

The European Commission's fine against cartellists in a plastic additives sector highlights risk of "facilitating" cartel participation (AC Treuhand)

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European Commission, 11 November 2009, Case COMP/38.589, Heat Stabilisers

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On 11 November 2009, the European Commission (the « Commission ») fined 24 companies a total of € 173 million for operating cartel arrangements in the plastic additive sector. The companies fixed prices, shared customers, allocated markets, and exchanged sensitive commercial information for tin stabilizers (1987-2000) and ESBO/esters heat stabilizers (1991-2000). Significantly, the Commission also fined AC Treuhand AG (« AC Treuhand »), a Swiss consultancy firm, a total of € 348,000 for cartel arrangements relative to tin stabilizers and ESBO/esters respectively. AC Treuhand was sanctioned in its capacity as a facilitator of the cartel arrangements. Decisions for both the tin stabilizer cartel arrangements and the ESBO/ester cartel arrangements were taken at meetings organized by AC Treuhand. In addition AC Treuhand provided its Zurich premises and associated office services to the companies involved. It made its premises in Zurich available in an endeavor to assist the cartellists avoid detection and to escape the jurisdictional reach of EU competition law.

It has long been established that liability for a cartel can be attributed not only to the undertakings actively involved in the cartel, but also to the facilitators of them such as consultancies. Despite this it was not until 2003 that the Commission took the step of actually sanctioning a facilitator. The fine it imposed in 2003 was on AC Treuhand who the Commission decided had infringed Article 81 EC Treaty (which prohibits agreements that prevent, distort or restrict competition and affect trade within the EU) by organizing meetings for cartellists in the organic peroxides sector. AC Treuhand had provided logistical assistance, audited a quota system agreed among the cartellists, and provided advice on how to avoid cartel detection [1]. The fine imposed was symbolic, only € 1,000, but as the Commission's press release explained, it was intended by the Commission to send a clear message that in the future organizers or facilitators of cartels should expect to be sanctioned heavily for their role.

AC Treuhand appealed the Commission's Decision. However, in July 2008, the Court of First Instance (the « CFI ») confirmed the Commission's Decision and upheld the symbolic fine imposed on AC Treuhand [2]. In its judgment the CFI stressed that co-perpetrators of an infringement under Article 81(1) and/or undertakings like AC Treuhand, that have played an accessory role in such an infringement are jointly liable for the cartel offence.

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At the beginning of 2009, the Commission again had the opportunity to sanction a facilitator, this time in relation to the marine hose cartel. The participants in the cartel were fined a total of € 131 million. However, a consultancy firm that helped to coordinate the cartel, was not sanctioned. The Commission was criticised at the time for not even imposing a « symbolic fine » following the serious warnings it had made in connection with the CFI's judgment in Treuhand. The Commission defended its decision not to sanction the consultancy firm on the basis that the executive behind the consultancy firm was already subject to criminal prosecution in the UK and further proceedings could risk « double jeopardy ».

The Commission's latest fine on AC Treuhand shows that the Commission has no intention of shying away from sanctioning cartel facilitators. The Commission is not alone in this regard. In June 2009, the Dutch Competition Authority (the « NMa ») for the first time fined a cost engineering firm that facilitated two cartels in the paint sector. *Calculatiebureau Coöperatieve Vereniging Spegelt. U.A.* was fined € 17,000, a significantly higher amount than the symbolic penalty of € 1,000 that the European Commission had imposed on AC Treuhand for facilitating the organic peroxide cartel in 2003.

This week's Decision by the Commission to sanction AC Treuhand sends a clear message to cartel facilitators that they risk significant fines (and the risk of follow on actions for damages) for their role in cartels. It also serves as a warning to all companies to check their compliance procedures. Most companies are well aware, for example, that should discussions between competitors at a trade association meeting touch on prices or customers, they should object to that conversation and, if it continues, leave the meeting and ensure that their departure is recorded in the minutes. Companies may not realize, however, that this conduct should be followed even where they are not active on the markets under discussion and have only agreed to host the meeting. In its 2008 judgment in Treuhand, the CFI held that, where an undertaking has contributed to the implementation of a cartel, even in a subsidiary, accessory or passive role, for example by staying silent and thereby tacitly approving the cartel and failing to report it to the administrative authorities, that undertaking may be held to have infringed Article 81. In the light of the CFI's judgment in Treuhand and the Commission's approach to sanctioning the cartel arrangements in the plastic additive sector, undertakings that are directly or indirectly involved in facilitating cartel arrangements need to be beware. The thresholds for facilitation are low, subsidiary, accessory and passive roles can be enough. However, the signs are that the sanctions for facilitation will increase in their severity.

[1] See Commission Decision 2005/349/EC, of 10 December 2005 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/37.857, Organic peroxides); OJ L 110 30.4.2005, p. 44-47.

[2] CFI, July 8th, 2008, AC-Treuhand v. Commission, Case T-99/04.

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