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CJEU Sends Clear Warning to "Cartel Facilitators"

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On 22 October 2015, the Court of Justice of the EU ("**CJEU**") handed down a seminal judgment holding for the first time that companies facilitating the implementation of a cartel can be sanctioned under EU competition law. Moreover, the Court confirmed that the European Commission ("**EC**") is entitled to impose a fine as a lump sum instead of using value of sales as a basis for calculating the fine, in instances where the company at hand does not have sales on the cartelised market. The Court's ruling is of particular importance for trade associations, industry consultants and similar organisations and will likely have immediate implications on a number of ongoing cartel cases.

Background

The case concerns an appeal against the General Court ("**GC**") judgment upholding a 2009 EC infringement decision in the heat stabilisers cartel which resulted in the imposition of EUR 173 million on a number of companies. AC-Treuhand, a Swiss-based consultancy firm, was among the companies sanctioned by the EC, even though it was not active in the market for heat stabilisers. The consultancy received a fine of EUR 348,000 for the essential role it played in facilitating the cartel. In particular, its role consisted in organising the meetings where the key decisions were taken and monitoring the implementation of the agreements on sales quotas and fixed prices for the majority of the cartel's duration. The EC found that, in addition to collecting and supplying to the cartel members data sales on the relevant markets, AC-Treuhand also acted as a moderator and encouraged compromise in instances where tensions between the cartel participants arose.

Grounds of Appeal

In its appeal before the CJEU, AC-Treuhand argued that a company cannot be held liable for a cartel infringement in circumstances where it does not carry out economic activity on the affected or neighbouring cartel markets. In particular, it claimed that the GC's broad interpretation of the EU cartel prohibition constituted a breach of the principle of legality, as that interpretation was not foreseeable at the time the offence was committed.

Moreover, AC-Treuhand vigorously contested the fine imposed to it, asserting that the EC was not entitled to set the fine as a lump sum, but that it should have calculated the fine on the basis of the remuneration the consultancy received for its services.

CJEU Judgment

Liability

The CJEU rejected AC-Treuhand's arguments, confirming that a company that deliberately contributed to practices, which it knew or could have reasonably foreseen that amounted to cartel arrangements, can be held liable for a cartel infringement, even if it is not operating on the markets affected by the cartel.

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Remarkably, in countering AC-Treuhand's argument that it could not "reasonably foresee" that its conduct would be caught by the EU cartel prohibition, the Court clarified that a law may be foreseeable even if legal advice is required to assess potential consequences of the given conduct.

"*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…*"

Fine

The CJEU confirmed that the EC is allowed to deviate from its value of sales methodology if the particularities of a case, or the need to achieve a deterrent effect, justify such a departure. As AC-Treuhand had no sales on the heat stabiliser market, the CJEU held that to use only the consultancy services fees as the starting basis for the fine would not "*accurately reflect the economic importance of the infringements in question, nor the extent of AC Treuhand's individual participation*". The EC was therefore entitled to fix the basic amount of the fine imposed on AC-Treuhand as a lump sum.

Significance and practical implications

The judgment is of significant importance for a number of reasons. First, the Court clarified that the EU cartel prohibition is broad enough to encompass "supportive" conduct. By confirming that "cartel facilitators" are caught by EU competition rules, the Court sends a clear and strong warning not only to consultancies but also to trade associations and other professional bodies that provide services to their members similar to those offered by AC-Treuhand, such as collection of sales data and organisation of meetings. Moreover, by endorsing the EC's discretion to impose lump sum fines, the Court cautions that fines in such instances may be particularly harsh, as they do not have to be calculated by reference to the company's turnover.

Importantly, the judgment suggests that companies offering professional services have a higher duty of care in assessing the antitrust compliance risk that their activities entail, and that duty will often be met through recourse to legal advisers. In view of this, it is of paramount importance for trade associations, and similar professional organisations to take all reasonable measures to ensure full compliance with competition law, including having external counsel attending meetings and advising on code of conduct.

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