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Court of Justice confirms that consultancy firms that *facilitate* anti-competitive practices may be held liable under Article 101 TFEU

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This judgement of the European Union Court of Justice is particularly relevant, as it confirms that undertakings, other than cartels' participants, which indirectly participate and facilitate anti-competitive conducts, without clearly opposing to such practices and publicly distancing themselves from their content or reporting them to the competition authorities, can infringe Article 101 TFEU and can be subject to sanctions under EU competition rules.

The European Union Court of Justice (***Court of Justice***), in case C-194/14 P, *AC-Treuhand v. Commission*, by judgment of 22 October 2015[1], dismissed the appeal brought by AC-Treuhand AG (***AC-Treuhand***) against the judgement of the General Court of the European Union (***General Court***) of 6 February 2014 in case T-27/10, by which the former dismissed the company's action for annulment of Commission Decision C(2009) 8682 final, of 11 November 2009, relating to a proceeding under Article 101 TFEU[2] (***Decision***) or, subsidiarily, a reduction of the imposed fines.

AC-Treuhand, whose main place of business is in Zurich, is a consultancy firm which provides a range of services to national and international associations and interest groups, including business management and administration for Swiss and international professional associations and federations and non-profit organisations, the collection, processing and assessment of market data, presentation of market statistics and the audit of reported figures at the premises of the participants.

By its Decision, the Commission found that a number of undertakings had infringed Article 101 TFEU by participating in a number of anti-competitive agreements and concerted practices covering the EU and relating to *(i)* the tin stabiliser sector, and *(ii)* the epoxidised soybean oil and esters sector. AC-Treuhand was found liable for having participated in both sectors in a series of agreements and concerted practices consisting of price fixing, allocation of customers and markets through sales quotas and exchange of commercially sensitive information, in particular on customers, production and sales, by playing an essential and similar role in both infringements at issue by *(i)* organising a number of meetings which it attended and where it actively participated, *(ii)* collecting and supplying to the relevant producers data on sales on the affected markets, *(iii)* offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises, for which it received remuneration. The Commission imposed two fines on AC-Treuhand, both in the sum of EUR 174,000.

AC-Treuhand sought before the General Court the annulment of the Decision or a reduction of the fines imposed on it, by arguing *inter alia* the non-fulfilment of the criteria of Article 101 TFEU and breach of the principle that offences and penalties must be defined by law, as well as the infringement of the Commission's obligation to impose only a symbolic fine in the circumstances of the case at issue and breach of the 2006 Guidelines with respect to the calculation of the basic amount of the fine[3]. The General Court dismissed the action in its entirety, following which AC-Treuhand brought an appeal before the Court of Justice

[1] Ruling accessed and available at http://curia.europa.eu/.
[2] Case COMP/38589 – *Heat Stabilisers*, accessed and available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38589/38589_4669_7.pdf.
[3] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, of 1 September 2006, p. 2 (***2006 Guidelines***).

alleging that the *a quo* court infringed: *(i)* the conditions to apply Article 101 TFEU and Article 49(1) of the Charter of Fundamental Rights of the EU (***Charter***)[4]; *(ii)* the principles that offences and penalties must be defined by law, equal treatment and obligation to state reasons; *(iii)* Article 23(2) and (3) of Regulation 1/2003, of 16 December 2002[5], the 2006 Guidelines on the method of setting fines and the principles of legal certainty, equal treatment and proportionality[6]; and *(iv)* Article 261 TFEU, the principle of effective judicial protection and Article s 23(3) and 31 of Regulation 1/2003, of 16 December 2002.

The Court of Justice dismissed AC-Treuhand appeal in its entirety. As regards the first ground of appeal, the court considered *inter alia* that "*there is nothing in the wording of* [Article 101 TFEU] *that indicates that the prohibition laid down therein is directed only at the parties to such agreements or concerted practices who are active on the markets affected by those agreements or practices.*"[7] and that passive modes of participation, as in the case at issue, "*are indicative of collusion capable of rendering the undertaking liable under* [Article 101(1) TFEU], *since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery*"[8]. Moreover, the court held that the company could reasonably have expected its conduct to be declared incompatible with the EU competition rules, in particular in the light of the broad scope of the terms "agreement" and "concerted practice" established by the court's case-law.

In respect to the second ground of appeal, the court found it in part inadmissible and in part unfounded, as the pleas at issue were not raised before the General Court.

Regarding the third ground of appeal, the court ruled that the General Court did not erred in law in finding that the Commission was entitled to depart from the method of calculating fines set out in the 2006 Guidelines, considering that to determine the fines on the basis of the fees charged by AC-Treuhand for the services provided to the cartel participants would accurately reflect neither the economic importance of the infringements in question nor the extent of the company's individual participation in those infringements.

Lastly the Court of Justice considered the fourth ground of appeal to be unfounded, taking into account that AC-Treuhand complaints related to the infringement of the principle that offences and penalties must be defined by law and the principles of equal treatment and proportionality were not raised at first instance, and that the *a quo* court examined all the complaints put forward by the company relating to the determination of the fines imposed. ■

"There is nothing in the wording of [Article 101 TFEU] *that indicates that the prohibition laid down therein is directed only at the parties to such agreements or concerted practices who are active on the markets affected by those agreements or practices."*

[4] AC-Treuhand alleged that the General Court erred in law by extensively interpreting Article 101 TFEU in breach of the principle of legality (*nullem crimen sine lege* and *nulla poena sine lege*) enshrined in Article 49(1) of the Charter of Fundamental Rights of the EU in such a way that the level of certainty and foreseeability of the facts of Article 101 TFEU required in accordance with the rule of law is no longer fulfilled in the present case.

[5] OJ L 1, of 4 January 2003, p. 1.

[6] In this regard, AC-Treuhand argued that, on the basis of the methods outlined in the 2006 guidelines, its fines were to be determined on the basis of the fee received for the performance of services in connection with the infringements and should not have been set at a flat rate; thus, the company submitted that the General Court wrongly rejected the submission and considered the amount of fines to be reasonable.

[7] § 27.

[8] § 31.

Case C-583/13 P *Deutsche Bahn* — The obligation to state reasons and the right of defence in premise searches

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On June 18, 2015, in the European Court of Justice ("Court of Justice" or "ECJ") an appeal[1] was filed by Deutsche Bahn AG ("DB") and its subsidiaries, seeking to set aside the judgment of the General Court which dismissed their action for the annulment of three Commission decisions ordering inspections at the premises of DB and its subsidiaries on account of a suspicion of infringement of competition rules. Such inspections were conducted without prior judicial authorisation.

The lack of prior judicial authorisation

As a first ground for its appeal, DB claimed that the General Court disregarded relevant judgments of the European Court of Human Rights ("ECHR"), when it stated that "*the absence of a prior judicial authorisation is only one of the factors borne in mind by the ECHR when deciding whether Article 8 of the ECHR has been infringed*" (§ 14).

The ECJ replied to the first argument by stating that in the light of the ECHR's case law, the lack of prior judicial authorisation "*was not capable, in itself, of rendering the inspection measure unlawful*". In fact, the Court argues that the lack of prior judicial authorisation may be counterbalanced by a post-inspection review covering both questions of fact and questions of law, as it results from the ECHR's judgments in *Harju*[2] and *Heino*[3].

Post-inspection review

Regarding this post-inspection review, DB criticised the General Court for having based its reasoning on a given number of case law decisions by the ECHR, as in such cases the relevant competition authorities had obtained prior judicial authorisation.

To this respect, the Court of Justice stated that the General Court correctly claimed that the key issue is the "intensity of the review" covering all matters of fact and law and providing an appropriate remedy if an activity found to be unlawful has taken place and not the point in time when it was carried out.

The obligation to state reasons and the violation of DB's right of defence

Lastly, DB claimed that the guarantees set out by the General Court do not ensure sufficient protection of its right of defence against interference with its fundamental right to the inviolability of private premises caused by the inspections conducted by the Commission. In fact, the undertaking claimed the Commission could not lawfully tell its officials about the existence of suspicions concerning its subsidiary DUSS before the first inspection decision, which later led to subsequent inspections by the Commission.

The Court of Justice stated that Regulation no. 1/2003 requires the Commission to provide reasons for the decision ordering an investigation by specifying its subject matter and purpose. This obligation is a fundamental requirement, designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to "*enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence*" (§ 56).

Moreover, the ECJ underlined that information obtained during investigations must not be used for purposes other than those indicated in the inspection warrant or decision. On the other hand, the Court of Justice acknowledged that it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it "*happened*" to obtain during a previous investigation if that information indicates the existence of conduct contrary to competition rules.

However, in the present case, it was apparent that the Commission informed its agents immediately before the first inspection was conducted that there was another complaint against DB's subsidiary. It should also be recalled, as the Advocate General observed in his opinion, that the information provided by the Commission to its agents must "*relate solely to the subject-matter of the inspection ordered by the decision*" (§ 62).

These facts led the Court of Justice to conclude that this information was unrelated to the subject matter of the first inspection decision and that the failure to inform DB about the existence of a complaint against its subsidiary violates the Commission's obligation to state reasons and DB's right of defence. As a matter of fact, it was expressly acknowledged by the General Court that "*the fact that the second inspection decision was adopted whilst the first inspection was underway demonstrates the importance of the information gathered during that inspection in triggering the second inspection and that the third inspection was unambiguously based, in part, on information gathered during the first two inspections*" (§ 65).

Consequently, the Court of Justice set aside the appealed judgment in so far as it dismissed the actions brought against the second and third inspection decisions.

This case draws important guidelines and alerts for national courts and authorities as to the way their inspection prerogatives must be seen against companies' rights of defence. ■

[1] Case C-583/13 P *Deutsche Bahn*
[2] Case no. 56716/09 Harju v. Finland , of February 15, 2011
[3] Case no. 56720/09 Heino v. Finland, of February 15, 2011

German merger control: *Edeka/Tengelmann* – New impulse for the ministerial authorisation procedure?

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Under German merger control law (Act Against Restraints of Competition, ARC), notifiable concentrations are subject to review by the competition authority (Federal Cartel Office, FCO) which is limited to an assessment of their effects on competition. If a concentration is likely to have negative effects on competition, it must be prohibited by the competition authority (§ 36 (1) ARC), irrespective of any public interest benefits which it might entail (e.g. the securing of jobs).

Although public interest benefits are therefore not taken into account in the review by the FCO, they are not entirely irrelevant for the approvability of concentrations under the ARC. Notifying parties to a concentration, which has been prohibited by the FCO, can invoke such benefits in an application for authorisation of the concentration by the Federal Minister of Economics (FME) pursuant to § 42 ARC (Ministerial Authorisation, MA). Authorisation shall be granted, if the negative effects of the concentration on competition are outweighed by advantages to the economy as a whole or if it is justified by an overriding public interest (§ 42 (1) ARC).[1]

The MA procedure was conceived as an extraordinary remedy for exceptional cases, meant to serve as a valve for political pressure which safeguards the independence of the FCO, and it has been largely applied in that way. From its introduction in 1973 (together with the German merger control regime) until the end of 2014, the FCO prohibited 187 concentrations. Only 21 prohibitions were followed by an application for MA, which was granted in only 8 cases, in 5 of them only in part and/or subject to conditions.[2]

After an extended period of dormancy (the last cases, concerning concentrations between regional hospitals, date back to 2008), the MA procedure recently re-emerged in the spotlight in the Edeka/Tengelmann case.

The case concerns the planned acquisition by Edeka (E), one of the 3 major German full-range food retailers (besides Rewe and Kaufland), of around 450 outlets of (the chronically loss-making) competitor Tengelmann (T). The FCO concluded that the project was likely to considerably worsen competition conditions on a large number of already highly concentrated regional and municipal food retail markets and, considering the commitments offered by the parties to be insufficient to address these concerns, prohibited the concentration by decision of 31 March 2015.[3] During the proceedings, several third parties had expressed an interest in acquiring a significant number of T outlets.

On 28 April 2015, the parties applied for MA pursuant to § 42 (1) ARC, arguing in particular that the substantial public benefits of the concentration outweighed any negative effects on competition. Most importantly, the acquisition of the entirety of T, as intended by E, would secure the jobs of T's ca. 16,000 employees and the status quo of their individual and collective rights. In the counterfactual scenario of T exiting the market and/or being sold in parts, at least half of the employees would be laid-off (with substantial follow-on costs for the State budget[4]), in particular in unprofitable T outlets which would have to be closed, and others be re-employed on significantly less favourable terms.

On 3 August 2015, the so-called Monopoly Commission (MC) issued its (non-binding) opinion pursuant to § 42 (4) ARC. The MC did not concur with the parties' submissions and recommended that the application for MA be rejected. While the securing of jobs and employee rights clearly qualified as public interest benefits, the concentration was not sufficiently likely to secure the 16,000 jobs at T, as claimed by the parties. E could be expected to have an incentive to generate synergies (including by removing duplicate functions and outlets) and to restructure T, including by reducing workforce (in order to render T profitable), and it would be legally allowed to do so. It was also not sufficiently certain that the concentration would secure a greater number of jobs than the counterfactual scenario, since several third parties had expressed an interest in acquiring and carrying-on a significant number of T outlets and since remaining (and mostly

[1] A similar procedure is foreseen, for example, in Portuguese merger control law (Article 41 of Decree Law No 125/2014 of 8 August 2014). The only application for MA to date, still under the previous regime of the MA procedure, was successful (BRISA/AEO/AEA).
[2] Examples of public benefits considered to outweigh the negative effects on competition in these cases: the creation of a 'national champion' to ensure long-term security of energy supplies and access to other international markets; protection of jobs; relief or prevention of burdening of State budget; retention of valuable technology and know-how.
[3] Case B 2-96/14 – *Edeka/Tengelmann*.
[4] Loss of income tax and social security contributions, costs for occupational retraining and reintegration.

> The procedure was conceived as an extraordinary remedy for exceptional cases, meant to serve as a valve for political pressure which safeguards the independence of the FCO.

unprofitable) outlets would likely require restructuring or closure also when acquired by E.

The FME (Sigmar Gabriel) has not taken a decision yet. Given that he should have normally done so within 4 months (§ 42 (4) ARC), this may be taken as a sign that the application for MA in the present case has got realistic chances of success. And indeed, what has transpired from the procedure so far, in particular from the public hearing on 16 November 2015, seems to indicate that the FME suspects a splitting-up and sale of parts of T to lead to a greater loss of jobs than T's acquisition by E. A lot will probably depend on whether the parties find a way to effectively commit to securing a sufficient number of jobs and employee rights for a sufficient amount of time, whilst at the same time respecting the rule that commitments, in order to be eligible, must be structural and not require a continuous control of E/T's conduct (§ 42 (2) ARC).

Should the FME grant authorisation, the Edeka/Tengelmann case may very well give the MA procedure an impulse to re-gain relevance in the merger approval process under the ARC. ■