

EU Competition briefing - September 2008

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Recent European Court Rulings in Cartel Cases

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In this briefing, we discuss the potential implications of the Court of First Instance ("CFI") judgments of 18 June and 8 July 2008 in the *AC-Treuhand* (Organic Peroxides), *Hoechst* (Sorbates), and *BPB* (Plasterboard) cases.

Advisers and consulting firms should be cautious when they become aware of anti-competitive activities involving their clients

By judgment of 8 July 2008 (Case T-99/04, *AC-Treuhand AG v. European Commission*), the CFI ruled that firms providing consultancy and advisory services to cartel participants could be found liable for the entire cartel behaviour in the same way as if they were themselves active in the markets directly affected by the cartel. While the Court confirmed that the Commission may prosecute non-market participants for their role as facilitators of cartel activity, its judgment nevertheless raises a number of issues about the limits of the Commission's prosecutorial powers.

In the case put before the CFI, a Swiss consultancy firm, *AC-Treuhand AG*, collected sales information from organic peroxides producers in the European Economic Area ("EEA") and provided those producers with a compilation of the aggregate data, a relatively innocuous task. However, it was also found to have organised cartel meetings; reimbursed travel expenses to cartel participants to conceal the existence of such meetings; calculated deviations from the agreed market shares; occasionally acted as chair and/or moderator and provided advisory services on the legal consequences of cartel behaviour. The Commission concluded that this conduct constituted an essential part of the cartel, as it added objectivity and transparency to the cartel and enhanced its stability. On these grounds, the Swiss consultancy was held to have taken part in the collusive agreement and, as such, to be liable for the whole infringement.

On appeal before the CFI, *AC-Treuhand* claimed that the Commission erred in law in finding that it was a co-perpetrator of the infringement, arguing instead that its role amounted to that of an accomplice or a mere facilitator of the infringement committed by the organic peroxides producers.

The CFI rejected this line of argument, holding that an undertaking's liability under Article 81(1) EC does not distinguish between perpetrator and accomplice. Any undertaking that takes part in a common enterprise the object of which is to restrict competition on the Common market infringes Article 81(1) EC

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irrespective of whether this undertaking is active on the relevant market. Furthermore, the CFI suggested that undertakings not active on the affected market may take responsibility for the various anti-competitive acts constituting the whole infringement where they have “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”.¹ At a minimum, there must be a showing that the undertaking tacitly agrees with the objectives of the cartel. This would be the case if the undertaking fails to distance itself from the anticompetitive conduct.

In the case under appeal, there was ample evidence of AC-Treuhand’s active participation in the cartel, which indicated that the consultancy could not ignore that it was taking part in the anti-competitive conduct and was prepared to accept the attendant risk. However, what would happen if the consultancy firm only became aware of some cartel activity in which one or more of its clients was taking part but failed to report it to the authorities? Would the consultancy be held liable for the entire infringement in the same way as the cartelists? According to the CFI’s ruling, the answer would probably be affirmative. Indeed, passive participation can be established, *inter alia*, “where an undertaking tacitly approves an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities”, because the effect of such behaviour would amount to encouraging the continuation of the infringement and to compromising its discovery.

The issue is, then, what practical steps should consultancy firms take to protect themselves against anti-competitive activities over which they have little or no control but to which they contribute even in a very limited way, *e.g.*, by remaining silent? Distancing itself from the anti-competitive conduct by showing clear and unambiguous disagreement with the conduct engaged in by the client should normally meet the threshold. Such actions would, however, have to be made public, *i.e.*, to the cartel participants with whom the consultancy firm is in business.

The CFI ruling has seemingly stretched the meaning of passive involvement to such a degree that consultancies have a heightened duty of care when carrying out their business. Presumably, not only should consultants assess the extent to which the services that they offer are instrumental to the pursuit of a cartel, but they should also reflect on cartel incidents of which they become aware to determine whether those incidents ought to be reported to their client’s management (or to the regulators).

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Do economic effects analyses carry any significant weight in cartel cases?

Under the Commission's 1998 Guidelines on Fines, the basic amount of a fine was set in accordance with the gravity and the duration of the infringement. In assessing the gravity, the Commission had to consider, *inter alia*, the actual impact of the infringement on the market, *where this can be measured*, without attaching to this factor a disproportionate significance *vis-à-vis* other factors, such as the nature and the geographic scope of the infringement.

In cartel proceedings, defendants very often argue that their anti-competitive conduct did not have any actual impact or effect on the market in an attempt to lower the gravity of the infringement. In support, they put forward economic studies which are purported to demonstrate that price developments were unaffected by the various cartel incidents.

According to the CFI ruling in the *Plasterboard* case, in assessing the gravity of an infringement, the Commission does not have a particularly high burden of proof when establishing whether the collusive practices had any effect. In particular, any attempt at singling out price developments attributable to cartel behaviour is "hazardous and speculative".² The influence of price factors other than the cartel and the chains of causation between them are necessarily subject to assumptions and probabilities. The CFI goes on to say that the Commission should not be "criticised for referring to the actual impact on the market of a cartel having an anti-competitive object even though it does not quantify that impact or provide any assessment in figures in that respect".³ It is sufficient for the Commission to carry out a qualitative analysis of several indicia, which, taken together, demonstrate with *reasonable probability* that the cartel had an actual effect on the market.

In particular, it is enough to show that the cartel participants controlled a "considerable" share of supply of the relevant market and had effectively adapted their conduct following collusive contacts between them. According to the CFI, the larger the combined share of supply controlled by the cartelists, the higher the probability that the cartel was effective. Both the share of supply and the evidence of actual implementation provide important indications "that the infringement was capable of producing significant anti-competitive effects".⁴

As to price developments during the period of infringement, quantified price studies and statistics are not necessary. Mere recognition by the parties that the prices tended to rise or to at least stabilise is sufficient to support the conclusion that the infringement had an actual impact on the market concerned.

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In this regard, the CFI held that, where there is evidence that a cartel has been implemented, the Commission is under no obligation to demonstrate with econometric evidence that “the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel”.⁵ According to the CFI, requiring evidence of this nature would be disproportionate and, in addition, its accuracy and infallibility would prove difficult for the Court to verify.

In the past, the CFI had taken issue with the fact that, when faced with specific evidence purported to demonstrate lack of effect, the Commission had failed to come forward with contrary economic evidence to support the claim that, but for the cartel, prices would have been lower.⁶ However, in *SAS v. Commission*, the CFI adopted a more lenient standard, holding that when the cartel is purported to restrict *potential* competition, its impact is difficult to assess with precision. Accordingly, the Commission may confine itself to estimates of the probability of such an effect.⁷ In the *Archer Daniels Midland* case, the CFI further indicated that the actual impact of the cartel could be established without it being necessary for the Commission to provide quantitative evidence in that respect.⁸

In *Plasterboard*, by holding that the Court would find difficult to appraise conflicting economic evidence on the effects of a cartel, the CFI neutralised the evidentiary value of economic models purported to demonstrate the lack of impact of collusive conduct. By the same token, it has limited the scope of its judicial review in relation to the assessment of gravity in cartel cases, since the actual impact may solely be presumed from specific instances of effective implementation of the collusive arrangements.

The lack of relevance of economic evidence in cartels is further highlighted in the 2006 Guidelines on Fines, which no longer require from the Commission that it takes the actual impact of a cartel into account when assessing its gravity; only proof of implementation is required.⁹ The 2006 Guidelines formalise the Commission’s practice consisting of equating *implementation* with *actual impact*. While the Commission decision in *Plasterboard* pre-dates the 2006 Guidelines on Fines, the ruling of the CFI in this case undoubtedly lends additional support to the increasingly restrictive policy of the Commission, since it makes it more difficult – if not impossible – for defendants to seek refuge behind the limited effects of a cartel.

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Criticism of the Commission's assessment of ring leaders

The Commission enjoys wide discretion in selecting and assessing the relevant factors for calculating and adjusting the basic amount of a fine. Aggravating circumstances are usually weighted on a case by case basis. This approach has generally been supported by the European Courts. Nevertheless, in the *Hoechst* case,¹⁰ the CFI clarified that the Commission may only increase the fine of an undertaking that has acted as the leader of a cartel, if the Statement of Objections (“SO”) contains a “sufficiently precise” indication to that effect.

In particular, in accordance with well-established case law, an undertaking's rights of defence entails its right to be heard both in relation to a finding of infringement and the imposition of a fine. This requires that the Commission set out in the SO all of the essential elements used against the addressee, including the facts, the characterisation of the facts and the evidence relied upon. In relation to the calculation of the fines, the Commission must indicate “expressly” in the SO the main elements of facts and of law which might have a bearing on the calculation of the fine.¹¹

In the case at hand, the CFI noted that the SO contained all of the relevant facts relied upon in the final Decision to substantiate the Commission's depiction of Hoechst as a leader of the cartel. However, the SO failed to establish a link between them and to characterise them “sufficiently precisely” so as to allow Hoechst to understand that the Commission intended to take its alleged leadership role into account in the calculation of the fine. It was only in the final Decision that those elements were brought together in a single part and that the objection that Hoechst was a leader was made clearly apparent.

As regards the type of facts and evidence necessary to support a finding of leadership, the CFI confirmed¹² that the Commission may only consider leadership as an aggravating circumstance for the increase of the basic amount of the fine when the undertaking in question was “a significant driving force in the cartel”. When it is the first one to make the price announcements agreed by the cartel, for example, it will only be considered a ‘leader’ if these correspond to a “spontaneous initiative giving impetus to the cartel”. The Commission must show that the undertaking is the leader of the infringement and not that it has merely played a particular role in the logistical aspect of the cartel.

Furthermore, the CFI criticised the Commission for having mentioned in the remedies section of the SO that it would take account in the Decision of the leading role played by ‘some’ companies in the cartel. The CFI found that such a

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vague statement was not sufficient to allow Hoechst to determine whether or not it was individually concerned.

This was especially the case given the lack of precision in relation to the scope and characterization of the facts and evidence in the rest of the SO. Presumably, the Commission should have at least specified the names of the companies concerned by this allegation.

While the CFI only concerned itself in this case with leadership, the CFI's reasoning could equally apply to other aggravating circumstances. In order to respect an undertaking's rights to be heard in relation to the imposition of the fine, the Commission must state in sufficiently precise terms in the SO the applicable aggravating circumstances.

1. See, Case T-99/04, *AC-Treuhand AG v. Commission*, at para 133.
2. Case T-53/03, *BPB plc v. Commission*, 8 July 2008, not yet reported, at para. 300.
3. *Id.*, para. 301.
4. *Id.*, para. 303.
5. *Id.*, para. 307.
6. Case T-352/94, *Mo och Domsjö v. Commission*, [1998] ECR II-1989, at para. 303-304.
7. See, Case T-241/01, *SAS v. Commission*, [2005] ECR II-2917, at para. 122.
8. Case T-329/01, *Archer Daniels Midland v. Commission*, [2006] ECR II- , para. 175-178.
9. See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, O.J. C 210, 1 September 2006, at point 22.
10. Case T-410/03, *Hoechst GmbH v. Commission*, 18 June 2008, not yet reported.
11. Joined cases C-189/02 P, C-202/02 P, C-205/02 to C-208/02 P, and C-213/02 P *Dansk Rorindustri and Others v Commission* [2005] ECR I-5425, para. 199.
12. Case T-15/02 *BASF v Commission* [2006] ECR II-497, para. 374.

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