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# **Cartel Facilitators Beware—*AC Treuhand* Spurs Competition Authorities into Action**

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### I. INTRODUCTION

It is uncontroversial that undertakings that are active in a particular industry (e.g. by manufacturing a product or providing a service) and who engage in anti-competitive behavior are guilty of illegal conduct. For example, price-fixing, market sharing, customer allocation, or bid rigging can all lead to large fines, possible criminal or civil penalties (depending on the jurisdiction) for directors or managers, and possibly significant liabilities arising from private enforcement damages actions.

However, until recently the position has been somewhat less clear in relation to cartel facilitators. Although such cartel facilitators, which are usually either consultancies or trade associations, have featured in cartels going back to the 1970's, the enforcement focus of competition authorities in Europe has traditionally been on the undertakings that are active in the cartelized industry.

After the European Court of First Instance's ("CFI") judgment in the *AC Treuhand* case,<sup>2</sup> however, cartel facilitators have found themselves under increased pressure from regulators. Whereas this article focuses on the approach taken on this issue by the Nederlandse Mededingingsautoriteit ("NMa"), the Dutch Competition Authority, it also charts the history of cartel facilitator jurisprudence at EC level and refers to a number of other cartel facilitator cases at national level.

### II. CARTEL FACILITATOR ENFORCEMENT AT EC LEVEL—FROM *ITALIAN FLAT GLASS* TO *ORGANIC PEROXIDES*

EC cartel facilitator enforcement activities go back to the early 1980's, when the European Commission (the "Commission") attributed liability for the *Italian Flat Glass* cartel<sup>3</sup> not only to the manufacturers involved in the illegal conduct but also to a consultancy firm that had actively facilitated the anticompetitive conduct. However, no fine was imposed on the consultancy firm.

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<sup>2</sup> Case T-99/04, *Treuhand AG v Commission of the European Communities*, [2008] 5 C.M.L.R. 13.

<sup>3</sup> Commission Decision 81/881/EEC of 28 September 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV.29.988 - *Italian Flat Glass*), OJ L 326, 13.11.1981, at pages 32-43.

The Commission got its next opportunity to censure cartel facilitation behavior when the cartel participants in the *Polypropylene* cartel<sup>4</sup> set up a complex information exchange mechanism through a consultancy called Fides Trust. Although, in contrast to the *Italian Flat Glass* cartel case, Fides Trust was not an addressee of the Commission's infringement decision, the Commission did find (and this point was upheld on appeal) that the information exchange mechanism run by Fides Trust was contrary to Article 81(1). In addition, the parties were ordered to bring the mechanism to an end.

Therefore, by the late 1980's it had been established by the Commission's decisional practice that cartel facilitation conduct was contrary to Article 81(1). However the Commission had not, at that time, imposed fines on cartel facilitators and one could have been forgiven for thinking that the Commission's cartel enforcement activities were firmly focused (as arguably they should be) on undertakings active in the cartelized markets (such as manufacturers) rather than on cartel facilitators.

However, this position changed significantly with the Commission's decision in the *Organic Peroxides* cartel case<sup>5</sup> and the CFI's judgment confirming the Commission's decision.

The Commission's decision in the *Organic Peroxides* cartel case is well known to competition law practitioners for two main reasons: on the one hand the Commission succeeded in exposing what was then (and remains to this day) the longest running cartel—nearly three decades from 1971 to 1999. Secondly, and more importantly for the purposes of this article, the Commission fined a consultancy for the first time for cartel facilitation conduct.

Due to the serious nature of the conduct that the organic peroxides manufacturers had engaged in, namely price-fixing and customer allocation, the Commission imposed fines of nearly EUR 70 million on those manufacturers. However, the Commission also found that the Swiss consultancy firm AC Treuhand (which, on an interesting aside, had recently acquired Fides Trust which had been censured in the *Polypropylene* cartel case) had engaged in conduct that had facilitated the manufacturers' cartel, and the Commission imposed a symbolic EUR 1,000 fine on it.

In addition, the Commission left no room for doubt as to what its future intentions were regarding the enforcement of antitrust rules against facilitators. In the Commission's *Organic Peroxides* cartel decision on December 10, 2003, the Commission stated:

[t]he sanction against AC Treuhand is limited in amount because of the novelty of the approach. But the message is clear: organisers or facilitators

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<sup>4</sup> Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV.31.149 - *Polypropylene*), OJ L 230, 18.08.1986, at pages 1-66.

<sup>5</sup> Commission Decision 2005/349/EC of 10 December 2003 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, 30.04.2005, at pages 44-47.

of cartels, not just the cartel members, must fear that they will be found and heavy sanctions imposed from now on.<sup>6</sup>

There has been some speculation as to why the Commission decided that it should change its previous cartel facilitator enforcement policy in the *Organic Peroxides* case. Some have argued that AC Treuhand's blatant conduct was to blame for the Commission's reaction—indeed, it is not difficult to see why it would rile the Commission that a consultancy was undertaking tasks such as safeguarding written cartel documents on its premises, acting as a “secretariat” for the cartel, organizing cartel meetings, reimbursing travel expenses, etc. It is therefore arguable that, in contrast to the *Italian Flat Glass* and the *Polypropylene* cartel cases, there was a different quality of conduct at issue in the *Organic Peroxides* cartel case and that the Commission wished to make a clear statement that the AC Treuhand conduct would not be tolerated.

However, the Commission did acknowledge that its approach to AC Treuhand was “novel” (and therefore by implication a departure from its previous practice in the *Italian Flat Glass* and the *Polypropylene* cartel cases), and the low level of the fine reflected this.

Predictably, AC Treuhand appealed the Commission's decision to the CFI, and it essentially argued that (i) it could not be liable for the alleged conduct as it was not active in the cartelized market (i.e. it was not a manufacturer of organic peroxides) and (ii) that it was being discriminated against as similar conduct in the *Italian Flat Glass* and the *Polypropylene* cartel cases had previously not been sanctioned by fines.

The CFI, however, dismissed AC Treuhand's appeal. In relation to the first argument, the CFI countered by saying that for a period of six years AC Treuhand had “actively and intentionally” contributed to the cartel. In relation to the second argument, the CFI held that AC Treuhand did not have a legitimate expectation that it would be treated similarly to other cartel facilitators in the past. The CFI believed that any professional organization such as AC Treuhand needed to properly assess risks that may be associated with its conduct, and that such an assessment would have revealed that such conduct at least risked breaching Article 81(1).

As AC Treuhand decided not to appeal the CFI's judgment to the European Court of Justice, it is now a clearly established principle that cartel facilitators can be liable for such conduct even where such facilitators are not active on the cartelized product market. The Commission was understandably very happy with the CFI's endorsement of its approach in this area and, indeed, within days of the judgment coming out, a senior DG COMP official had gone on record to suggest that cartel

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<sup>6</sup> European Commission Press Release IP/03/1700 of 10 December 2003, “*Commission fines members of organic peroxides cartel*”, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1700&format=HTML&aged=1&language=EN&guiLanguage=en>.

facilitators were in DG COMP's sights. The official also warned that now that the *AC Treuhand* case had clearly established the applicable principles, cartel facilitators could no longer hope for a novelty bonus (i.e. symbolic fines would likely become substantial fines).<sup>7</sup>

One final point to make in this regard is to clarify that the *AC Treuhand* case, which deals with the liability for cartel conduct coordinated by cartel facilitators, must be distinguished from well-established case law on trade associations which can breach Article 81(1) by entering into collective agreements with members on terms of business (rather than letting these be determined by bilateral negotiation).<sup>8</sup>

### III. THE NMA TARGETS CARTEL FACILITATORS AFTER AC TREUHAND

The NMa has a reputation as being one of the most progressive national competition authorities in Europe. It is particularly well known for using innovative procedural mechanisms to deal with large and complex cases, and it has become increasingly frequent for much larger and better resourced national competition authorities, such as the UK's Office of Fair Trading, to seek to emulate procedural mechanisms pioneered by the NMa. For example, the NMa's innovative efforts to deal with the Dutch construction cartel investigation, the largest by far in the NMa's history, have been copied both in the United Kingdom and elsewhere when dealing with large cases involving several dozen or more parties. Therefore, it is always worth watching what the NMa does in relatively new fields of competition law, such as cartel facilitator enforcement. Based on previous experience, the likelihood is that other national competition authorities will follow suit.

It was no surprise, then, that within weeks of the CFI's *AC Treuhand* judgment coming out it was the NMa which took concrete steps towards increasing detection and enforcement action against cartel facilitators. In a press release, the NMa took the opportunity to expressly invite cartel facilitators to make use of its leniency program.<sup>9</sup>

The NMa has recently followed this up with the first post-*AC Treuhand* cartel facilitator enforcement decision in Europe. On June 12, 2009, the NMa announced fines on several paint firms and a cartel facilitator in the Netherlands for rigging two Dutch Ministry of Defence tenders for painting services. Although, in comparison with some of the fines we have recently seen both at the EC and UK levels, the fines imposed by the NMa are relatively small (less than EUR 200,000), the level of the fine on the cartel

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<sup>7</sup> Lewis Crofts (M-Lex), "Bigger fines for cartel consultants post-*AC Treuhand*" (27 October 2008), available at <http://www.mlex.com/Content.aspx?ID=39189>.

<sup>8</sup> Commission Decision 39/168/EC of 19 September 2007 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/39.168 - *PO/Hard Haberdashery: Fasteners*), OJ C 47, 26.2.2009, at pages 8-12.

<sup>9</sup> NMa press release 08-23 of 29/07/2008, "Ook kartelondersteuners kunnen om clementie vragen", available at [http://www.nmanet.nl/nederlands/home/Actueel/Nieuws\\_Persberichten/NMa\\_Persberichten/Persberichten\\_2008/08-23\\_Ook\\_kartelondersteuners\\_kunnen\\_om\\_clementie\\_vragen.asp](http://www.nmanet.nl/nederlands/home/Actueel/Nieuws_Persberichten/NMa_Persberichten/Persberichten_2008/08-23_Ook_kartelondersteuners_kunnen_om_clementie_vragen.asp).

facilitator (EUR 17,000) exceeds the fine imposed on AC Treuhand by a factor of nearly 20.

In its press release, the NMa noted that bid rigging “constitutes an extremely severe violation of the Dutch Competition Act”<sup>10</sup> The press release also explained that the cartel facilitator in question, Coöperative Vereeniging Spegelt (a so-called ‘cost estimate consultant’), had been actively involved in establishing the (two separate) cartels in question by (i) organizing a meeting at its offices to discuss the tenders, (ii) being present at the meeting, (iii) drawing up documents evidencing the bid rigging arrangements agreed on, and (iv) managing the agreements to ensure compliance.

Therefore, the conduct that the NMa has censured in this cartel facilitator case falls squarely within the factual matrix of the *AC Treuhand* case law. It sends out a strong signal to consultants everywhere that much care is now required so that, when assisting clients, consultants do not stray over the line from admissible assistance for their clients into actively setting up, facilitating, and running cartels.

#### **IV. OTHER CARTEL FACILITATOR ENFORCEMENT CASES**

Following the DG COMP official’s comments referred to above,<sup>11</sup> it was expected that the Commission would seize on the first opportunity that arose to impose a significant fine on a cartel facilitator in a suitable case.

Therefore, it came as some surprise to commentators that the Commission’s investigation (at EC level) of the *Marine Hoses* cartel case<sup>12</sup> did not result in a significant fine for Peter Whittle, the consultant at the center of the entire cartel. Although this would ordinarily have been the ideal case for the Commission to press home its strategy on vigorously enforcing the competition rules against cartel facilitators, it is understood that *ne bis in idem* concerns prevented the Commission from imposing a fine on Peter Whittle when he was already subject to both U.S. and U.K. penalties for the conduct in question.

#### **V. CONCLUSION**

Although it has been reasonably clear since the 1980’s that the Commission applies Article 81(1) to both manufacturers as well as to cartel facilitators, the absence of a fine for the latter seems to have lulled some consultants into a false sense of security. Some may consider this to be a somewhat surprising approach, as it would be very odd (from the point of view of competition enforcement effectiveness) if merely not being active on a market, but actively supporting a cartel, were to lead to an exoneration.

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<sup>10</sup> NMa press release 09-10 of 06/12/2009, “NMa imposes fine on two cartels and cartel supporter in Dutch paint industry”, available at [http://www.nmanet.nl/engels/home/News\\_and\\_publications/News\\_and\\_press\\_releases/Press\\_2009/09-10\\_NMa\\_imposes\\_fine\\_on\\_two\\_cartels\\_and\\_cartel\\_supporter\\_in\\_Dutch\\_paint\\_industry.asp](http://www.nmanet.nl/engels/home/News_and_publications/News_and_press_releases/Press_2009/09-10_NMa_imposes_fine_on_two_cartels_and_cartel_supporter_in_Dutch_paint_industry.asp).

<sup>11</sup> *Supra* note 6.

<sup>12</sup> Commission Decision 39/406/EC of 28 January 2009 relating to a proceeding under Article 81 of the Treaty and Article 53 of the EEA Agreement (Case COMP/39406 - *Marine Hoses*)—not yet published.

The NMa has, in accordance with its progressive reputation, blazed a trail which other competition authorities are likely to follow (even though the authors are not aware of any other authorities having focused as heavily as the NMa has on using cartel facilitators as an increasingly important method of detecting illegal cartels).

Nevertheless, consultants must become increasingly careful, particularly in these troubled economic times when their clients' intentions may be less than honorable, to not stray into activities that could be seen by the Commission or national competition authorities as actively supporting illegal cartel behavior.