Facilitation of infringements of EU competition law and the general principles common to the laws of Member States

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I. The Case before the Commission and the courts

A. The Commission’s Decision

AC Treuhand is a small but well-established Swiss consultancy firm. It specialises in offering administrative and other support to industry associations, especially associations that are too small to have their own staff and premises. According to AC Treuhand’s website, these services include providing “information for associations and interest groups and collect[ing] data”, for instance on “production, capacity utilisation and sales”. Examples given for the type of information the company collects are annual statistics for European or global industrial associations, monthly and quarterly statistics on sales, commodity markets, exports, imports, etc., capacity surveys and industry-specific surveys, such as field expenses.4

By a decision of 11 November 2009, the Commission found that AC Treuhand had participated in the heat stabilisers cartels as a cartel facilitator.5 In the markets for heat stabilisers, i.e. tin stabilisers and epoxidised soybean oil and esters (ESBO/ester), the cartel members had infringed art.101 TFEU by agreeing on price increases, sharing markets through volume quotas, allocating customers, and agreeing on a reporting and monitoring system in order to ensure implementation of the restrictive agreements. Furthermore, they exchanged and disclosed commercially sensitive information, such as concerning pricing policies, production capacities, and sales volumes.6

The Commission concluded that AC Treuhand had acted as a cartel facilitator in the following manner: the company had organised meetings and dinners for the cartel members, which it attended and in which it actively participated. It provided cartel members with the data it collected on information on sales of heat stabilisers (such as individual sales volumes in tonnage and prices) and product statistics. Furthermore, it acted as a mediator in case of tensions and assisted the cartel members in finding compromises.7 Part of AC Treuhand’s attractiveness was the fact that cartel meetings could be held in Switzerland, which—as a non-EEA Member State—was thought to be outside of the territorial scope of the Commission’s investigative powers. Additionally, AC Treuhand would make the necessary hotel and restaurant reservations, presumably to avoid the suspicion of the Commission.

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5 Principal, Weitbrecht, Law, Bonn and Honorary Professor, University of Trier.
9 See http://www.acotreu.ch/welcome_e.htm [Accessed 1 November 2017].
11 COMP/38589 — Heat Stabilisers, para.100.
12 COMP/38589 — Heat Stabilisers, para.101 et seq.
that would have arisen had employees of the major
competitors in the heat stabilisers market booked the same
hotels and restaurants on identical dates.

To further conceal the activities of the cartel, AC
Treuhand documented its activities in different papers.
The "pink papers" gave an overview of the development
of individual quotas and quantities of sales of the
participants, including every member's deviations
therefrom. The "red papers" contained the minutes of the
cartel meetings. It was prohibited to take both the red and
the pink papers off the premises of AC Treuhand and AC
Treuhand collected them after the meeting. The cartel
members received minutes of the meetings in the form
of so-called "white papers". These "white papers" only
recorded the lawful exchanges between the cartel
members and omitted any illegal information such as
discussions on price-fixing. They were furthermore altered
to include documents and issues that had in fact not been
discussed in the meetings, but were added to the papers
to make them appear legitimate. The aim of the
distribution of the "white papers" was to disguise the
anti-competitive arrangements. In total, about 160
meetings took place on the premises of AC Treuhand
between 1987 and 2000 with respect to these two cartels.

According to the Commission

"such conduct can only be characterized as active
participation and involvement conducive to, and
facilitating, the anti-competitive arrangements and
their implementation. In no circumstances, can such
conduct be interpreted as AC Treuhand acting as a
simple administrative and statistical secretariat. [The
company] intended, through its own conduct, to
contribute to the common objectives pursued by the
participants, it was aware of the substantive conduct
planned or implemented by other undertakings in
pursuance of those objectives, or that it could
reasonably have foreseen that conduct and that it
was ready to accept the attendant risk. Therefore,
AC Treuhand must be considered a perpetrator for
the purposes of art.81 of the Treaty. In doing so, AC
Treuhand contributed significantly to the common
objectives pursued by the participants. On that basis,
AC Treuhand could not but be aware of the
anti-competitive nature of the conduct at issue and
was able to make a significant contribution to the
committing of the infringements."^[8]

2. On the concept of a single and
continuous and complex infringement

An infringement of art.101(1) TFEU may not only result
from an isolated act but also from a series of acts. This
holds true even if one or more elements of the series of
acts or continuous conduct could also constitute an
infringement of art.101(1) TFEU in itself and in isolation.
Starting from this premise, even relatively disparate acts
of various participants may be part of a single and
continuous complex infringement where the parties pursue
a general plan to distort competition in the internal
market. Even parties that do not produce or distribute
certain products that are subject to cartelisation can be
held liable for participating in the infringement.

As a result, if the actions of the cartel members
constitute a single and continuous infringement, the
Commission may consider that

"an undertaking that had taken part in such an
infringement through conduct of its own which
formed an agreement or concerted practice having
an anti-competitive object for the purposes of
art.85(1) of the Treaty (now art.101(1) TFEU)
and which was intended to help bring about the
infringement as a whole was also responsible,
throughout the entire period of its participation in
that infringement, for conduct put into effect by other
undertakings in the context of the same
infringement."^[9]

This reasoning was applied by the Commission to AC
Treuhand.

3. The imposition of a substantial fine on
AC Treuhand

As regards the appropriate sanction to be imposed on AC
Treuhand, the Commission recalled that the firm had
previously been fined for its role as cartel facilitator in the
Organic Peroxides Cartel case,^[10] a fine subsequently
confirmed by the GC.^[11] At the time, the Commission had
only imposed a symbolic fine of €1,000 since there was
no precedent to the fining of a mere facilitator of a cartel.
This symbolic sanction could not, however, create
legitimate expectations with regard to the amount of the
fines for future cases. On the contrary, the Commission
in the heat stabilisers cartel deemed it necessary to
"impose fines at a level that genuinely reflects the gravity
and the duration of the infringements committed by AC
Treuhand AG, as well as the need to ensure that fines
have a sufficiently deterrent effect."^[12] Due to the role AC
Treuhand played both in preventing the detection of the
cartel as well as in supporting its continuance, the
Commission imposed a total fine of €348,000 (€174,000
for each affected sector).

B. Judgment of the General Court

In its appeal to the General Court, AC Treuhand put forward numerous pleas. For the purpose of the present analysis we focus on one plea: AC Treuhand claimed that the prohibition of art.81(1) EC does not apply to an undertaking which merely organised meetings or provided services for the cartel, but did not enter into an agreement in restriction of competition or engage in concerted practices. According to AC Treuhand, the application of art.81(1) EC in the case at hand breached the principle that offences must be defined by law as stipulated by art.7(1) ECHR, which is applicable in EU law by virtue of art.49 CFEU. Even under the assumption that AC Treuhand’s conduct could be considered to fall within the scope of art.81(1) EC, the applicant argued that the contested decision violated said principle, since such a broad interpretation of the norm could not be foreseen. This was claimed to be all the more serious as the fine imposed was far from being a mere symbolic one.

The Court rather curtly dismissed these claims, holding that it had addressed the same points in the first AC Treuhand case, both with regard to the application of art.81(1) EC as well as the foreseeability, and that it had dismissed them at the time.

C. The proceedings before the CJEU

AC Treuhand’s appeal brought this issue before the CJEU for the first time. The company repeated its arguments that a party not active in the relevant market cannot be held liable for an infringement of art.81 EC as offences and penalties must be clearly defined by law.

1. Opinion by Advocate General Nils Wahl

Advocate General Nils Wahl considered that AC Treuhand could not be fined by the Commission for violation of art.101 TFEU. In his opinion of 21 May 2015, AG Wahl essentially discussed two issues:

- Can a company not active on the relevant markets be a perpetrator of a cartel?
- Can a company not active on the relevant markets be an accomplice to a cartel?

a) AC Treuhand as a direct participant in the cartel

The AG’s central thesis is embodied in his opening remarks:

“The identification of a restriction of competition presupposes that it has been established, following an economic analysis, that, by its conduct, the undertaking in question has fully or partially ceased to constitute a constraint — the defining feature of effective competition — for the other operators on the market or markets concerned, to the detriment, ultimately, of economic efficiency and consumer welfare. On the other hand, where conduct does not restrict competition in the way described above, however morally or ethically reprehensible it may be, such conduct cannot be caught by the prohibitions laid down in European Union (EU) law”.17

AC Treuhand was not active in the relevant markets and did not make or accept anti-competitive commitments. According to the AG, it therefore cannot be considered to be a full member of the cartels since it was only party to the agreement to provide services to the participating undertakings. Its conduct was thus deemed as being separate from that of the other participants. In addition, the Commission failed to prove that AC Treuhand constituted a constraint exerted by competition on the cartel members, which is why its conduct could not restrict competition in the sense of art.81(1) EC.18 To decide otherwise would “seriously upset the methodology used to identify the anti-competitive conduct contemplated by the Treaties. [It] would remove the connection between the conduct in question and the need to identify a restriction of competition, within the economic meaning of that term, in such a way as to render entirely superfluous the delimitation of the relevant market and the identification of the constraints imposed, in principle, on that market.”19

b) AC Treuhand as an accomplice to the cartel

AG Wahl went on to examine whether AC Treuhand could be held liable as an accomplice to the cartel. He answered this question in the negative based on the following considerations: first, the conduct deemed objectionable was not precisely identified and classified. Secondly, the Commission, which had fined AC Treuhand as a perpetrator, never argued that AC Treuhand’s involvement was secondary or ancillary to that of the other cartel members. Thirdly, even though there is a differentiation between perpetrator and accomplice in criminal law, this distinction is unknown in administrative law. The concept of participating in an infringement as an accomplice thus cannot be applied in competition law, which is essentially administrative law. Finally, even in the Member States few examples can be found where cartel facilitators have been held liable, and these were based either on national law or the AC Treuhand I case.20

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21 Opinion of AG Wahl AC Treuhand EU:C:2015:350 at [71].
In the view of AG Wahl, the wish to ensure the effectiveness of the policies of the EU institutions must be reconciled with the principle that offences must be defined by law.

"[The] principle of ‘effect utile’ must not prompt the Court to interpret Treaty provisions in such a way as to give maximum scope to the powers of the institutions, but must enable the relevant rules to be interpreted in accordance with their aim and their purpose." 

It is for the EU legislature to adopt a provision penalising cartel facilitation.

The AG therefore proposed that the CJEU set aside the judgment of the GC, annul the Commission Decision and order the European Commission to pay the costs of the proceedings.

2. Judgment of the CJEU

a) Alleged infringement of article 81 EC

The Second Chamber of the CJEU began by stating that the wording of art.81 EC does not limit the application of the cartel prohibition to parties of an anti-competitive agreement that are active on the respective markets. Furthermore, the Court’s definitions of the terms “agreement”, “concerted practice” and “decision by an association of undertakings” only differed in order to ensure that various forms of collusion fall into the scope of art.81 EC. In a case involving both agreements and concerted practices, the Commission must prove that the involved undertakings contributed to the common objectives of the cartel members, that they were aware of the conduct planned or put into effect by other undertakings to reach these objectives or could have reasonably foreseen it, and that they were prepared to take the risk. According to case law, passive participation in the infringement likewise falls under the scope of art.81 EC.

While in previous cases the Court has held that agreements and concerted practices include the situation where an undertaking has voiced its intention to act in a certain way on the relevant market, these terms do not presuppose a mutual restriction of the free market behaviour on the market on which all cartel participants are active. Furthermore, it does not follow from case law that art.81 EC is only applicable to those undertakings that are actually present on the market which is affected by collusion or to firms that restrict their freedom on the same market on which all the parties to the agreement operate. On the contrary, art.81(1) EC refers to “all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question”.

According to the CJEU, the interpretation of art.81 EC suggested by the AG goes against the objective of the provision, which is to ensure undistorted competition within the common market, an objective which would become obsolete if the application of art.81 EC were to be limited to undertakings operating on the market affected by a cartel.

b) Alleged infringement of the principle nullum crimen, nulla poena sine lege

The Court also found the principle that offences and penalties must be defined by law to have been respected where, based on the wording of a provision and its interpretation in precedents, the concerned parties are in a position to determine what acts and omissions will lead to criminal liability. This approach does not preclude a case-by-case advancement of the law by judicial interpretation. In the case of the Union Courts and the Commission’s practice, AC Treuhand should have expected that its conduct would be declared incompatible with art.81 EC. The GC was therefore correct in finding that AC Treuhand was liable under art.81 EC and that it could reasonably have foreseen this outcome when it committed the competition law infringements.

II. Analysis

A. Opinion of AG Wahl

AG Wahl concedes that it would be desirable to provide for the possibility of sanctioning AC Treuhand for collusion. He also acknowledges at least implicitly that this kind of conduct may be subsumed under the wording of art.101 TFEU. Nevertheless he holds that the existing law does not provide a legal basis for fining cartel facilitators. Thus, he argues that it is for the legislature to adopt appropriate provisions.

1. AC Treuhand as a direct participant in the cartel

Wahl’s somewhat surprising conclusion results from “a teleological interpretation” of art.101 TFEU, which he believes restricts the type of conduct caught by art.101 TFEU. In our view, an interpretation which runs counter to the goals of art.101 TFEU, i.e. fails to discourage behaviour that harms competition, cannot be described as teleological in nature. This holds all the more true...
where it is clear that the conduct in question runs counter to the goals of art.101 TFEU and where the wording of that provision allows for a wider interpretation, having due regard to the principle of *nullum crimen sine lege*. In this regard, we note that art.101 TFEU expressly includes decisions of associations of undertakings, i.e. industry bodies that do not actively participate on the relevant market and are not themselves directly capable of restricting competition between their members.

2. AC Treuhand as an accomplice to the cartel

We would also question AG Wahl’s rejection of the argument that AC Treuhand should be fined for having been an accomplice to the infringements committed by the companies active on the markets for heat stabilisers. The AG acknowledges that the actions of which AC Treuhand was accused could be described as aiding or assisting the infringement committed by others. But he dismisses this notion on the basis that it is a concept stemming from criminal law which is unknown in administrative law, of which the competition rules of the EU including the sanctions are supposedly a part.

According to the AG, the administrative nature of EU competition law has been confirmed by the CJEU “on numerous occasions”. While he acknowledges that this proposition is controversial, we note that he offers no citations of judgments by the CJEU in this regard. In addition, this argument runs counter to recent developments regarding the criminal law nature of sanctions for violation of EU competition law, which culminated in the *Menarini* judgment of the European Court of Human Rights (ECtHR). While the CJEU never explicitly adopted the ECtHR’s position, it did make reference to *Menarini* in its *Schindler* judgment. It stated that even though the ECtHR had found that competition fines fall within the criminal sphere of art.6 ECHR, the enforcement system of the EU and the subsequent review by the GC and CJEU guaranteed the right to a fair trial as enshrined in the Convention.

Moreover, the argument that solely the principles of administrative law apply in the area of competition law a fortiori speaks for holding cartel facilitators liable. A concept which is part of criminal law should easily be transferable by way of analogy into administrative law, where strict requirements such as *nullum crimen sine lege* do not apply.

B. The CJEU’s judgment

The CJEU did not follow AG Wahl, but upheld the judgment of the GC, thereby confirming the approach of basing the liability of AC Treuhand on the concept of a single continuous and complex infringement. While we agree with the result reached by the Court, one may argue that the concept itself is open to criticism as it tends to blur the limits of individual liability of companies for participating in certain aspects of an infringement.

The concept has become a catch-all formula in the recent practice of the Commission regarding hard core cartel cases. The Commission describes the defendants’ conduct in detail, quoting from the statements of leniency applicants, and finally concluding that all the defendants participated in a common plan to distort competition in the internal market which is the essence of the single and continuous complex infringement. This practice was harshly criticised by the GC in *Air Cargo*, where the Commission’s decision was annulled in its entirety because of a discrepancy between the reasoning and the operative part of the decision. According to the GC, the Commission’s practice makes it virtually impossible for private plaintiffs to identify the conduct and liability of individual defendants, thereby rendering almost meaningless for private plaintiffs the binding effect of Commission decisions provided for in art.16(1) Regulation 1/2003.

III. An alternative approach

We believe that it is not necessary to rely on the concept of a single continuous and complex infringement in order to answer the question of whether facilitating and supporting a cartel falls under art.101 TFEU. A more convincing approach may be found by applying the principles followed in other jurisdictions.

A. A comparative look at other jurisdictions

1. UK

In the *Marine Hose Cartel* case, Peter Whittle was sentenced to three years’ imprisonment and disqualified from being a director of a company or being in any way, whether directly or indirectly, involved in or concerned in the promotion, formation or management of a company without leave of the court for a period of seven years. His company had not been directly active on the market affected by the cartel. Rather, he had acted as what the Crown Court described as a “co-coordinator” for the cartel. His actions included organising and holding clandestine meetings, creating monthly reports to document the activities of the cartel, and preparing bid documents to rig the bids. His actions were described as a “labour intensive exercise, time consuming and highly sophisticated.” For this work, Mr Whittle received $50,000 per year by each of the six main corporate participants in the cartel, plus additional payments by
way of commission from some members of the cartel for assisting them in cheating on other members of the cartel.36

2. Australia

The Australian Competition and Consumer Act of 2010 (CCA) explicitly names the types of acts which constitute facilitation of anti-competitive behaviour. According to ss.76 and 79, firms may be ordered to pay a pecuniary penalty if they have:

(a) aided, abetted, counselled or procured another person to contravene, or commit a competition law offence;

(b) induced, or attempted to induce, a person, whether by threats or otherwise, to contravene, or commit a competition law offence;

(c) been in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of, or offence of competition law.

In case of criminal cartel offences, the court may for the same conduct impose criminal fines and/or prison sentences. Companies and persons may be held liable even if they did not directly engage in the relevant conduct and did not directly participate in the markets affected by the illegal conduct.37

In several cases, the Australian Competition and Consumer Commission (ACCC) opened proceedings because of alleged cartel facilitation. For instance, it held that the Australian Egg Corp Ltd (AECL)—an industry body providing marketing, research and development services—attempted to induce egg producers to engage in cartel conduct. In another case against producers of laundry detergent, the ACCC contended that the supermarket retailer Woolworths played a key role in the organisation of a cartel. Moreover, proceedings were initiated against Informed Sources (Australia) and several petrol retailers. According to the ACCC, Informed Sources provided a service to petrol retailers allowing them to privately and on a near real-time basis exchange pricing information at each of their petrol stations.38

3. United States

In United States v Apple Inc.,39 the US Court of Appeals for the Second Circuit was faced with a somewhat different form of participation by Apple in an infringement committed by others. Apple had plans to release its iPad in 2009 together with the launch of the iBookstore (a virtual market place for books). It entered into negotiations with the six major publishing companies in the US. The latter were interested in selling their books via the iBookstore rather than distributing them via Amazon (at the time the only undertaking selling e-books), whose pricing policy of $9.99 for popular books they saw as a threat to their business. Under the agreement with Apple, the publishing companies had the authority to set prices, which for popular books they could set as high as $19.99 and $14.99, respectively. Shortly after the iBookstore opened, all six major publishing companies took control over pricing from Amazon and raised prices on many of their products, particularly on new releases and bestsellers.

The DOJ and a number of states and territories filed suit against Apple, alleging that by launching the iBookstore the company had conspired with the publishers to raise prices across the nascent e-book market. Apple argued that it could not have organised a conspiracy among the major publishers given that its role was limited to “unwittingly facilitate[ing] their joint conduct.”40 The Court of Appeals rejected this plea, stating that

“[e]ven if Apple was unaware of the extent of the Publisher Defendants’ coordination when it first approached them, its subsequent communications with them as negotiations progressed show that Apple consciously played a key role in organizing their express collusion.”41

First, it told the publishers it would launch the iBookstore only if a sufficient number of them agreed to participate and that each publisher would receive identical terms, assuring them that a critical mass of major publishers would be prepared to move against Amazon. Secondly, it kept the publishers updated about how many had already signed Apple’s agreement, reminding them that this was the best chance to challenge Amazon’s pricing strategy before it became cemented on the market. Thirdly, Apple co-ordinated phone calls between the publishers who had agreed and those who had not, in order to assure the publishers that they did not have to fear retribution by Amazon. Lastly, Apple continued to follow the negotiations between the publishers and Amazon even after the agency agreements were signed with the major publishing companies. The Court of Appeals therefore concluded that Apple’s conduct went well beyond a legitimate exchange of information, and that its actions were in violation of the Sherman Act.

Apple’s role in this case may well be considered to be more than that of a mere accomplice. It may be more properly described as that of co-conspirator. This is due

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38 For a detailed overview, see Gould.
39 United States v Apple Inc No.13-3741 (2d Cir. 2015).
40 Apple No.13-3741 (2d Cir. 2015) at 63.
41 Apple No.13-3741 (2d Cir. 2015) at 63 et seq.
to the fact that Apple, while not active on the relevant market for e-books, was active in the downstream market of distributing e-books.40

B. EU law

In developing our alternative approach under EU law, we will first address the principle of *nullum crimen sine lege*. In a second step, we will apply accepted principles of general EU law which are based on the national laws of Member States.

1. The principle *nullum crimen sine lege*

In light of the principle *nullum crimen sine lege*, the starting point must be the wording of arts 101 and 102 TFEU. We consider that facilitating a cartel can be characterised as participation in a concerted practice within the meaning of art.101(1) TFEU. Nothing in the wording of art.101 TFEU suggests that companies must be active on a relevant market in order for art.101 TFEU to be applicable.41 Likewise, art.102 TFEU, which refers to the practice of one or more undertakings, does not require all participants to the abuse to hold a dominant position. This is also in line with the rationale of the EU’s competition rules, which aim at preventing the distortion of competition. Applying arts 101 and 102 TFEU only to undertakings active on the affected market would run counter to this objective.

As a side note, we remark that the proposal by AG Wahl and others that the EU should introduce specific legislation to deal with accomplices to such infringements seems to be somewhat unrealistic. Apart from the fact that the EU Member States have more pressing concerns than amending the TFEU in order to deal with a detail of the Treaty’s competition rules, it also blends out the concept of development of the law by courts. In any event, such legislation would not apply retroactively and thus leave past conduct unsanctioned, even though the vast majority of commentators agree that as a matter of policy it should not go unsanctioned.

2. General principles common to the laws of the Member States

We therefore start from the premise that the principle *nullum crimen sine lege* allows the sanctioning of the conduct in question. However, the existing written law, in particular Regulation 1/2003, does not explicitly mention the facilitation of an infringement committed by others. Over the years, the Court of Justice has frequently been faced with the situation where the law of the EU does not provide an answer to an issue. Starting with the famous *Algera* case of 1957,42 the Court has consistently held that such questions should be addressed by applying the common principles inherent in the laws of the Member States, in analogy to art.340(2) TFEU, which for the non-contractual liability of the EU refers to general principles common to the laws of the Member States.43 The CJEU uses comparative law to deduce general principles of EU law, without requiring a substantial majority, let alone unanimity, in the laws of Member States.44 We therefore examined the national laws of a significant number of Member States below to establish whether a common approach exists. Even though sanctions for the violation of EU competition law are only quasi-criminal in nature,45 we base our analysis on criminal law provisions. The reason being that if such sanctions are not criminal in nature, analogies to criminal law should be far from being possible.

a) Germany

Paragraph 27 of the German Criminal Code states that “any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aid.”

b) France

French law defines the participation in a criminal act explicitly in the Criminal Code. Article 121-6 of the French Criminal Code46 states that the accomplice to the offence, in the meaning of art.121-7, is punishable as a perpetrator. Article 121-7 of the Criminal Code provides:

“The accomplice to a felony or misdemeanor is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.”

The “accomplice” must act in knowledge of his aid to the main crime (“connaissance”) and with the intention (“volonté”) to participate. He must not have full knowledge of the main act. It is sufficient if he recognizes its criminal nature. Furthermore, his intention must not be directed at the success of the crime, but at his will to participate (“volonté de participer”).47

45Article 23(5) Regulation 1/2003.
46Code penal, version consolidée au 15 April 2016.
c) Italy Article 110 of the Italian Codice Penale states under the heading “Punishment for those concurring in crime”:

“When several people contribute to the same criminal act, each of them is subject to the penalty established for this act according to the provisions of the following articles. The participant in a crime must have the intention to participate in the completion of the crime. This intention consists of the knowledge of the contributions of the other participants and the intent to help carry out the criminal act through one’s own contribution.”

d) UK In the UK, participation in a criminal act may occur by aiding, abetting, counselling, or procuring. The act of aiding and abetting must be committed intentionally, and the person acting must at least have knowledge of the essential matters of the offence he is attempting to participate in. Hence, it is sufficient that someone intentionally participates in a criminal act of which he knows about the essential elements of the crime.

e) Austria According to para.12 of the Austrian Criminal Code, not just the immediate perpetrator commits an offence, but also anyone who instructs someone to execute it or who otherwise contributes to its realisation. The Supreme Court in 1982 recognised the differentiation between aiding and abetting in cases where the perpetrator has acted negligently. This is only the case, however, where criminal liability for negligent action is expressly stipulated in the law. Negligent aiding and abetting is only punishable when the act itself can be committed negligently. To negligently induce someone to decide to act in a criminal manner is also qualified as abetting. Finally, negligent aiding will also be assumed where the perpetrator negligently aids the main perpetrator who is committing negligently or with intent.

f) Denmark In Danish criminal law, the intent of the participant must be directed at the realisation of the crime and must cover all elements of the offence. If a norm requires a specific type of intent, the participant must show it to be held liable. Generally speaking, the intent of the participant must be sufficiently concrete. According to case law, each participant must assume responsibility for the acts of the other participants or main perpetrators, even if they are not covered by his personal intent. It is sufficient that he could have anticipated the outcome.

Negligent participation in negligently and/or intentionally committed offences is also possible under Danish criminal law.

g) Sweden Chapter 23 s.4 of the Swedish Penal Code of 1962 states:

“1) Punishment as provided for an act in this Code shall be imposed not only on the person who committed the act but also on anyone who furthered it by advice or deed. The same shall also apply to any other act punishable with imprisonment under another Law or statutory instrument.

2) A person who is not regarded as the perpetrator shall, if he induced another to commit the act, be sentenced for instigation of the crime and otherwise for aiding the crime.

3) Each accomplice shall be judged according to the intent or the negligence attributable to him. Punishments defined in law for the act of a manager, debtor or other person in a special position shall also be imposed on anyone who was an accomplice to the act of such person.

4) The provisions of this paragraph do not apply if the law provides otherwise in special cases.”

The person aiding the main perpetrator must have a double intent: on the one hand, he must intentionally aid the realisation of the criminal act. On the other hand, his intent must be directed at all the objective elements of the crime to which he is an aid. If the main perpetrator commits a graver act than anticipated by the participant, this will not be covered by his personal intent.

h) Finland The Criminal Code of Finland of 1889 provides in Ch.5 s.6 under the title “Abetting”:

1) A person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, shall be sentenced for abetting on the basis of the same legal provision as the perpetrator. [...]”
2) Incitement to punishable aiding and abetting is punishable as aiding and abetting.

The provision requires a two-fold intent: the person aiding the main perpetrator must act intentionally to support an intentionally committed crime.

C. Conclusion

The above compilation shows that under national criminal law there are rules for dealing with persons who themselves do not commit a crime but merely assist the perpetrator in carrying out the infringement. These national rules can form the basis for a parallel rule of EU law derived from common principles of the laws of the Member States. We therefore conclude that under arts 101 and 102 TFEU and Regulation 1/2003, conduct that facilitates the infringement committed by others constitutes an infringement in itself and may be sanctioned. This result is not based on a further extension of the questionable principle of a single continuous and complex infringement and it is therefore not limited to infringements of art.101 TFEU.

IV. Extent and limits of the liability of facilitators

AC Treuhand has clearly established the principle that cartel facilitation falls under art.101 TFEU. The Commission has been encouraged to pursue such cases in the future. A prime example for this is the fine of €14.9 million imposed on ICAP in the Commission’s Yen Interest Rate Derivative decision of 4 February 2015. According to the Commission decision, the UK-based voice and electronic dealer broker ICAP had contributed to six of the seven cartels in the YIRD sector by: (i) disseminating misleading information to certain JPY LIBOR panel banks to influence certain panel banks that did not participate in these infringements to submit JPY LIBOR rates in line with the misleading information; (ii) using its contacts with several JPY LIBOR panel banks that did not participate in the infringements with the aim of influencing their JPY LIBOR submissions; and (iii) serving as a communications channel between a trader of Citigroup and a trader of RBS and thereby enabling the anti-competitive practices between them. On appeal by ICAP, the GC, in its judgment of 10 November 2017, confirmed the liability of cartel facilitators. However, with respect to the majority of the individual infringements it considered that they were not proven by the Commission to the requisite legal standard; the fine assessed against ICAP was quashed in its entirety.

Below we outline the extent of such a liability and also its limits.

A. Existence of a principal infringement committed by perpetrators

Given that an infringement committed by a facilitator consists of aiding and abetting an infringement committed by others, as a starting point the principal violation must be established. This is assessed on the basis of the established rules and case law. This also means that practices which facilitate tacit co-ordination in an oligopolistic market—which is legal—cannot constitute an infringement of arts 101 or 102 TFEU.

B. The facilitator’s conduct

As regards the facilitator’s conduct, there is little precedent except for AC Treuhand and ICAP cases. The question has been raised whether the wording that AC Treuhand “played an essential and similar role in both cartels and that the “very purpose of the services provided by AC-Treuhand” was “the attainment, in full knowledge of the facts, of the anti-competitive objectives” of the parties active on the relevant markets is merely descriptive or whether in fact the presence of these elements is a necessary precondition of a facilitator’s liability for an infringement of art.101 TFEU. In our view, the CJEU used the colourful description of AC Treuhand’s conduct in order to make its conclusion—liability of cartel facilitators—all the more convincing, indeed compelling. Therefore, we consider that this language is merely a description of AC Treuhand’s conduct and does not formulate a legal test for future cases.

1. Hub-and-spoke cartels

As regards the participation of mere intermediaries in an infringement committed by others, the main example is a hub-and-spoke cartel, where the intermediary (the hub) may be a participant in a cartel among the parties constituting the spokes. Commercially sensitive information is channelled from one competitor to another via a common customer or supplier. Establishing the required high level of knowledge and intent on the part of the intermediary/facilitator is difficult and instances where this test was met are limited to the UK. In
continental Europe, authorities have preferred to sanction this type of conduct as a violation of the prohibition against resale price maintenance.⁶⁴

A recent European example concerns the price-fixing agreements between the major Belgian supermarkets regarding pharmacy, perfumery and hygiene products dealt with by the new Belgian Competition Authority. There had been repeated co-ordinated increases in consumer prices for a large number of products. Eighteen retailers and suppliers, including major chains such as Carrefour, Colruyt, Cora, Delhaize, Intermarché, Makro, Mestdagh and the most important suppliers of pharmacy, perfumery and hygiene products in Belgium, such as Colgate-Palmolive, Beiersdorf, GSK, L'Oréal, Henkel, Procter & Gamble and Unilever, were involved. The price co-ordination was the result of indirect contact between the retailers via their suppliers, which acted as intermediaries and facilitators. The Competition Authority imposed fines. Since all the undertakings involved agreed to a settlement, no judicial review will take place.⁶⁵

2. Professional market research organisations

Perhaps the most interesting issues arise with respect to information exchange. The dividing line between clearly legal exchange of information about past occurrences and possibly illegal exchange of information about very recent information is somewhat opaque.⁶⁶ At the same time, the very purpose of many professional service organisations is (similar to AC Treuhand) the collection of information by various means on sales by retailers as well as the usage of television and other media by consumers. In its recently published Guidance Note on the Prohibition of Vertical Price Fixing in the Food Retail Sector, the German Federal Cartel Office (FCO) notes the activities of professional service organisations in this sector that charge significant fees for the collection and provision of data on price and volume.⁶⁷ Nevertheless, in the ensuing discussion of legal and possibly illegal scenarios, the FCO restricts its guidance to the direct exchange of pricing data between supplier and retailer.

While the FCO is not in a position to provide authoritative guidance on the interpretation of art.101 TFEU, it is nevertheless noteworthy that the FCO tends to view the exchange of such information via a professional service organisation as legal. In our view, the distinguishing factor here is that the parameters of this information exchange are completely open and accessible to competition authorities at any time, therefore immunising the professional service organisation at least for the time being from the imposition of fines.⁶⁸

C. The role of intent/negligence

Whether mere negligence in facilitating the conduct of others that amounts to a cartel leads to liability of the facilitator is an issue that has to our knowledge not yet been discussed in detail. It is obvious that the AC Treuhand case law should not apply to, e.g. a hotel owner in whose establishment cartel meetings were taking place and who happened to overhear discussion of the participants. Absent a specific provision requiring him to take action, he could not even be held accountable under criminal law for not informing the authorities about guests plotting a criminal act.

As a practical matter, the Commission when imposing fines on undertakings for violations of arts 101 or 102 TFEU routinely and without supporting evidence concludes that the violation was committed either intentionally or negligently. Nevertheless, as regards violations of arts 101 and 102 TFEU, it appears that fines have never been imposed in cases where the parties' conduct did not involve complete knowledge of the relevant facts. Discussions at the fringes did concern the question whether the parties were aware of the fact that their conduct might violate art.101 TFEU.⁶⁹

We therefore believe that it would be extremely rare, if not inconceivable, that merely negligent conduct on the part of the facilitator would lead to an infringement of the competition rules and result in a fine being imposed.

D. Remedies

1. Appropriate level of fines

The sanctions foreseen in the legal orders of the Member States against facilitators tend to be somewhat lower than the fines issued under identical circumstances against perpetrators. The Commission’s Fining Guidelines⁷⁰ do not address this issue. Since the Commission no longer hesitates to enforce the competition rules against facilitators, it would be desirable that a section on fines for cartel facilitation is added with the next update. In this regard, we note that the facilitator is usually responsible for the conduct of all perpetrators. Thus, the relevant turnover could be considered to be the entire turnover achieved in the market. This would, however, be a strong argument for the application of a significantly

lower multiplier compared to perpetrators. In any event, in many cases the fine against the facilitator will be cut by the 10% limit of art.23(2) of Regulation 1/2003.

2. Liability for damages

As a participant in the infringement of art.101 TFEU, the facilitator is jointly and severally liable to indemnify anyone who suffered damages as a result of the infringement. However, in practice we assume that undertakings with limited means such as AC Treuhand will be unlikely primary targets for damage claims by direct or indirect purchasers.

V. Summary and outlook

The principle of *nullum crimen sine lege* does not prohibit holding facilitators of infringements of EU competition law liable. However, basing this liability on the concept of a single continuous and complex infringement is questionable. In our view such liability follows from the general principles for aiding and abetting a crime common to the laws of the Member States. As to the exact scope and extent of the liability of facilitators, future Commission practice and jurisprudence from the European courts will provide further clarification.