup>

### Key Issues

Challenging the General Court's judgment AC-Treuhand maintained that it had not infringed Article 101 TFEU and that a finding of such an infringement was contrary to the principle that offences and penalties must be defined by law. The Court of Justice rejected the claims considering that the General Court was correct in finding that AC-Treuhand's conduct was caught by Article 101 TFEU and that that interpretation could reasonably have been foreseen at the time of the infringement.

#### *Infringement of Article 101 TFEU*

AC-Treuhand essentially claimed that the conduct of a consultancy firm which (i) merely provides assistance to a cartel by supplying services to the participants of the cartel and (ii) is not active on the market(s) affected by the cartel, does not fall within the scope of Article 101 TFEU. The Court of Justice disagreed.

<sup>1</sup> Commission decision of 11 November 2009 (Case COMP/38589 – Heat Stabilisers).

<sup>2</sup> Case C-194/14 P *AC-Treuhand AG v Commission* EU:C:2015:717. The case is commonly known as *AC-Treuhand II*: in 2008 the General Court ruled on an appeal against an earlier decision involving the same parties.

The Court of Justice observed that there is nothing in the wording of Article 101 TFEU that indicates that the prohibition is directed only at companies who are active on the markets affected by the cartel arrangements.<sup>3</sup> Moreover, it cannot be inferred from the Court's case law that Article 101 TFEU concerns only (i) companies operating on the market affected by the infringement (or any upstream, downstream or neighboring market of that market) or (ii) companies which restrict their freedom of action on a particular market as a result of a cartel arrangement.<sup>4</sup>

The Court of Justice added that the terms "agreement" and "concerted practice" do not presuppose a mutual restriction of freedom of action on one and the same market on which all the parties are present.<sup>5</sup>

AC-Treuhand's conduct was characterized by the Court of Justice as "*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 [these] services [...] being the attainment [...] of the anti-competitive objectives in question, namely [...] price-fixing, market sharing and customer allocation and the exchange of commercially sensitive information.*"<sup>6</sup>

In those circumstances, the Court of Justice concluded that the action taken by AC-Treuhand, as a consultancy firm, could not be simply described as "*peripheral services that were unconnected with the obligations assumed by the [cartel participants] and the ensuring restrictions of competition.*"<sup>7</sup>

#### ***Infringement of the Principle that Offences and Penalties Must Be Defined by Law***

The Court of Justice observed that even though at the time of the infringement 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 one adopted by AC-Treuhand, that company should have expected its conduct to be declared incompatible with EU antitrust rules. The Court referred in this regard to the Commission's precedent in *Italian Cast Glass*<sup>8</sup>, in which Fides was held liable for cartel infringement as it was in charge of drawing up summaries of shipments by the cartel participants and carrying out verification of the information provided by them.

#### **Amount of the Fines**

On appeal, AC-Treuhand claimed that the General Court infringed the Commission 2006 Fining Guidelines by concluding that the Commission was entitled to set the fines as a lump sum. Rejecting this argument, the Court of Justice recalled that the Commission is entitled to depart from its 2006 Fining Guidelines in the particular

<sup>3</sup> AC-Treuhand II, para. 27.

<sup>4</sup> AC-Treuhand II, para. 34.

<sup>5</sup> AC-Treuhand II, para. 33.

<sup>6</sup> AC-Treuhand II, para. 38.

<sup>7</sup> AC-Treuhand II, para. 39.

<sup>8</sup> Commission decision of 17 December 1980 (Case COMP/29869 – Italian Cast Glass).

circumstances of a case.<sup>9</sup> In this context, the Court of Justice observed that the only markets affected by the infringements were the tin stabilisers and the ESBO/esters markets, on which AC-Treuhand, as a consultancy firm, was not active.<sup>10</sup> As a result, no portion of AC-Treuhand's turnover could be accounted for by the goods in respect of which the infringements were committed. In these circumstances, the Commission was entitled to depart from the fining methodology set out in its Guidelines in order to determine the fine to be imposed on AC-Treuhand.

## Comments

Cases involving consultancy firms such as AC-Treuhand are rare and, until now, the fines imposed on such firms have been nominal.

For example, in *Italian Cast Glass*, the Commission found in particular that the cartel participants exchanged commercially sensitive information through Fides and that its role of verifying compliance contributed to the realization of a restriction of competition. Although not directly involved, the Commission concluded that Fides was jointly responsible. For a number of reasons, the Commission ultimately did not impose fines on any of the companies involved. Of note however is the Commission's observation that "*it would be necessary when assessing the gravity of the infringement also to take into account the fact that until now, the Commission has never addressed a decision pursuant to Article [101 TFEU] to undertakings in a position of joint responsibility of this kind.*"<sup>11</sup>

Equally, in *Organic Peroxides*, the Commission imposed on AC-Treuhand a symbolic fine of EUR 1 000 on the basis that addressing a decision to a company which had played such a specific role was, to some extent, a novelty. It held that this had to be taken into account when deciding on the level of fines.<sup>12</sup> Following *AC Treuhand II*, this reasoning no longer applies: firms that facilitate cartels may expect to receive substantial fines. Interestingly, things could have been significantly different had the Court of Justice followed the (non-binding) Opinion of Advocate General Nils Wahl.<sup>13</sup> The Advocate General had invited the Court of Justice to uphold AC-Treuhand's appeal on the basis that, having merely acted in its capacity as a consultancy firm, AC-Treuhand did not enter into any anti-competitive arrangement and was not active on the market in question.

With the principle of liability for the facilitation of cartels now firmly established, going forward, consultancy firms (or other intermediaries) providing services to companies active on a market that is separate from that on which the consultancy firm itself operates may seek to argue that the services they perform are "mere[ly] peripheral" and are unconnected with the obligations assumed by the cartel participants and the restrictions of competition in order to

<sup>9</sup> The 2006 Fining Guidelines provide that in determining the amount of the fine, the Commission will take value of the infringing company's sales of goods or services to which the infringement directly or indirectly relates. Point 37 of the Guidelines provide however that the particularities of a case may justify departing from such methodology.

<sup>10</sup> *AC-Treuhand II*, para. 66.

<sup>11</sup> Commission decision of 17 December 1980 (Case COMP/29869 – *Italian Cast Glass*) [1980] OJ L 383/26.

<sup>12</sup> Commission decision of 10 December 2003 (Case COMP/37857 – *Organic Peroxides*), para. 454.

<sup>13</sup> Opinion of Advocate General Nils Wahl in C-194/14 P *AC-Treuhand AG v Commission* EU:C:2015:350.

avoid the imposition of substantial fines, if not to escape liability altogether. In doing so, such firms may seek to rely on the fact that in both *Organic Peroxides* and *Heat Stabilisers*, the Commission described AC Treuhand as playing a crucial role in the organization of the cartel.<sup>14</sup> However, the chances of success of such a line of defense are unclear.

While nothing in the *AC Treuhand II* judgment prevents bona fide trade associations or market intelligence firms from engaging in legitimate activities including, for example, the exchange of genuinely aggregated market data consistent with the Horizontal Guidelines, following *AC-Treuhand II*, the principle of antitrust liability for firms that facilitate cartels has been unequivocally confirmed and firms engaging in this type of activity may expect to receive substantial fines.

Finally, it should be noted that, following the ruling in *AC-Treuhand II*, the Competition and Markets Authority (“CMA”), the UK competition authority, posted on its website a note, linked to its infringement decision in relation to the advertising of estate agents’ fees,<sup>15</sup> inviting firms that are approached to facilitate or give effect to anti-competitive arrangements to assess whether they are complying with competition law and, if appropriate, to report to the CMA any issue.

## CONTACTS

**Stephen C. Mavroghenis**  
Brussels  
+32.2.500.9814  
[stephen.mavroghenis@shearman.com](mailto:stephen.mavroghenis@shearman.com)

**Trevor Soames**  
Brussels  
+32.2.500.9800  
[trevor.soames@shearman.com](mailto:trevor.soames@shearman.com)

**Geert Goeteyn**  
Brussels  
+32.2.500.9800  
[geert.goeteyn@shearman.com](mailto:geert.goeteyn@shearman.com)

**Collette Rawnsley**  
London, Brussels  
+44.20.7655.5063  
[collette.rawnsley@shearman.com](mailto:collette.rawnsley@shearman.com)

<sup>14</sup> Commission decision of 10 December 2003 (Case COMP/37857 – Organic Peroxides), para. 95 and Commission decision of 11 November 2009 (COMP/38589 – Heat Stabilisers), para. 749.

<sup>15</sup> See <https://www.gov.uk/cma-cases/investigation-into-property-sales-and-lettings-and-their-advertising>. Following its probe into advertising of estate agents’ fees, the CMA found that an association of estate and lettings agents, 3 of its members and a newspaper publisher had infringed competition law. The newspaper publisher had, under pressure, become a party to an agreement between estate and letting agents to prevent agents from advertising their fees or discounts in their local newspaper.

ABU DHABI | BEIJING | BRUSSELS | DUBAI | FRANKFURT | HONG KONG | LONDON | MENLO PARK | MILAN | NEW YORK  
PARIS | ROME | SAN FRANCISCO | SÃO PAULO | SAUDI ARABIA\* | SHANGHAI | SINGAPORE | TOKYO | TORONTO | WASHINGTON, DC

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

AVENUE DES ARTS 56 | B-1000 BRUXELLES | BELGIUM

Copyright © 2015 Shearman & Sterling LLP. Shearman & Sterling LLP is a limited liability partnership organized under the laws of the State of Delaware, with an affiliated limited liability partnership organized for the practice of law in the United Kingdom and Italy and an affiliated partnership organized for the practice of law in Hong Kong.

\*Abdulaziz Allassaf & Partners in association with Shearman & Sterling LLP