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EU's highest court confirms liability of cartel facilitators

Victoria Canu · Thursday, October 29th, 2015

If the recent Wahl opinion could have instilled some doubts about the responsibility of cartel facilitators under Article 101 of the Treaty on the Functioning of the European Union (TFEU),[1] the debate has been brought to an end with the Court of Justice of the European Union's judgment (CJEU) from 22 October 2015.[2] Through this ruling, the Court upheld the decision of the General Court (GC) according to which AC-Treuhand AG (AC-Treuhand), shall be sanctioned under Article 81(1) EC (now, Article 101(1) TFEU), irrespective of it not being active on the cartelized market.

Background

AC-Treuhand is a consultancy firm which offers services to professional associations such as the collection and assessment of market data, the presentation of market statistics and the audit of the reported figures at the premises of the participants.

In 2009, the Commission found AC-Treuhand and several suppliers of heat stabilizers liable for having participated in a cartel on the tin stabiliser and ESBO/esters markets.[3] AC-Treuhand has been fined €348,000 for organizing meetings which it attended and in which it participated, as well as for collecting and supplying data, acting as a moderator between participants and encouraging the finding of compromises, in exchange of a remuneration.[4]

AC-Treuhand lodged an appeal before the GC. In line with the Commission's decision, the Court held that despite not being active on the cartelized market, AC-Treuhand had infringed Article 81 EC when acting as facilitator.

AC-Treuhand appealed the judgment before the CJEU on four grounds aiming at the annulment of the decision or, the annulment or reduction of the fine. The Court rejected all of them. The first, and most important ground of appeal states that the GC erred in law when extensively applying Article 81 EC to a consultancy firm which provides services to a cartel and that that interpretation breached the principle of legality. The answer of the Court on both aspects will be dealt with in turn.

The broad application of Article 81(1) EC to undertakings active on a market that is distinct from that on which the cartel occurs

The CJEU proceeded to a literal and contextual interpretation of Article 81(1) EC and observed that there were no requirement according to which undertakings shall operate on the affected market in order to be held responsible for an infringement. The Court recalled that no matter the market in which the undertakings operate, the Commission must show that the undertaking in question intended to contribute to the cartel and that it was aware of the conduct planned or implemented by the other undertakings or that it could reasonably have foreseen it.

The Court went further and stated that for Article 81(1) EC to apply, undertakings are not required to be present on upstream, downstream or neighbouring markets. In other words, being capable to exert a competitive constraint on the affected market is not a prerequisite.

The Court concluded by putting forward the need to preserve the *effet utile* of Article 81 EC, as the adoption of a more restrictive approach of the Treaty would preclude the fair and effective application of competition law.

The reasonable foreseeability of the sanctioning of AC-Treuhand

For what regards the alleged breach of the legal certainty principle, the Court affirmed that even though offences and penalties must be defined by law, clarifications can be made through case law as long as "the result was reasonably foreseeable at the time the offence was committed […]".[5] According to the Court, the degree of foreseeability depends on several factors, i.e. the content of the text, its fields, and the addressees. The Court goes on and specifies that the requirement of foreseeability is met even even when companies feel necessary to receive appropriate legal advice to assess the potential consequences of their conduct. In the case at hand, even if the Courts never reached a judgment on the facilitator issue at the time of the infringement, the CJEU considers that the sanctioning of AC-Treuhand's conduct was reasonably foreseeable.

Discussion

The present judgment clearly departs from Advocate General Wahl's opinion. As a matter of fact, it goes against the argument according to which only undertakings capable of exerting a competitive constraint on the cartelized market shall be held liable under Article 101 TFEU. Such a strict approach would have certainly led many situations to slip through the cracks, and, as already noted in the 2008 *AC Threuhand* case,[6] would have encouraged the "outsourcing" of infringing behaviours.

However, now that the argument on the competitive constraint has been rejected, the Commission should make sure to meticulously assess the awareness criteria. Indeed, being free of any market related condition, one could wonder if, for instance, Article 101 TFEU could apply to the owner of an hotel in which an anticompetitive meeting took place and who happened to hear some of the discussions? To avoid any farfetched decision, only undertakings being aware of the anticompetitive aspect of the scheme should be susceptible to be fined.

Lastly, and just as a matter of curiosity, it would have been interesting to know to what extent the Commission and the Courts, when developing their reasoning, have been influenced by the recidivist aspect of AC-Treuhand's conduct. Let's not forget that AC-Treuhand or its predecessor Fides Trust AG have been involved in numerous cases as facilitators

The next judgment on cartel facilitators will be released by the GC in the *Yen Interest Rate*

Derivative case concerning the broker ICAP.[7] There is no doubt that after the present judgment, ICAP's appeal chances of success against its qualification as facilitator are low.

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