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Press and Information

PRESS RELEASE N° 46/08

8 July 2008

Judgment of the Court of First Instance in Case T-99/04

AC-Treuhand AG v Commission

A CONSULTANCY FIRM WHICH HAS CONTRIBUTED TO THE IMPLEMENTATION OF A CARTEL MAY BE FINED FOR COMPLICITY

The fact that a consultancy firm is not active on the market on which the restriction of competition materialises does not rule out its liability for the infringement as a whole

In December 2003 the Commission adopted a decision¹ finding that, from 1971, three producers² of organic peroxides (chemicals used in the plastics and rubber industry) had implemented a cartel on the European market for those products. One of the aims of that cartel was to preserve the market shares of the producers concerned and to coordinate their price increases.

In its decision, the Commission found that AC-Treuhand AG, a consultancy firm, had from 1993 provided those producers with various services and had played an essential role in the cartel by organising meetings and covering up evidence of the infringement. The Commission therefore concluded that that consultancy firm had also infringed the competition rules and imposed a fine on it of EUR 1 000.

The limited amount of the fine can be explained by the Commission's new policy when tackling cartels. In the present case, it not only penalised the undertakings which were contracting parties to the cartel but also a consultancy firm which, although not present on the market concerned, none the less contributed to the cartel's implementation.

AC-Treuhand AG brought an action for annulment of the Commission's decision before the Court of First Instance claiming, inter alia, that it could not be held liable since it was not a contracting party to the cartel. In addition, it maintains that the Commission was late in informing it of the proceeding which had been initiated against it and that it was accordingly deprived of the opportunity to defend itself quickly and effectively.

The alleged infringement of the rights of the defence and of the right to a fair hearing

¹ Commission Decision 2005/349/EC of 10 December 2003 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 – Organic peroxides) (OJ 2005 L 110, p. 44).

² The AKZO group, Atofina SA, successor to Atochem, and Peroxid Chemie GmbH & Co. KG, a company controlled by Laporte plc, now Degussa UK Holdings Ltd.

The Court notes that the administrative procedure initiated by the Commission in order to determine whether the competition rules have been complied with is divided into two distinct and successive stages: a preliminary investigation stage and an *inter partes* stage. In order to ensure that the effectiveness of the Commission's investigation is not compromised, it is not until the beginning of the *inter partes* stage that the undertaking concerned is informed, through notification of the statement of objections, of all the essential evidence relied on at that stage of the procedure. Consequently, it is only after the notification of the statement of objections that that undertaking is able to rely **in full** on its rights of defence.

However, when the first measure is taken in respect of an undertaking, such as a request for information, for the purposes of investigating a suspected cartel, the Commission is required to inform that undertaking of the putative infringements concerned by the investigation underway and **of the fact that the Commission might have to impute to it unlawful conduct**. In the present case, the Court finds that the Commission's failure to do that does not mean that the contested decision must be annulled, since that irregularity did not adversely affect the effectiveness of AC-Treuhand AG's defence.

The question whether an undertaking may be held liable for a cartel even if it is not active on the market on which the restriction of competition materialises

The Court notes that any restriction of competition within the common market may be classed as an 'agreement between undertakings' where the restriction results from the manifestation of a concurrence of wills between the undertakings involved. **The fact that an undertaking is not active on the market on which the restriction of competition materialises thus does not rule out its liability for having participated in the implementation of a cartel.**

Next, the Court finds that the mere fact that an undertaking has participated in a cartel only in a subsidiary, accessory or passive way is not sufficient to rule out **its liability for the entire infringement**. The possibly limited importance of that contribution may none the less be taken into consideration for the purposes of **determining the level of the penalty**.

In the view of the Court, in organising meetings and covering up traces of the infringement, AC-Treuhand AG **actively** contributed to the implementation of the cartel and there was a sufficiently definite and decisive causal link between its activity and the restriction of competition on the organic peroxides market.

Accordingly, **the Court dismisses as unfounded the action brought by AC-Treuhand AG in its entirety.**

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

Unofficial document for media use, not binding on the Court of First Instance.

Languages available: DE, EN, ES, FR, IT, HU

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-99/04>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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