Facilitating conduct--a restriction of competition under Article 101?

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Competition analysis: What constitutes a restriction of competition under Article 101 TFEU? Yves Botteman, partner at Steptoe in Brussels, considers Advocate General Wahl's authoritative view on the matter, expressed in his Opinion in AC-Treuhand v Commission.

Original news

Court of Justice: Opinion in Case C-194/14 P AC-Treuhand v Commission, LNB News 21/05/2015 18

On 21 May 2015, Advocate General (AG) Wahl delivered his opinion in which he proposes, inter alia, that the Court of Justice of the European Union should set aside the General Court judgment of 6 February 2014 in Case T-27/10 AC-Treuhand v Commission, in which the court dismissed the appellant's action brought against the Commission Decision in Case COMP/38589--Heat stabilisers, concerning a cartel for the supply of tin and ESBO/esters heat stabilisers. Consequently, the Advocate General also proposes that the Commission Decision be annulled insofar as it affects the appellant.

For more information on this case, see Case C- 194/14 P AC-Treuhand v Commission (cartel facilitator).

How does AG Wahl approach the issue of whether AC-Treuhand could be liable as a 'cartel facilitator' despite not being active on the affected market?

The Opinion is focused on the notion of what constitutes a restriction of competition under Article 101 TFEU. In AG Wahl's view, the purpose of Article 101 TFEU, and more generally, EU competition law, is to prohibit agreements or concerted practices between undertakings that limit their individual competitive behaviour on the markets on which they are active. For an undertaking to be held liable for violating Article 101 TFEU, it must be in a position to exert a competitive pressure on the other parties to the cartel. If its competitive behaviour is not capable of being constrained or eliminated by the cartel, AG Wahl concludes that this undertaking cannot be considered to engage in a restriction of competition, either by object or by effect.

According to AG Wahl's opinion, for an undertaking to fall within the prohibition of Article 101 TFEU several conditions have to be satisfied. The European Commission must define the relevant market affected by the anti-competitive behaviour. While, to trigger the application of Article 101 TFEU, the undertakings concerned must not necessarily be active on that market, they must be in a position to exert competitive constraints on one another. This includes vertical relationships on which suppliers may constrain distributors in a number of ways and vice-versa.

If one undertaking is neither active on affected or related markets nor is it being restricted in the way it offers its products and services by a restrictive agreement to which it is merely acting as 'facilitator', AG Wahl considers that that undertaking cannot be found liable for participating in a violation of Article 101 TFEU.

What is the basis for his view?

AG Wahl's reasoning is based on the notion that the terms of Article 101 TFEU may not be extended to capture facilitating conduct by an undertaking, which only contributes to making more effective a cartel committed by others. Such extension would create a dangerous disconnect between that conduct and the requirement to identify a likely restrictive effect on the market. As a result, in the current state of EU competition law, AG Wahl's opinion concludes that one can't commit an antitrust violation without being able to exert a competitive constraint on the members of a cartel.

The AG's view is not without merits or solid foundation. His opinion comes at a time when there has been more vigorous judicial review exercised by the Court of Justice to constrain the European Commission's ever-extensive interpretation of what amounts to cartel-like behaviour (see Groupement des Cartes Bancaires (CB) v Commission, Guardian Industries and Guardian Europe v Commission and, in the context of the LCD panels cartel, the debate pending before the Court of

Justice on the extra-territorial powers of the European Commission). In this regard, over the past few years, there has been a gradual and increased focus on what is a restriction of competition.

In particular, in order for Article 101 TFEU to apply, it has consistently been held that the likely effect of an agreement of concerted behaviour on competition in the relevant market must be appreciable. The debate surrounding the concept of restriction by object (see Groupement des Cartes Bancaires (CB) v Commission) also indicates that an alleged restrictive conduct must be appraised in light of all the relevant circumstances in the affected market, including the relevant economic and legal context in which the conduct is being implemented. This suggests that a conduct that is not capable of restricting competition in the relevant market should not fall within the scope of the prohibition.

Could an argument be made for a company to be liable as an 'accomplice' under Article 101 TFEU?

AG Wahl comes to the conclusion that, in its current form, Article 101 TFEU only relates to the authors of a cartel. In his view, there is no legal basis for holding that this provision also captures the behaviour of facilitators as defined above. In particular, contrasting with the criminal laws of many of the member states, Article 101 TFEU does not draw a distinction between direct perpetuators of a cartel and accomplices. AG Wahl notes that the UK has created a specific status for accomplices of antitrust violations and concludes that the only way for AC-Treuhand to be held liable for antitrust violations under EU law would be through a legislative change.

What approach is the Court of Justice likely to take?

The AG recommendations are very often followed by the Court of Justice, although the latter may be less determinative and its rulings often contain certain caveats. Given the authoritative view provided by AG Wahl in this case, it seems quite probable that the Court of Justice will follow his reasoning.

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Interviewed by Lucy Karsten.

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