

Shady Contours of Cartel Liability of Service Providers

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Introduction

Service providers, such as independent consultants and data processors, have encountered increased risks of higher monetary fines under European competition law for their activities in cartel facilitation under Article 101 of the Treaty on the Functioning of the European Union (TFEU), following the judgment of the Court of Justice of the European Union (the ‘Court of Justice’) in *AC-Treuhand II* in 2015,¹ which upholds the *Heat Stabilisers* decision² of the Court of Justice.

Until the *AC-Treuhand II* case in 2015, the General Court of the European Union (the ‘General Court’) had already upheld³ the *Organic Peroxides* decision⁴ of the European Commission. These earlier decisions had held that service providers would be considered liable for cartel activity, even if they were not active in the relevant markets affected by the cartel.⁵ The European Commission had issued a merely symbolic fine on a service provider in *Organic Peroxides*.⁶ In *Heat Stabilisers*,⁷

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1 Case C-194/14 P, *AC-Treuhand II*, October 2015.

2 Case COMP/38.589, *Heat Stabilisers*, November 2009.

3 Case T-99/04, *AC-Treuhand I*, July 2008.

4 Case COMP/E-2/37.857, *Organic Peroxides*, December 2003.

5 Case V/29.869, *Italian Cast Glass*, December 1980.

6 See n4 above.

7 See n2 above.

however, the European Commission imposed two separate monetary fines on AC-Treuhand, a consultancy firm, for its involvement in two separate cartels, with each fine amounting to €174,000,⁸ which was later upheld by the Court of Justice.

The competition law authorities and relevant courts consider the contribution of independent service providers to a cartel as facilitation and, therefore, treat them as cartelists within the meaning of competition law. Considering that this conclusion cannot be directly inferred from the wording of Article 101 TFEU itself, this appears to be a long-lasting policy decision. Accordingly, this approach gave rise to legal uncertainty and led to ongoing questions regarding the contours of liability for facilitators. Despite the Court of Justice's ruling in *AC-Treuhand II*, it is still worth discussing when the conduct of a service provider amounts to a cartel under competition law, and what the contours of its liability should be. This article will delve into the contours of liability set forth in the relevant decisions and judgments and will question whether they provide sufficient legal certainty for service providers. It will also explore the arguments against imposing such liability on service providers.

Chasing the cartel facilitators

Even though certainty and predictability are the cornerstones of the rule of law, the law also requires a certain amount of flexibility in order to address various forms of infringements. Indeed, the European Commission perceives cartel facilitators as a potential tool for undertakings to circumvent the requirements of competition law and to disguise restrictive agreements.⁹ Thus, the mere fact that a service provider is not active in a market where the cartel has effects is not enough to save the service provider from liability under competition law.

The approach to hold third parties liable as cartel facilitators under EU competition law can be traced back to 1980. In *Italian Cast Glass*,¹⁰ the European Commission looked into cast glass producers, who had entered into several agreements with the common objective to restrict the production and sale of the products. The European Commission noted that Fides-Unione Fiduciaria SpA ('Fides'), a management and accounting company that also provided supervisory and statistical research, was an undertaking within the meaning of competition

⁸ *Ibid.*

⁹ For instance, in *Heat Stabilisers*, the European Commission deemed AC-Treuhand to play central role in the tin stabiliser cartel by producing, distributing and collecting the agreed market shares and prices on the coloured papers. The European Commission explains in its decision that the coloured papers were used to conceal illegal arrangements. Meanwhile, AC-Treuhand also produced the official minutes on white papers to disguise the anti-competitive arrangements, and to divert attention from the coloured papers: see n2 above, 356.

¹⁰ See n5 above.

law. Fides carried out economic activities complementary to those of production and distribution companies. The European Commission decided that, because of its participation in the common objective and practices that restricted competition within the market, Fides was jointly liable for the resulting effect.¹¹ The European Commission expressly stated that the joint liability of the third party, which was not active in the production or distribution of the products in question, would have been considered if it were not for the statute of limitations. Such joint liability had not been addressed by the European Commission prior to this case.

Later, for instance, in *Cartonboard*,¹² which concerned a cartel among cartonboard producers, the European Commission reviewed the contribution of Fides Trust Company ('Fides Trust') to the cartel. The European Commission noted that even though Fides Trust – an independent data collection consultancy firm – was not directly involved with the producers in price fixing and market allocation, the information exchange through Fides Trust constituted a 'facilitating device', which allowed the producers to monitor the market and coordinate their conduct. Therefore, the European Commission assessed that the services of Fides Trust could not be viewed in isolation or separated from the overall anti-competitive objectives of the cartel.¹³ However, the European Commission merely ordered the investigation parties to modify their information exchange system, which had been carried out by Fides Trust, in compliance with the competition law.

The European Commission imposed a symbolic monetary fine on AC-Treuhand, an entity involved in the collection, processing and analysis of market data, and presentation of market statistics, in its *Organic Peroxides* decision.¹⁴ The European Commission found that producers of organic peroxides set up and maintained a cartel, beginning in 1971. AC-Treuhand played a significant part in this anti-competitive arrangement, which went 'beyond the mere collection and treatment of statistical data'.¹⁵ Significantly, the European Commission acknowledged in its decision that imposing fines on facilitator is 'to a certain extent a novelty'.¹⁶

AC-Treuhand's activities fell under the scrutiny of the European Commission, once again, in *Heat Stabilisers*¹⁷ in 2009, where the European Commission looked into agreements related to two product categories: tin stabilisers and ESBO/esters. The European Commission held AC-Treuhand liable for its essential role in both cartels as a consultancy firm. AC-Treuhand organised meetings, collected sales information, produced statistics and acted as a moderator between the cartelists.¹⁸

11 *Ibid.*

12 Case IV/C/33.833, *Cartonboard*, July 1994.

13 *Ibid.*, 134.

14 See n4 above.

15 See n4 above 95.

16 See n4 above 454.

17 See n2 above.

18 See n2 above, 109.

In its decision, the European Commission relied on the General Court's confirmation in *AC-Treuhand I*, discussed below, that a service provider that knowingly contributes to a cartel can be held liable.¹⁹ The European Commission imposed significant fines that reflect the gravity and duration of the infringement.²⁰

In the above decisions, the European Commission relied on the single overall agreement concept which mandates a common objective among the cartelists and the awareness of the service provider of such an objective, irrespective of the fact that such a service provider is not active on the market affected by the cartel. In other words, an undertaking can be held liable as a party to a single overall agreement to restrict competition, even if it does not have an interest in each and every part of the agreement.

Inevitably, as further discussed in the following sections, the service providers challenged this approach in the appeal courts, arguing that there is no legal basis for holding service providers liable for assisting cartels.²¹ The Court of Justice, however, confirmed the previous case law and upheld the European Commission's longstanding approach. The following sections of this article will revisit the principal arguments of the service providers before the appellant courts and an analysis on the basis of the limits of such liability.

Revisiting the main tenets of Article 101 TFEU: relevance of market definition

One of the most significant grounds of appeals for the service providers is that cartel facilitator as a standalone concept is controversial,²² since aiding or abetting is not expressly prohibited under Article 101 TFEU. Therefore, such undertakings have claimed that they cannot be held liable under the principle of legality.

The principle of legality, otherwise known as the principle of *nullum crimen, nulla poena sine lege* ('no crime or punishment without a law') is one of the cornerstone principles in criminal law. Owing to the distinction between perpetrators (those that actively commit the crime) and the accomplices (those that aid or abet the perpetrators), a separate definition of liability is necessary for accomplices. In light of this legal principle, accomplices cannot be held liable under criminal law, unless such liability is expressed in a specific provision of the relevant criminal code.

Referring to this bedrock principle of legality in criminal law, undertakings that are not active in the market affected by the restrictive agreements have argued that

19 See n2 above, 744.

20 See n2 above, 745.

21 See n1 above, Opinion of AG Wahl para 56; and see n1 above, 17.

22 See n3 above, 61; see n1 above, 15.

they cannot be considered to restrict competition because Article 101 TFEU²³ is directed only at the parties to restrictive agreements. Simply put, they assert that their conduct cannot be deemed as participation in cartels.²⁴

Article 23(5) of Regulation No 1/2003 on the implementation of the rules on competition, which are enshrined in Articles 101 and 102 TFEU, states that the European Commission decisions imposing fines are not criminal in nature. The European Commission, however, indicated that by imposing fines it would help create a deterrent effect.²⁵ Accordingly, it imposes substantial fines for the purpose of sending a clear message to undertakings that competition law violations will not be tolerated.²⁶ As established by the case law of the European Court of Human Rights, fines that have a punitive nature can be considered to be criminal in nature, regardless of their definition under national law.²⁷ Accordingly, some commentators have argued that, given the punitive nature of the fines imposed by the European Commission, the monetary fines imposed under competition law can also be considered to be criminal in nature and, therefore, the rules for criminal proceedings should be observed.²⁸

One case where such defence is put forward was earlier in the 2000s. The European Commission found Krupp Hoesch Stahl AG (KHS) liable for supplying its market data to other undertakings, who, in turn, used the data to benchmark their market positions.²⁹ Consequently, the European Commission held that KHS had facilitated information exchange among competitors. Although KHS was active in the markets affected by the information exchange,³⁰ KHS referred to the principle of legality before the Court of Justice, and argued that the ‘simple fact that it was aware of the anti-competitive conduct of other undertakings or that it may have provided them with mere support’ would not be a punishable offence

23 Art 101 TFEU provides the following: ‘All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the EU member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited.’

24 Case T-180/15, April 2015; see n3 above; see n1 above, 18.

25 Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003, 4, 30, 37.

26 European Commission, ‘Antitrust: Commission fines truck producers €2.93 billion for participating in a cartel’ (19 July 2016): http://europa.eu/rapid/press-release_IP-16-2582_en.htm, accessed 4 November 2016.

27 See *Engel and Others v the Netherlands* (Application no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), June 1976, 82.

28 Ian S Forrester, ‘Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures’ (2009) 34(6) *European Law Review*, see: www.biiicl.org/files/5749_forrester_25-06-11_biiicl_1.pdf, accessed 4 November 2016; Marco Botta and Alexandr Svetlicinii, ‘The Standard of Judicial Review in European Competition Law Enforcement and its Compatibility with the Right to a Fair Trial under the EU Charter of Fundamental Rights’ in Tanel Kerikmäe, *Protecting Human Rights in The EU: Controversies and Challenges of the Charter of Fundamental Rights* (Springer, 2014) 109, 110.

29 Attorney General Stix-Hackl’s Opinion on Case C-195/99 P, *Krupp Hoesch Stahl AG v European Commission*, October 2003, 56.

30 Case C-195/99 P, *Krupp Hoesch Stahl AG v European Commission*, October 2003, 84.

under competition law.³¹ The Court of Justice upheld the General Court's judgment on the grounds that the elements of conduct, namely reciprocal exchanges of information and awareness of anti-competitive conduct, were sufficient to hold KHS liable. Advocate General Stix-Hackl's remarks on the issue are enlightening.³² The Advocate General opined that a distinction between complicity and aiding and abetting was unnecessary since the European Commission takes notice of a wider framework to determine complicity, and the parties' forms and degrees of involvement when imposing fines.

The issue was discussed thoroughly in the General Court's *AC-Treuhand I* judgment in 2008 upon AC-Treuhand's appeal of *Organic Peroxides*, and later in the Court of Justice's *AC-Treuhand II* judgment in 2015, where the European Commission's *Heat Stabilisers* decision was contested.

In *AC-Treuhand I*,³³ AC-Treuhand, a consultancy firm that provided business and management services and collected and circulated statistics to enterprises in various other fields,³⁴ filed an appeal requesting the General Court to annul part of the European Commission's decision in *Organic Peroxides*, which had held AC-Treuhand liable for participating in a cartel in the market for organic peroxide products.

AC-Treuhand denied any responsibility in its arguments before the European Commission, asserting that it was not party to the anti-competitive agreement and that it had merely acted as a secretary for the other parties.³⁵

AC-Treuhand argued its case, inter alia, on the basis of *nullum crimen, nulla poena sine lege* (no crime or punishment without a law).³⁶ According to AC-Treuhand, the European Commission had failed to take into account the fact that AC-Treuhand had merely played an accessory role as a consultancy firm serving the cartel. Given that an accomplice's liability is not regulated under EU competition law, AC-Treuhand stated that it could not be held liable for the conduct of its clients.

The General Court evaluated AC-Treuhand's appeal by employing a literal interpretation of Article 101 TFEU, followed by a contextual and teleological interpretation. The General Court deemed it necessary to assess the distinction between a perpetrator of an infringement and a third party, taking into consideration the prohibition of restrictive agreements between undertakings in Article 101(1) TFEU and the principle of *nullum crimen, nulla poena sine lege*.³⁷ The General Court observed that in order to be held responsible for a competition law infringement, the literal interpretation of Article 101 TFEU does not require undertakings to be active

31 *Ibid*, 82.

32 See n29 above, Opinion of AG Stix-Hackl, paras 64, 15.

33 See n3 above.

34 See n4 above, 91.

35 *Ibid*, 331.

36 See n3 above, 21.

37 *Ibid*, 114.

in the market where competition is restricted. The General Court also referred to its case law,³⁸ which put an emphasis on the element of ‘joint intention’; an element that does not take into consideration whether the cartel concerns a specific sector of activity. In other words, according to the General Court, the consultant was not required to be active in the market where the restriction had occurred or to have operated in the upstream, downstream or neighbouring markets. The General Court noted that, irrespective of the market where they are primarily active, holding all undertakings liable can prevent the circumvention of the law through new forms of collusion and thus ensures competition in the markets.³⁹

In its contextual and teleological interpretation, the General Court held that ‘restriction of commercial freedom’ was not a compulsory requirement for a violation of Article 101 TFEU. Rather, it is necessary to take into account the overall context, which includes the operating conditions of the agreement, the economic and legal context of the parties’ conduct, and the structure of the market.⁴⁰ The General Court further clarified that in order to achieve the main objective of competition law and to prevent new forms of violations through facilitation, undertakings must be subject to liability even if they do not restrict their own commercial freedom on the market where they are predominantly active.⁴¹

AC-Treuhand did not appeal the judgment, given that the fine imposed by the European Commission, €1,000,⁴² was merely symbolic. Therefore, *AC-Treuhand I* (contesting the European Commission decision concerning the activities of AC-Treuhand in the organic peroxides sector) was never brought before the Court of Justice for review.

In *AC-Treuhand II* (where the judgment of the General Court contesting AC-Treuhand’s activities in the heat stabilisers and ESBO/esters sectors were scrutinised), the Court of Justice had the opportunity to revisit the question of whether a consultancy firm, not active on the relevant market, could be held liable for cartel facilitation.⁴³

For an interesting turn, Advocate General Wahl reaffirmed the arguments put forward by AC-Treuhand when he opined on the issue in *AC-Treuhand II* in 2015. Advocate General Wahl disagreed with the General Court’s reasoning in *AC-Treuhand I* and drew attention to the scope and the objectives of Article 101 TFEU,⁴⁴ noting that the conduct that is ‘shown, or, on the basis of economic analysis, may legitimately be presumed, to have an adverse effect on competition’ is prohibited.⁴⁵

38 Case T-41/96, October 2000; Case 41/69, July 1970.

39 See n3 above, 127.

40 *Ibid*, 126.

41 *Ibid*, 127.

42 See n4 above, 519.

43 See n1 above.

44 Opinion of AG Wahl, para 42.

45 *Ibid*, para 44.

Advocate General Wahl further observed that liability as set down in Article 101 TFEU arises when undertakings no longer act as competitive constraints on other undertakings,⁴⁶ emphasising the importance of economic analysis in such assessments.⁴⁷ He went on to state that only such undertakings are ‘liable to eliminate a constraint or a barrier which in principle exists on the market’.⁴⁸ This interpretation of restrictive agreements requires a relevant market, where competition is restricted, and the identification of undertakings that have the capacity to abolish the competitive constraints, irrespective of the market where they are active.⁴⁹

Following on from these remarks, Advocate General Wahl opined that the object of the agreements between the consultancy firm and its clients were connected with the implementation of the cartel but nevertheless separate from the prohibited conduct.⁵⁰ As a consultancy firm, AC-Treuhand could not constitute a competitive constraint on the undertakings in the heat stabilisers sector. Thus, it could not restrict competition within the meaning of Article 101 TFEU.⁵¹

The Court of Justice, however, refrained from adopting Advocate General Wahl’s approach. The Court of Justice held that an undertaking can be liable for participating in an infringement if the conduct in question contributed to the common objective and the undertaking was aware of or could reasonably foresee the objective pursued by the participants and was prepared to take the risk.⁵² The Court of Justice further emphasised that an agreement does not have to restrict the freedom of action of all undertakings on a market where the parties are active⁵³ to be found in violation of competition law, and that Article 101(1) TFEU is not limited to undertakings that operate in the market concerned or which restrict their freedom of action on a particular market.⁵⁴

The Court of Justice also asserted that in order to fulfil the main objective of competition law under Article 101(1) TFEU – that is, to maintain undistorted competition within the common market – competition law enforcement also has to intervene in cases of active contribution to a restrictive agreement even if that contribution does not relate to an economic activity that forms part of the relevant market on which that restriction comes about.⁵⁵

46 *Ibid*, para 47.

47 *Ibid*, para 48.

48 *Ibid*, para 50.

49 *Ibid*, para 54.

50 *Ibid*, para 67.

51 *Ibid*, para 68.

52 See n1 above, 30.

53 *Ibid*, 33.

54 *Ibid*, 34.

55 *Ibid*, 36.

The Court of Justice noted that AC-Treuhand's conduct was directly linked to the actions of the cartelists and that AC-Treuhand had full knowledge of the objectives of the cartel.⁵⁶ Therefore, the Court of Justice maintained that AC-Treuhand's appeal was unfounded under such circumstances, since said service agreements, although separate from the horizontal arrangements, were connected to the obligations of the cartelists and that AC-Treuhand's actions did not constitute mere peripheral services.⁵⁷ The Court of Justice held that AC-Treuhand's conduct was in violation of Article 101(1) TFEU and that AC-Treuhand could reasonably have foreseen the risk of violation of said article.⁵⁸

The Court of Justice, therefore, settled any question marks remaining on the liability of service providers, upholding the judgment of the General Court. Against this backdrop, we see that the liability of a service provider for its role in cartel facilitation is not a new concept under the settled EU case law. However, there is still a degree of uncertainty on the contours of liability for facilitators.

When would service providers be liable as cartelists in the market where their clients are active?

Although the European Commission decisions and the Court of Justice's ruling in *AC-Treuhand II* established a basic structure outlining the liability of service providers, the case law yet remains rather vague and sheds inadequate light on the limits of any such liability. To get a better understanding of these limits, we will review some of the European Commission's precedents. These precedents, in which the European Commission deemed that consultancy firms' conduct amounted to facilitation, specifically deal with services provided by consultancy firms.

In *Italian Cast Glass*,⁵⁹ Fides was hired to check and inspect the shipments and sales of the manufacturers because the three manufactures sought to ensure that this information was objective and accurate, and, therefore, needed a neutral third party to perform this specific task. Fides carried out inspections, prepared reports of every shipment, including data on customers, prices, terms of sales, output figures and other sales information relevant to cast glass manufacturers. It also used a verification system to ensure the reliability of its reports. All of this information was considered to be commercially sensitive and sharing such information with competitors gave rise to competition law concerns. According to the European Commission, Fides had been supervising the implementation of

⁵⁶ *Ibid*, 38.

⁵⁷ *Ibid*, 39.

⁵⁸ *Ibid*, 46.

⁵⁹ See n5 above.

the cartel obligations.⁶⁰ The European Commission stated that the information shared by Fides with the three manufacturers had contributed to the restriction of competition in the Italian cast glass market. Therefore, the service agreement between the three manufacturers and Fides had the restriction of competition on the cast glass market in Italy as its object and effect. In the opinion of the European Commission, it is stated that: ‘Fides enabled and consciously assisted the implementation of the restrictions of competition which were the very purpose of the agreements, and consequently it is jointly responsible for the resulting restrictive effects.’⁶¹

In the *Cartonboard* case, Product Group Paperboard, an association set up by the cartonboard producers for technical and statistical purposes, had hired Fides Trust to collect data and share the processed data with the association members. Fides Trust also arranged meetings among the producers and held the minutes of those meetings. The customers under investigation did not have exclusive use of the data processing program provided by Fides Trust. Nonetheless, the European Commission was of the view that the program provided to this specific association differed from the program provided to other customers. A specific element of the program, which was installed to prevent data from being individualised, was not integrated into the program for Product Group Paperboard. Therefore, the association members were mutually able to identify and access each other’s sales information.

However, the European Commission did not assess the liability of Fides Trust as a carteliser or a facilitator. Instead, it merely ordered the undertakings under investigation to modify their information exchange system, which had been carried out by Fides Trust, in order for them to comply with the competition law.

It seems that the European Commission in the *Cartonboard* case was not convinced or able to prove to its satisfaction that Fides Trust had intentionally contributed to the cartel. There was no further assessment as to whether Fides Trust was aware of the common objective of its employers or whether it had made any intentional contributions to the establishment of the cartel.

However in *Organic Peroxides*, the European Commission observed that AC-Treuhand exercised authority over the members of the agreement; considering that it required them to adapt their business conduct, it played an advisory role in hiding the cartel from regulatory oversight and, it made an effort to keep the cartel operating in its moderating role.⁶² The European Commission noted that the service agreements between the organic peroxide producers and AC-Treuhand was an essential element in the complex anti-competitive arrangement,

60 See n5 above, 5.

61 *Ibid*, 7.

62 See n4 above, 94.

and emphasised that AC-Treuhand's provision of services went beyond the mere collection and handling of statistical data.⁶³ The European Commission further found that AC-Treuhand exercised authority over the members of the agreement by playing an advisory role in hiding the cartel through requiring them to adapt their business conduct, and by acting as a moderator in order to keep the cartel operating.⁶⁴ Accordingly, the European Commission decided that AC-Treuhand participated in the agreement as an undertaking and took decisions as an association of undertakings.⁶⁵

In the appeal, the General Court determined that: (1) AC-Treuhand had contributed to the implementation of the cartel;⁶⁶ (2) there was a 'sufficiently definite and decisive causal link' between AC-Treuhand's conduct and the restriction of competition in the relevant market;⁶⁷ and (3) AC-Treuhand had acted intentionally and in full knowledge of the facts.⁶⁸ Therefore, the General Court rejected the arguments put forward by AC-Treuhand in its appeal pleadings.

In *Heat Stabilisers*, the activities of AC-Treuhand amounted to: (1) organising meetings between manufacturers; (2) attending and chairing some of the meetings; (3) drafting and disseminating lawful and illegal meeting minutes; (4) monitoring the deviations from the cartel arrangements; (5) collecting and providing sales data on the relevant markets; (6) acting as a moderator when disagreements arose between producers; and (7) encouraging the parties to reach a compromise.⁶⁹ AC-Treuhand received remuneration in return for its foregoing activities.⁷⁰

In the appeal, the Court of Justice observed that the conduct of AC-Treuhand was directly linked to the conduct of the cartelists, and that AC-Treuhand was in full knowledge of the objectives of the cartel.⁷¹ Under such circumstances, the Court of Justice deemed AC-Treuhand's appeal to be unfounded since its service agreements with its clients, although separate from the horizontal arrangements, were connected to the cartel obligations.⁷² The Court of Justice held that AC-Treuhand's conduct was in violation of Article 101(1) TFEU and that AC-Treuhand could reasonably have foreseen such an interpretation.⁷³

63 *Ibid*, 332.

64 *Ibid*, 335.

65 *Ibid*, 344.

66 See n3 above, 152.

67 *Ibid*, 154.

68 *Ibid*, 156.

69 See n2 above, 356, 358.

70 *Ibid*.

71 See n1 above, 38.

72 *Ibid*, 39.

73 *Ibid*, 46.

In view of the above case law, as long as a service provider who contributes to a cartel and cannot but be aware of the anti-competitive conduct of its clients, it can be held liable as a cartel participant.⁷⁴ These conditions could be applicable in *Cartonboard*, which followed *Italian Cast Glass*, and Fides Trust could be held liable if the European Commission had identified a cartel.

In situations where clients have a common objective to restrict competition, the service provider's activities are considered to serve such common objective to the extent that there is a causal link. As noted above in *Italian Cast Glass*, the European Commission assessed that the service provider's provision of commercially sensitive data to competing firms and monitoring the cartel enabled the anti-competitive structure.

With regards to the test of awareness, according to the decisions of the European Commission⁷⁵ and the judgments of the appellant courts,⁷⁶ the service provider will be held liable for its clients' illegal conduct if it could have been aware that its own services facilitate the implementation and continuance of the cartel. Also, the risk of violation should be reasonably foreseeable by the service provider. The awareness or reasonable foreseeability condition seems to have been met in the *AC-Treuhand* cases, since in its role as a consultant, AC-Treuhand acted as if it were a secretary for the cartel or a mediator for its clients, by arranging meetings, processing and conveying data, and holding meeting minutes. Although it could be argued that the presumption of awareness may arguably hinder services such as market data provision services that give rise to efficiencies,⁷⁷ one cannot deny the responsibility of service providers in terms of data gathering and distribution or various other forms of consultation that result in potential anti-competitive effects. It is settled in the case law that clients' liability for requesting and using such a service does not eliminate the liability of the service provider for providing such services outside the allowed limits of competition law.

The future of service providers

Notwithstanding the ongoing debate on the cartel liability of service providers,⁷⁸ it is evident that we can expect to see more cases where a service provider's conduct will be scrutinised by the competition law authorities and relevant courts, as seen in the following examples.

74 Brian N Hartnett and Will Sparks, 'The Service Provider As Cartel Facilitator: Assessing 'Third Party' Liability Under Article 101 TFEU' (2015) 1(2) Competition Law and Policy Debate at www.squirepattonboggs.com/~media/files/insights/publications/2015/05/the-service-provider-as-cartel-facilitator/article-hartnett-sparks.pdf, accessed 11 January 2017, 59.

75 See n2 above, 382.

76 See n3 above, 133.

77 See n74 above, 59.

78 For an analysis on the risks associated with the sector of data aggregators in fast moving consumer goods, see n74 above.

The General Court is currently⁷⁹ reviewing the liability of a cartel facilitator, following broker ICAP's appeal to annul the European Commission's *Yen Interest Rate Derivatives* decision, which was made on 4 February 2015.⁸⁰ The European Commission has imposed around €15m on broker ICAP for facilitating cartels in Yen interest rate derivatives by disseminating misleading information, using its contacts with non-participating banks, and facilitating communication between banks.⁸¹ The other parties to the infringement had settled with the European Commission in 2013.⁸²

It is also worth noting that the Court of Justice subsequently published its judgment on *AC-Treuhand II* in 2015, which came after the legal steps taken by ICAP in its appeal to annul the European Commission's decision. Hence, although the view of the Court of Justice regarding the liability of facilitators was uncertain at the time ICAP filed its appeal, the issue has now been clarified in *AC-Treuhand* as the Court of Justice has endorsed the General Court's doctrine in *AC-Treuhand II*. It can be reasonably expected that the General Court in the *ICAP* case will follow the reasoning of the Court of Justice's judgment in *AC-Treuhand II*, and its assessment may shed additional light on the limits of liability of facilitators.

Immediately after the General Court's *AC-Treuhand I* judgment, in 2008, the Brazilian Competition Law Authority (CADE) fined undertakings for their involvement in the sand extraction cartel due to their role in price fixing and customer allocation.⁸³ CADE also sanctioned a consulting firm, which had conducted a study that enabled price harmonisation among the cartel undertakings, for providing assistance to the cartel members in implementing the agreement that restricted competition. This example, which appears in CADE's Leniency Programmes brochure, allows us to speculate that the liability of a service provider is not particular to the European jurisdiction.

Furthermore, the Netherlands Authority for Consumers and Markets (ACM) fined Dutch painting companies for bid rigging.⁸⁴ It also fined a cost-engineering company for cartel facilitation because it had arranged meetings for the painting companies to discuss tenders and had kept a tally of agreements among the painting companies. The related press release contains a statement by Pieter Kalbfleisch,

79 As of January 2017, at the time this article was being prepared for publication.

80 Case AT.39861, February 2015.

81 European Commission, 'Commission fines broker ICAP €14.9 million for participation in several cartels in Yen interest rate derivatives sector' (4 February 2015): http://europa.eu/rapid/press-release_IP-15-4104_en.htm, accessed 16 January 2017.

82 *Ibid.*

83 Antitrust Division Council for Economic Defense of the Secretariat of Economic Law of the Ministry of Justice of Brazil, 'Fighting Cartels: Brazil's Leniency Program' (2009) 3, 16.

84 Netherlands Authority for Consumers and Markets, 'NMa imposes fine on two cartels and cartel facilitator in Dutch painting industry' (12 June 2009): www.acm.nl/en/publications/publication/6366/NMa-imposes-fine-on-two-cartels-and-cartel-facilitator-in-Dutch-painting-industry, accessed 4 November 2016.

the then chairman of the Board of the ACM, who maintained that: 'It is a good thing that the European courts have confirmed that the NMa⁸⁵ can impose fines on cartel facilitators.'⁸⁶ Again in 2012, the ACM fined a consulting firm because of its role as a cartel facilitator in the bell pepper cartel. The press release indicates that the consulting firm arranged cartel meetings.⁸⁷

Similarly, in 2009, the Turkish Competition Authority⁸⁸ investigated whether the Peugeot Turkey Distributor Council (the 'Distributor Council'), which was established by Peugeot Turkey's authorised distributors, had violated Law No 4054 on the Protection of Competition (the 'Competition Law'). The Distributor Council set the prices and profit margins of its distributors and fixed the discount rates for sales, distribution, and insurance companies. According to the decision, the Distributor Council concluded an agreement with 'Method Research Company', in order to maintain the price consensus mechanism, to detect distributors that were not compliant with the price agreements, and to provide customer satisfaction studies as an alternative to studies performed by Peugeot Turkey. According to the decision, Method Research Company had conducted a 'secret customer study', which obtained the prices applied by the distributors through voice recording, and by pretending to be a customer. It then conveyed these records to the distributors.

Even though the reasoning does not thoroughly analyse the activities of the consultancy firm, the Turkish Competition Board concluded that Method Research Company had endeavoured to continue price maintenance. However, it also concluded that Method Research Company's activities were auxiliary to price fixing. Referring to the *Organic Peroxides* decision of the European Commission,⁸⁹ and the related *AC-Treuhand I* judgment of the General Court,⁹⁰ in its evaluation of the level of conduct of the consultancy company, the Turkish Competition Board noted that Method Research Company was simply a consultancy company and its role differed from the consultancy company in *AC-Treuhand I*. The Turkish Competition Board stated that, unlike in *AC-Treuhand I*, Method Research Company did not 'intentionally and actively' participate in the cartel. The Turkish Competition Board concluded that a fully fledged investigation against the third-party research company was not required at this stage. That being said, the Turkish Competition Board

85 Formerly Netherlands Competition Authority.

86 See n84 above.

87 Netherlands Authority for Consumers and Markets, 'NMa fines two cartels in agricultural industry' (5 June 2012): www.acm.nl/en/publications/publication/6749/NMa-fines-two-cartels-in-agricultural-industry, accessed 4 November 2016.

88 The Turkish Competition Board's *Peugeot* decision, 8 January 2009, No 09-01/8-7.

89 See n4 above.

90 See n3 above.

decided to send an advisory opinion⁹¹ to Method Research Company, explaining the scope of the competition law and reminding the firm not to facilitate conduct that violates competition law. Based on this short assessment of the Turkish Competition Board, it could be speculated that since the Turkish Competition Board is following the case law of the European Commission closely, its approach to service providers may evolve in line with the *AC-Treuhand II* judgment, which would increase the risk of monetary fines for third-party service providers in Turkey as well.

Conclusion

So far, the competition law authorities and courts have rejected any arguments that contend non-liability of third-party service providers for facilitation of infringement under competition law. Although the precedents provide us with a limited number of conditions for analysing the service provider's liability, namely intentional participation in the common objective and reasonable foreseeability of the infringement, the limits of the concepts give rise to some level of uncertainty over the scope of actions that can be evaluated as cartel facilitation.

Further, on the question of a service provider's contribution to the cartel, the European Commission does not consider actual active contribution necessary for the actions to amount to a restriction in the relevant market, which reflects the fact that the service provider does not have to be active in the market affected by the cartel. The liability of a service provider can be assessed in comparison to liability of an undertaking under a single overall agreement, where an undertaking can be held to restrict competition without an interest in each and every part of the agreement. Rather, it assesses the contribution to the cartel on the basis of facilitation. More specifically, the test it applies is concerned with whether the conduct of the service provider contributes to the infringement or facilitates the implementation of the cartel; accordingly, unless the conduct is 'merely peripheral',⁹² the service provider would be liable for the cartel.

Naturally, the assertion of such a broad and uncertain scope of liability for service providers has unfurled debates on whether this approach is a violation of the principle of *nullum crimen, nulla poena sine lege*, which was settled for now with the judgment of the Court of Justice.⁹³ It is foreseeable that the competition law authorities are likely to continue with their broad interpretation of the law, in order to protect market competition by penalising cartel facilitators. In any event, what

91 Art 9(3) of Law No 4054 states that: 'Prior to taking a final decision encompassing those behaviours to be fulfilled or avoided so as to establish competition and maintain the situation before infringement, The Board shall inform in writing the undertaking or associations of undertakings concerned of its opinions concerning how to terminate the infringement.'

92 See n1 above, 39.

93 *Ibid.*

has become abundantly clear is that independent service providers are increasingly under the watchful eye of the competition authorities, and are therefore required to be ever more vigilant to ensure that their services comply with competition law. A more prudent approach for the service providers would be to have their procedures and actions in compliance with competition law at all times, and to seek professional guidance.

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