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Liability for Aiding and Abetting in EU Competition Cases: The Court of First Instance Confirms…

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Liability for Aiding and Abetting in EU Competition Cases: the Court of First Instance Confirms…

Antonio Caruso & Ewoud Sakkers[*]

I. INTRODUCTION

On July 8, 2008, in a judgment concerning a European Commission cartel decision against the company AC Treuhand AG, the Court of First Instance of the European Communities ("CFI") shed light on an area of anticartel enforcement that had not yet been tested in the European Courts. The CFI confirmed the decision of the European Commission (the "OP Commission Decision") concerning a company that acted as a consultancy firm which, though not active as a competitor on the market affected by the cartel, was held liable for actions that contributed to an infringement of Article 81 of the EC Treaty. According to the CFI, the behavior consisting of offering support services to a cartel falls within the prohibition of Article 81 EC. AC Treuhand was considered to have contributed actively to the functioning of the cartel and to have been aware of the cartel's anticompetitive objective. In other words, the Commission Decision and the CFI judgment make clear that, companies that "aid or abet"[1] in infringing the prohibition on

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[1]Compare the definition under U.K. law, see Section 8 of the Accessories and Abettors Act 1861: "[w]hoever shall aid, abet, counsel or procure the commission of [any indictable offence], whether the same be [an offence] at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender."

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cartels are caught within the ban of Article 81(1) EC and can be subject to the payment of a fine. AC Treuhand did not appeal the CFI judgment before the European Court of Justice, so the Commission Decision has become definitive.

Issuing prohibition decisions against those who assist in setting up, supporting, or sustaining cartel activity indicates that the European Commission has intensified its strategic fight against cartels, a trend which has become increasingly evident over the past decade. The strategy encompasses—apart from a stringent approach in relation to fines—scrutinizing (and sanctioning) behavior that does not directly concern the restriction of competition on the market, but that covers activity contributing to the committing of such infringements or to their concealment, whether or not they do so as a separate entity or as a member of the cartel that is active on the market. Such behavior may consist of acts that can be classified as aiding or abetting, as facilitating practices, or can concern aspects of concealment or obstruction to Commission investigations.[2] If such behavior is committed by a participant to a cartel active on the market, this is usually dealt with by the Commission in the ultimate decision with fines against that company, as an aggravating circumstance leading to an increase of the overall fine, rather than such conduct being treated as an isolated offence under Article 23 of Regulation 1/2003. For example, in the Commission decision against the Gas Insulated Switchgear cartel in 2007, the Commission increased the fine by 50 percent for three companies for their leadership role, each having operated the secretariat of the cartel for a number of years.[3]

[2]See, recently, the Commission Decision in Professional Videotapes of 20 November 2007, C(2007)5469, non-confidential version published on internet, par. 220.

[3]See the Commission Decision in GIS - Gas Insulated Switchgear, of 24 January 2007, C(2006)6762, non-confidential version published on internet, par. 511 ff. Note that the undertakings have appealed the

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II. THE BACKGROUND TO THE TREUHAND JUDGMENT: THE 2003 COMMISSION DECISION IN *ORGANIC PEROXIDES*

The Commission Decision in *Organic Peroxides* of December 2003 fined several producers for participation in a cartel of long duration that had the objective of preserving suppliers' market shares and of coordinating price increases in the organic peroxides ("OP") sector. A consultancy firm in Switzerland, AC Treuhand, was included in that decision for providing logistical services concerning the organization of meetings among the cartelists, including, for example, the aspect of travel and cost declarations, so that no trace of illegal meetings would be found within the companies themselves. AC Treuhand was also storing secret documents relating to the cartel and was collecting, processing, and distributing information concerning the activities of the cartel members.[4]

decision of the Commission, also on this aspect. See Commission Decision in the GIS case, recital 514: "Therefore, taking up the role of secretary warrants an increase in the fine to be imposed. In this case, it merits an increase of 50 percent for each of the European undertakings (Siemens, ALSTOM and AREVA) for leadership because they assumed responsibility for the cartel's secretariat". The GIS decision can be found at: http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38899/non_conf_dec_fin.pdf.

[4] See rec. 92 of the Commission Decision: AC Treuhand: "organised meetings of the members of the agreement, often in Zürich; (b) produced, distributed and recollected the so called 'pink' and 'red' papers with the agreed market shares which were, because of their colour, easily distinguishable from other meeting documents and were not allowed to be taken outside the AC Treuhand premises; (c) calculated the 'pluses and minuses', i.e. the deviations from the agreed market shares, which were used for compensations; (d) reimbursed the travel expenses of the participants, in order to avoid traces of these meetings in the companies' accounts; (e) collected data on OP sales and provided the participants with the relevant statistics; (f) stored the original agreement from 1971 and other relevant documents concerning the agreement in its safe and handed them over to PC; (g) acted as a moderator in case of tensions between the members of the agreement and encouraged the parties to find compromises. […]; (h) was actively involved in reshaping the arrangement among producers in 1998 […]; (i) AC Treuhand advised the parties whether or not to allow other participants into the agreement; (j) instructed all participants on the legal dangers of parts of these meetings and on what measures to take to avoid detection of these arrangements' bearing on Europe; (k) participated mainly the 'summit' meetings but at least at once instance in the nineties attended also a working group meeting; […] (m) was aware of the Spanish sub arrangement and was asked to calculate the deviation between agreed quotas and effective sales in Spain organised the auditing of the data submitted by the parties…"

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In the Commission Decision—that included the determination and fines against the organic peroxide producers—it was stated that the AC Treuhand undertaking had played a "crucial role in the organization of the cartel," contributing to the cartel functioning, in violation of Article 81 (EC), acting as an association of undertakings and/or as an undertaking in its own right. The Commission, based on the novelty "to a certain extent" of sanctioning an undertaking that was not a seller of the products or services concerned, imposed a symbolic fine of EUR 1000 on AC Treuhand by referring to the *Italian Cast Glass* case, a decision dating back to 1980 where the Commission had prohibited the conduct of an "organizer/facilitator"[5] of a cartel, without imposing a fine. As regards AC Treuhand, in the OP Decision the Commission acknowledged that despite this precedent, "a number of decisions between 1980 and today did not follow the same approach,"[6] and took this factor into account in setting the fine at such a mitigated level, notwithstanding the gravity and duration of the cartel as a whole (duration of 29 years, for which the members of the cartel were fined a joint amount of 69.5 million EUR). As qualifying elements of AC Treuhand's liability, the Commission stressed the "active role played" by it in the functioning of the cartel and that AC Treuhand "…knowingly contributed to this objective of restricting competition in the sector of organic peroxides, by supporting the overall plan, although it does not produce organic peroxides." The press release of the Commission at the time of the decision mentioned that, despite the symbolic fine, "the message is clear: organizers or facilitators of cartels, not just the cartel members, must

[5] *See* Commission Decision of 17 December 1980 relating to Italian Cast Glass, [1980] OJ L 383/19.

[6] Rec. 454 of the Commission Decision. (*See also* Commission Decision of 27 July 1994 94/599/EC ("PVC"), OJ [1994] L 239/14, Commission Decision of 21 December 1988, 89/191/EEC ("LdPE"), [1989] OJ 74/21, Commission Decision of 2 December 1986, 87/1/EEC ("Fatty Acids"), [1987] OJ L 3/17; Commission Decision of 23 April 1986, 86/398/EEC ("Polypropylene"), OJ L 230/1.

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fear that they will be found and heavy sanctions imposed from now on." The underlying issues of this case were whether the conduct of actors who are not suppliers of the products or services concerned could be defined as "co-perpetrators," "accomplices," or "aiders/abettors" within the boundaries of Art. 81 EC, and whether a fine could therefore be issued against such entities.

III. THE AC TREUHAND CASE BEFORE THE CFI

In the appeal before the CFI, AC Treuhand maintained that Article 81 EC could actually not be held applicable to its conduct, without there being prior definition in the law as regards the notions of co-perpetration, accomplice or aiding/abetting and which in national legal systems—often under criminal laws—are subject to specific requirements and criteria. Given that in Community competition law such a violation had not been defined, the behavior against which the Commission had taken objection was therefore not a punishable offence.

Prior to the judgment in AC Treuhand the CFI had not expressed itself on this issue in particular. However, the matter was touched upon by Advocate-General (A-G) Stix-Harl in her Opinion in one of the *Steel Beams* appeals which came before the ECJ[7] (and were later dismissed). The applicant in that case (Krupp Hoesch Stahl AG) appealed the CFI judgment,[8] arguing, *inter alia*, that the Commission had unjustifiably punished its conduct (supply of market data that made it "easier for the other undertakings to review the market position") which, in the applicant's opinion, constituted "third party conduct" and could be "a case of liability for 'incitement or complicity', lying outside the scope of

[7]Case C-195/99, *Krupp Hoesch Stahl AG v Commission*, [2003] ECR I-10937

[8]Case T-141/94, *Krupp Hoesch Stahl AG v Commission*, [1999] ECR II–603.

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competition provisions."[9] With reference to this claim by the appellant the A-G concluded—in commenting on the CFI judgment—that the CFI judgment does

> not warrant the conclusion […] that the Court of First Instance has here created a new category of competition law (liability under competition law in the case of accomplices who are not themselves perpetrators),

dismissing the further claim that the alleged "new category" would not be covered by competition provisions and "would represent an infringement of Article 7 of ECHR on unforeseeability grounds." In a footnote to the Opinion the A-G stated: "In my view there is no need even at the present time to make a formal distinction between complicity and aiding and abetting under Community competition law," since Community Courts jurisprudence already provided "a relatively wide application of competition law,"[10] adding that

> in certain circumstances, therefore, complicity is established even in situations that, under the general criminal law of many Member States, would amount to the lesser offence of aiding and abetting. In the Community-law context, therefore, although the dogma might differ, the end is still the same: a wide framework is provided for establishing complicity and the Commission can acknowledge the presence of different forms of involvement in an infringement of competition by reducing the 'gravity' of participation in the offence when determining the amount of the fine to be imposed.

According to the A-G, the establishing of liability for "different forms of involvement in an infringement of competition" was in line with consolidated case law. Hence no violation occurred of the principle *nullum crimen, nulla poena sine lege* ("No punishment without law") enshrined in Art. 7 of the European Convention of Human

[9] *See* para 54 ff. of the Opinion.

[10] Quoting the judgment in the Polypropylene cases, particularly Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539.

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Rights ("ECHR").[11] It is noted that the applicant's claim was dismissed in summary terms, by the ECJ judgment,[12] which concluded the CFI judgment had correctly found that

> the actual participation of the appellant in a system of reciprocal exchanges of information, of the operation of which it was aware, was sufficient to establish that it had acted in accordance with the agreement on that system,

and that the competition provision prohibiting restrictive agreements (in that case Art. 65 (1) of the ECSC Treaty) "is to be applied even where the party to an agreement did not profit from that agreement."[13]

Notwithstanding the Opinion of the Advocate-General—and the dismissal of the claim by the ECJ—the issue of the liability of accomplices/aiders or abettors in competition infringements was not definitively clarified at a Community judicature level. The argument that it was not possible to apply Art. 81 of the EC Treaty to such cases without a specific legal codification was the main weapon used by AC Treuhand in its appeal against the Commission Decision.

AC Treuhand's appeal was in fact twofold: i) a first plea concerned an aspect of procedure, alleging an infringement of rights of defense as a result of the Commission's failure to inform it in due time of the nature and reasons for its inclusion as a (potential) addressee, and ii) a set of other pleas focusing on the *nullum crimen, nulla poena sine*

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[11] Article 7 reads: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[12] *See* Case C-195/99 P, *Krupp Hoesch Stahl AG v Commission*, referred to above.

[13] *See* paras 85 and 86 of the judgment.

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lege argument. As part of this second group of pleas, AC Treuhand alleged (a) that Art. 81 EC applies only to conduct of market players as perpetrators of cartel infringements and not to complicity (aiding/abetting) or instigation to commit it, and (b) an infringement of the principle of legitimate expectations (by virtue of the absence of Commission decisional practice against entities offering similar services as AC Treuhand). In further pleas, AC Treuhand claimed that the

> broad interpretation of Article 81 (1) EC adopted by the Commission means that the constituent element of the infringement laid down in Article 81(1) EC may be discerned in all manner of conduct and thus fails to have regard for the principle of nulla poena sine lege certa,

that is the principle of legal certainty in relation to the punishment for the conduct concerned (and hence as a corollary to the argument of *nulla poena sine lege)*.

Although the first plea (violation of the rights of defense) is not the principal object of this article, the CFI scrutinized the Commission practice and duties during the investigatory phase, as regards the manner in which, and the timing of, informing undertakings of the fact that they are under investigation and may become an addressee of a Statement of Objections. The CFI, reaffirming the duty of the Commission "to inform the undertaking concerned, inter alia, of the subject-matter and purpose of the investigation underway," when sending out requests for information under Art.18 of Reg. 1/2003,[14] found that, in this case, the Commission had failed to sufficiently inform AC Treuhand in due time of its status as a possible incriminated party. Although this omission was found not to have impaired AC Treuhand's rights of defense,[15] it is noted

[14] Para 56 of the judgment.

[15] Because *in concreto* AC Treuhand acknowledged they suffered no harm by being informed at a later stage of their status as party "suspected" of an infringement.

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that the CFI introduced a seemingly new obligation to inform addressees of requests for information (under Art. 18 of Reg. 1/2003) of the "putative infringement" *and* of "the fact that the undertaking may be faced with allegations related to that possible infringement of Art. 81 EC."[16] We will not further comment on that aspect as it is not within the purpose of this article and would require a longer description of relevant case law.

On the second set of pleas about the boundaries of the prohibition Art. 81 EC, the CFI clarified that co-perpetrators and/or accomplices were within the delineation of the cartel prohibition. The CFI arrived at that conclusion on the basis of a literal, contextual and teleological interpretation of Art. 81 EC. Some relevant sections of the judgment are highlighted below.

The judgment states that liability for infringements of Art. 81 EC does not require "the relevant market on which the undertaking which is the ‘perpetrator’ of the restriction of competition is active to be exactly the same as the one on which that restriction is deemed to materialise,” and that "any restriction of competition within the common market may be classed as an "agreement between undertakings" within the meaning of Article 81(1) EC."[17] Furthermore, the CFI stated that

> the notions of a cartel and of an undertaking which is the perpetrator of an infringement are conceptually independent of any distinction based on the sector or the market on which the undertakings concerned are active.

Subsequently, the CFI recalled that the liability of AC Treuhand followed from consolidated case law on cartel involvement in general, referring to the essential requirements for holding an infringer liable, i.e. making "contribution" to the

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[16]Paras 56 and 57 of the judgment.

[17]Para 122 of the judgment.

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infringement[18], even "in a subsidiary, accessory or passive role" and the "awareness" of the cartel's objective.[19] Finally the CFI concluded that:

> the undertakings which are co-perpetrators of an infringement and/or which are complicit in the overall infringement, to which the anti-competitive conduct of the other participating undertakings is also attributed

have a "shared liability" under Art. 81 EC.[20]

Moreover, the applicant could not base its claims on the absence of a codified notion of "accomplice" or "aiders/abettors" as against particular definitions in the laws of certain Member States' legal systems. On this last point, the CFI concluded that the definition of perpetrators of an infringement under Art. 81 EC is "sufficiently broad to cover both the conduct of the main perpetrators of the infringement and that of the parties whose role is one of complicity." As regards the claim of the lack of predictability of holding AC Treuhand liable, in view of the absence of a Commission practice, the CFI pointed to the *Italian Cast Glass* precedent of 1980 that had actually been referred to in the Commission Decision. That earlier decision had clarified what the effective scope/range of Art. 81 EC was, concerning those active in the field of professional services rather than on the market concerned by the infringement. Any lack of further enforcement since 1980 could

[18] Para 133 of the judgment: "Case-law recognizes the joint liability of the undertakings which are co-perpetrators of an infringement under Article 81(1) EC and/or which have played an accessory role in such an infringement, in so far as it has been held that the objective condition for the attribution of various anticompetitive acts constituting the cartel as a whole to the undertaking concerned is satisfied where that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role, for example by tacitly approving the cartel and by failing to report it to the administrative authorities, since the potentially limited importance of that contribution may be taken into consideration for the purposes of determining the level of the fine."

[19] Para 134 of the judgment: "In addition, the attribution of the infringement as a whole to the participating undertaking depends on the manifestation of its own intention, which shows that it is in agreement, albeit only tacitly, with the objectives of the cartel."

[20] See para 146 of the judgment.

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not change the fact that the scope of Art. 81 EC had been defined, despite the fact that the prior case dates from the early 1980s. In closing on the *nullum crime, nulla poena sine lege,* and the *nulla poena sine lege certa* arguments, the CFI underscored that

> any undertaking which has adopted collusive conduct, including consultancy firms which are not active on the market affected by the restriction of competition, could reasonably have foreseen that the prohibition laid down in Article 81(1) EC was applicable to it in principle. Such an undertaking could not have been unaware, or was in a position to realise, that a sufficiently clear and precise basis was already to be found, in the former decision-making practice of the Commission and in the existing Community case-law, for expressly recognising that a consultancy firm is liable for an infringement of Article 81(1) EC where 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."[21]

It should be noted that whereas the Commission Decision qualified AC Treuhand as "actively" and "knowingly contributing" to the cartel objectives,[22] the CFI mentions—and underlines—the "intentional" contribution (rather than just "knowingly"). It is submitted, nevertheless, that the criteria applied are to be considered within the framework of the case and its factual specificities, so that the aspect of the "intentional nature" is not necessarily of general application, and would not exclude cases to be brought if an accomplice was aware, but its actual intent could not be established.[23]

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[21]See in particular para 150 of the judgment.

[22]Rec. 349 of the Commission Decision: "AC Treuhand has knowingly contributed to this objective of restricting competition in the sector of OP, by supporting the overall plan, although it does not produce OP".

[23]See rec 95 and ff. of the OP Decision, and in particular para. 102: "AC Treuhand was *absolutely* aware of the anti-competitive nature of the agreement. AC Treuhand derived an economic advantage from the agreements via the services it provided to the parties to the agreement. It actively ensured the secrecy of the agreement and mediated between the members in order to reach compromises. These compromises were necessary for AC Treuhand to continue its role and to be paid by the other parties to the agreement. And, indeed, as the agreement ended in 1999, the other parties stopped exchanging data and also stopped paying AC Treuhand. AC Treuhand's tasks were the basis for the functioning of the agreement." (emphasis added)

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The applicant had also claimed a violation of the principle of legitimate expectations, as it felt that the Commission's practice had shown a record of not including in its decisions companies in similar roles as AC Treuhand, therefore AC Truehand could legitimately expect not to be fined for its conduct. On this point—closely related of course to the above mentioned principles—the CFI concluded that given the Commission's duty to "ensure the application of the principles laid down in article 81 EC" the fact that the Commission's decision-making practices previously followed the same line as the *Italian Cast Glass* case, does not give rise to any such legitimate expectation. In other words, the fact that the Commission did "not censure or penalise the consultancy firms" in prior cases, "does not disavow…the approach initially followed."[24]

After having stated the applicable principles, the CFI turned to the merits of the case, judging whether on substance AC Treuhand could actually be seen as a perpetrator. It assessed the claim of AC Treuhand relating to the lack of "active contribution" to the infringement and looked at whether the actions of AC Treuhand had a "sufficiently definite and decisive causal link between" AC Treuhand's activity and "the restriction of competition in the organic peroxide market," which it was found to have had. In assessing the awareness of AC Treuhand, the CFI stressed that due to the role that its predecessor *Fides* and—as of December 28, 1993—the company itself had played in the cartel, the consultancy company "clearly could not have been unaware"—and "indeed it knew" that the "objective of the cartel to which it contributed was anti-competitive and unlawful."[25] As the CFI stated, given the symbolic amount of the fine, there was no need

[24]Cf. para 164 of the judgment.

[25]Para 156 of the judgment.

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to assess the effective contribution of the company in terms of participation and gravity and the impact of those criteria on the fine for AC Treuhand.

In conclusion, the CFI entirely dismissed the claim by AC Treuhand that the interpretation of the Commission of Art. 81 EC, holding the company liable as an "accomplice" to the cartel, was "vague and contradictory" and the claim that the Commission had infringed the principle of "certainty of law," as a corollary to the principle laid down in Art.7 of ECHR of "no punishment without law." The CFI concluded that all elements "establishing the active and intentional participation of the applicant in the cartel," had been provided in the Commission Decision—with reference to consolidated jurisprudence—"thus making it possible for the applicant to be held liable for an infringement of Article 81(1) EC, independently of the real extent of that participation in detail."[26]

IV. POSSIBLE IMPLICATIONS FOR FUTURE COMMISSION PRACTICE

An immediate lesson from the Commission Decision and the judgment of the CFI is that those who provide shelter for cartels or act as facilitators may become the target of investigations and sanctions.[27] It is indeed likely that the Commission will consider bringing other cases to target companies offering support services and that, as the Commission indicated, fines will no longer be symbolic. A question in setting priorities in this regard is whether, where such support services are carried out by an *association of undertakings* (and where the members of that association are members of a cartel in their

[26]Para 171 of the judgment.

[27]The Commission, according to the CFI,- para 163 of the judgment- even does not have "…any leeway enabling it, where relevant, to forego bringing an action against a consultancy firm which satisfies the criteria for shared liability."

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own right), the Commission will choose to also include in its decision the association itself for any facilitating role. As for the legal denomination of such entities, organizers or facilitators, or accomplices in general ("undertakings" or "associations") the difference does not appear material. (In the Organic Peroxide case, although the Commission Decision left the question open as to whether the consultancy company could be qualified as an "undertaking" or "association of undertakings," the CFI was conclusive on the qualification as undertaking. This factual conclusion cannot rule out that similar "organising and facilitating" or otherwise contributing roles could be taken up by an association of undertakings, as was the case in the *Belgian Roofing Felt* case.)[28]

As regards the particularities of any conduct "contributing" to the cartel, the concept leaves space for interpretation, as long as the conduct has a "sufficiently definite and decisive causal link" to the cartel combined with the awareness of the cartel objectives. Such a contribution can consist in general terms of organizing or facilitating the functioning of the cartel, as in the AC Treuhand (and previously in Italian Cast Glass). The judgment of the CFI in *Needles*[29] provides another example of an undertaking—

[28]Commission Decision 86/399, of 10 July 1986, rec. 115: "Although Belasco's members [a trade association] were also the members of the cartel, Belasco itself must be held responsible, independently of its members, for its involvement in operating the cartel."

[29]Commission Decision of 26 October 2004: http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38338/en.pdf.

On the factual distinction between the Coats' role and that of AC Treuhand, see also rec. 274 of the Decision: " The role of Coats in the tripartite agreement differs drastically from the cases contemplated in the Commission Decisions Italian Cast Glass and Organic Peroxides in which respectively FIDES and AC Treuhand were in both cases service undertakings in charge of organising and collecting statistical information in order to enforce the cartels. Coats plays a different role, as it is a party to the tripartite agreement emerging out of the formally bilateral agreements and a cornerstone of the infringements. Without Coats' involvement it is proven in this Decision that the market sharing agreement between Prym and Entaco would not have come into being and in the same manner its own brand at the retail level would not have been protected against competition. However Coats never organised the daily business of the market sharing agreement since, as has already been demonstrated, it did not need to do so." See

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Coats—that was a market player different from the producers, found as "facilitating the entry into force of an agreement." Nevertheless, since this "role is therefore more akin to that of a mediator than that of a full member of the cartel,"[30] the CFI considered that such a particular circumstance warranted a reduction of the fine of 20 percent compared to that imposed by the Commission.[31] Also, in considering whether or not support services can be addressed separately whatever the material contribution and the role played, *awareness* by accomplices *of the cartel objective(s)* and *of the causal link* that their contribution has to such objective(s) appear indispensable elements.

Another conclusion that may be drawn is that the approach to include legal persons offering support services avoids that this conduct—looked at separately as support to the cartel—will be outsourced and thus go unpunished. As noted above, conduct that consists of, for instance, running the secretariat of the cartel could lead to a higher fine through aggravation if carried out by one of the regular members. Now that support providers also risk being fined, leaving the administration of a cartel to an outside entity does not therefore reduce the liability of all cartel members, including the other entity.

A further inference concerns the effectiveness of the Commission's leniency program: the fact that entities such as AC Treuhand may attract a fine—based on a shared liability—also means that they can actually make use of the Leniency Notice and obtain immunity. This would serve to enhance the instability that the Leniency Notice aims to

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furthermore Case *Coats v. Commission*, judgment of 12 September 2007, not yet reported, para 105, quoting *JFE Engineering Corp. v. Commission*, Case T-67/00, T-68/00, T-71/00 and 78/00, of 8 July 2004).

[30] *See* Case *Coats v Commission*, para 105.

[31] *See* CFI judgment, *Coats v Commission* paras 214 and 215.

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instill within cartels, and would also serve as a disincentive for companies to make use of such services. In a wider context, that of the European Competition Network, the Commission Decision and ensuing CFI judgment are also relevant, in that they provide a basis for, and comfort to, national competition authorities intending to investigate and sanction such entities, at least where Article 81 EC is being applied but also in the application of national competition law.

Should the Commission in future want to sanction entities supplying support services it will need to consider on what basis a fine should be determined. It is submitted that the Commission 2006 Guidelines on Fines[32] cannot be applied in the same way as to the cartelists who are active on the market for the relevant product or services. The participation of accomplices, while sharing the objectives of the cartel, would not lead to a sharing of the benefits/profits. For the other cartel members the Fining Guidelines foresee a fine in relation to their turnover. For "support entities" a turnover on that market does not exist. Still, they do have turnover as regards their own services, and this could form a basis for any fines. Furthermore, the degree of their involvement would play a role for the fine, to be assessed on a case-by-case basis.[33] It would appear indicated and logical, for the above reasons, that the Commission consider applying point 37 of the Fining Guidelines, allowing for an *ad hoc* determination of the appropriate fine.

[32]Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210, 1.09.2006, p. 2-5.

[33]*See also* the CFI judgment in *Coats*, above cited.

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V. CONCLUSION

The case law has confirmed that the determination of liability of "accomplices" or "co-perpetrators" does not provide the Commission with new ammunition but rather fortifies that which is already contained in Article 81 EC. One can place the fact that the Commission targeted a company like AC Treuhand in the wider context of both clarifying and reinforcing cartel enforcement where it comes to practices that assist cartels. Another indication that cartel enforcement is becoming more robust (outside the level of the fines), is the Commission's apparent tougher stance as regards lack of cooperation and obstruction.[34] The goal is to maximize deterrence, not only for being in a cartel, but also for playing any role that supports its functioning or hampers its detection. Ultimately these efforts of the Commission, combined with those of the Member States, are contributing to the reduction of the negative effect of cartels in the economy as a whole.

[34]The Commission policy as regards repeat offenders (recidivism) and as regards the (joint) liability for parent companies may be seen in this same overall context.

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