The service provider as cartel facilitator: assessing 'third party' liability under Article 101 TFEU

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1. Introduction

The history of the European Commission finding so-called 'cartel facilitators' liable for antitrust infringements is lengthy, with the first clear precedent dating back at least to 1980. However, it is also patchy, with a lapse of over twenty years passing before the next such decision. It is arguably only since the judgment of the Court of First Instance in *AC Treuhand I* (2008) that there has been some degree of clarity regarding the circumstances in which a third party service provider can be considered liable as a co-perpetrator for a cartel infringement. That judgment, as we shall discuss below, set the bar for such liability worryingly low.

The Commission's decision in 2015 to fine a broker more than EUR 14 million in connection with a cartel in the market for yen interest rate derivatives indicates that the era of so-called facilitators receiving nominal sanctions is over.[1] In light of the European Court of Justice's ("ECJ") recent confirmation that information exchange can constitute a restriction of competition by object even when no actual future prices are involved, it is thus clear that firms whose business depends upon the supply of information face increasing exposure to antitrust risk.[2]

In this article, we shall review the case law on the liability of third parties as cartel facilitators with a particular focus on providers of data aggregation services. We shall consider the extent to which data aggregators can be exposed to such liability, in light of this case law, and suggest how such exposure might be mitigated. To place this analysis into a more practical context, we have focussed especially on the risks associated with the provision of data aggregation services in the consumer goods sector, in which there is a practical need for reliable retail statistics and there are legitimate pro-competitive benefits, borne out by economic assessment, to information exchange.

2. *Fides Milan* and *AC Treuhand*: the original cartel facilitators

2.1 The Commission's early decision-making practice

The first instance in which the Commission imposed a fine on an undertaking for its role as a cartel facilitator was in the *Organic Peroxides* decision of December 2003, which we review below.[3] It should be noted, however, that this was not the first time that the Commission found a third party consultant liable for the implementation of a cartel. In the *Italian Cast Glass* decision of December 1980, three glassmakers were found to have entered into agreements establishing production quotas and committing to exchange manufacturing and marketing data.[4] This agreement was supervised by an external consultant, F-Unione Fiduciaria SpA ("Fides Milan"), which received and disseminated the information that was exchanged between the glassmakers. In its

1 IP/15/4104, Antitrust: Commission fines broker ICAP € 14.9 million for participation in several cartels in Yen interest rate derivatives sector, 4 February 2015.
2 Case C-286/13 P, *Dole Food Company v European Commission*, Judgment of 19 March 2015.
3 Case COMP/E-2/37.857– Organic Peroxides, Decision of 10 December 2003.
4 Case V/29.869 — Italian cast glass, Decision of 17 December 1980.

decision, the Commission found that the consultant had thus "*enabled and consciously assisted the implementation of the restrictions of competition which were the very purpose of the agreements*".[5] On this basis, the Commission concluded that, "*although not directly involved in the production or distribution of the products in question*, [Fides Milan] *was nevertheless jointly responsible for the application of the agreements restricting competition*". Although no fines were imposed in the decision, the Commission explicitly noted that Fides Milan's joint responsibility for the infringement would have been taken into account if they had been.

Post-*Italian Cast Glass*, there followed a series of five decisions in the 1980s and 1990s in which the Commission found that an external data aggregator had facilitated the implementation of a cartel, but in which it did not attribute liability for the infringement to that party.[6] In four of these cases (the exception being *Cast Iron and Steel Rolls*) the third party in question was Fides Trust AG of Zurich, Switzerland ("Fides"; note that this firm was unrelated to the aforementioned Fides Milan).

The facts of these cases are relatively similar, in that in each of them Fides received sales and production data from suppliers and provided back to them aggregated market statistics. The suppliers, however, engaged in additional and direct anti-competitive information exchanges (with which Fides was not involved) relating to the objectives of their cartel. For example, in *Polypropylene* the Commission found that the safeguards that Fides had put in place to ensure that its aggregated information did not reveal any individualised data were "*rendered nugatory by the producers systematically exchanging amongst themselves either by telephone or at meetings the details of the tonnages delivered by each to the European market*".[7] However, it is clear that Fides was more directly involved in the *Cartonboard* cartel in which it acted as the secretariat to the working group, attending meetings and taking minutes of them, as well as gathering and providing data. Moreover, the Commission found that the safeguards that Fides had used in other cases were missing in *Cartonboard*, allowing the cartelists to determine and monitor individual market shares more easily and thus constituting "*a 'facilitating' device making it easier for the producers to coordinate commercial behaviour in an anti-competitive way*."[8] Nevertheless, in its decision, the Commission did not find Fides liable for any infringement.

2.2 The Commission's decision in *Organic Peroxides*

In 1993, a management buy-out of the division of Fides that had been implicated as a third party in the series of cases from *Woodpulp* to *Cartonboard* led to the creation of AC Treuhand AG. It was under this name that the firm was first sanctioned by the Commission ten years later, in *Organic Peroxides*.

As described in the decision of December 2003, this case involved a cartel implemented by a small group of organic peroxide producers to coordinate price increases and allocate market shares for a period between 1971 and 1999. The Commission imposed total fines of approximately EUR 70 million, of which AC Treuhand was held liable for EUR 1,000. The long-term duration and stability of the cartel can be attributed in part to the extent of its formal organisation; it was based, for instance, on two written agreements signed in 1971 and 1975, respectively. In the Commission's view, the success of the cartel could also be attributed to the role played by AC Treuhand (and its predecessor, Fides) as a cartel facilitator: its tasks, the Decision stated, "*were the basis for the functioning of the agreement*".[9]

By its own admission, AC Treuhand provided "*clerical-administrative*" services to the members of the cartel such as hosting meetings at its premises in Zurich and acting as a document repository.[10] The evidence uncovered by the Commission, however, indicated that these services were not as innocuous as they might have seemed. As well as hosting meetings, AC Treuhand organised travel and handled the attendees' expenses in order to avoid creating a paper trail to Zurich; among the documents that it stored for its clients were the 1971 and 1975 cartel agreements. In addition, AC Treuhand collated data from the parties on the basis of which

5 Case V/29.869 — Italian cast glass, Decision of 17 December 1980, A4.
6 Case IV/30.064 - Cast iron and steel rolls, Decision of 17 October 1983; Case IV/29.725 - Wood pulp, Decision of 19 December 1984; Case IV/31.149 — Polypropylene, Decision of 23 April 1986; Case IV/31.866 - LdPE, Decision of 21 December 1988; and Case IV/C/33.833 — Cartonboard, Decision of 13 July 1994.
7 Case IV/31.149 — Polypropylene, Decision of 23 April 1986, 66.
8 Case IV/C/33.833 — Cartonboard, Decision of 13 July 1994, 134.
9 Case COMP/E-2/37.857– Organic Peroxides, Decision of 10 December 2003, 102.
10 Case T-99/04, *AC-Treuhand v Commission*, Judgment of 8 July 2008, 62.

it calculated their market shares, and audited their sales to identify if any party had deviated from their agreed allocation. This data, including the agreed market shares, was provided to the parties on papers that were colour-coded to identify that they should not be removed from AC Treuhand's premises. Moreover, there was a suggestion that AC Treuhand not only chaired some cartel meetings but also acted as a mediator when the producers disagreed over the implementation of their agreement, and even advised them on whether a new producer should join their group.

In light of this evidence, the Commission concluded that AC Treuhand had "*played a crucial role in the organisation of the cartel* [which] *went beyond the mere collection and treatment of statistical data*."[11] The Commission described how "*AC Treuhand was aware and actively involved in cartel arrangements*" and its functions went "*beyond the role of a secretariat*", noting in particular that in auditing the parties' data and calculating any deviations from their allocations "*AC Treuhand had authority over the members of the agreement … for example by 'handing' over clients in order to restore the agreed quotas.*" AC Treuhand's involvement in the cartel was based not only on helping it to operate, but helping it to operate in secret. The implication of this, in the Commission's view, was that the consultant was "*absolutely aware*" that the underlying agreements were anticompetitive. Moreover, although AC Treuhand did not benefit directly from the distortion of the organic peroxides market, the Commission held that it benefitted indirectly by being paid to help implement it.[12]

On this basis, the Commission found – in rather broad terms – that AC Treuhand was "*party to the agreement and/or took decisions as an undertaking and/or as an association of undertakings*".[13] It cited to its previous decision in *Italian Cast Glass* as a precedent, noting that Fides Milan would have been taken into account had fines been imposed in that case.[14] For its role as a cartel facilitator, the Commission fined AC Treuhand the symbolic amount of EUR 1,000 on account of "*the novelty of* [its] *approach*" and took the opportunity to send out a message that "*organisers or facilitators of cartels, not just the cartel members, must fear that they will be found and heavy sanctions imposed from now on*".[15]

AC Treuhand appealed the decision insofar as it related to it. In particular, it argued that the Commission had breached the principle of *nullum crimen, nulla poena sine lege* and it defined its role in the cartel as one of "*non-punishable complicity*", such that it could not be considered a perpetrator of the infringement.[16] The Court of First Instance (as was) dismissed the application almost in its entirety in a judgment of July 2008.[17]

> The Commission found that AC Treuhand's services were "the basis for the functioning" of the Organic Peroxides cartel

2.3 The judgment in *AC Treuhand I*

The CFI's judgment is interesting for several reasons including not only its ruling on third party liability, but also the finding on legitimate expectations. On the latter point, the Court held that the Commission's decision in *Italian Cast Glass* was sufficient to put AC Treuhand on notice that it could be found liable for an infringement as a co-perpetrator. It also ruled that the subsequent decisions in which AC Treuhand or its predecessor, Fides, had been found not liable – such as *Woodpulp* and *Cartonboard* – did not give rise to a legitimate expectation that its conduct was lawful. The Court stated that the Commission's "*post-1980 deci-*

11 Case COMP/E-2/37.857– Organic Peroxides, Decision of 10 December 2003, 95.
12 Case COMP/E-2/37.857– Organic Peroxides, Decision of 10 December 2003, 102.
13 Case COMP/E-2/37.857– Organic Peroxides, Decision of 10 December 2003, 349.
14 Case COMP/E-2/37.857– Organic Peroxides, Decision of 10 December 2003, 348.
15 IP/03/1700, Commission fines members of organic peroxides cartel, 10 December 2003.
16 Case T-99/04, *AC-Treuhand v Commission,* Judgment of 8 July 2008.
17 The CFI did uphold one of AC Treuhand's arguments, namely that the Commission had failed to inform it in a timely manner that it was subject to an investigation – but it concluded that there was no evidence that this irregularity affected AC Treuhand's rights of defence. See Case T-99/04, *AC-Treuhand v Commission,* Judgment of 8 July 2008, 57-59.

sion-making practice could not reasonably be construed as a definitive abandonment of the initial approach" set out in *Italian Cast Glass* and that, although the latter practice was to not censure data aggregators, the Commission still did not "*disavow, as a matter of law, the approach initially followed*".[18]

More relevant for our discussion is the Court's ruling on establishing the liability of so-called co-perpetrators. Firstly, the Court held that a literal interpretation of the term 'agreements between undertakings' in what is now Article 101 TFEU requires a broad or "*unitary*" construction, which comprises any undertaking that has contributed to the infringement, rather than a narrow or "*bipolar*" one which distinguishes between undertakings that perpetrated an infringement and those that were merely complicit in it.[19] The Court then addressed the conditions that an undertaking's participation must satisfy for it to be held liable as a co-perpetrator of an infringement. In this regard, it established the following legal test:

> *the Commission must prove that [the co-perpetrator] intended, through its own conduct, to contribute to the common objectives pursued by the participants as a whole and that 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.*[20]

As the Court explained, this test comprises both an objective and a subjective element. To establish the liability of a co-perpetrator as an accessory to a cartel, the Commission must show that it contributed objectively to the implementation of the infringement "*even in a subsidiary, accessory or passive role*".[21] The Commission must also show that the alleged co-perpetrator intended subjectively to make such contribution. It is the Court's interpretation of this subjective condition which is the most troubling element of the *Organic Peroxides* judgment. The Court stated that the principles established in its legal test "*apply* mutatis mutandis *to the participation of an undertaking whose economic activity and professional expertise mean that it cannot but be aware of the anti-competitive nature of the conduct at issue and enable it to make a significant contribution to the committing of the infringement*" (emphasis added).[22] In other words, in the context of considering AC Treuhand's role – and, perhaps, its long-standing history as a service provider to cartels – the Court suggested that there exists a class of firms who, by the very nature of their business, will be presumed to know when the conduct that they facilitate is illegal.

The implications of this are clearly concerning for firms that may be deemed to have the "*economic activity and professional expertise*" to which the Court cited. Effectively, the Court ruled that the subjective element of its test for liability as a co-perpetrator will be presumed to be met whenever such a firm is found to have contributed, objectively, to a cartel. To avoid liability, the firm must either prove that it did not contribute to the cartel – even in a "*subsidiary, accessory or passive*" way – or rebut the presumption that its contribution was knowing and intended. In Section 4, below, we consider in more detail how this might be done.

2.4 The Commission's decision-making practice after Organic Peroxides

The *Organic Peroxides* decision was presented and interpreted as a salutary warning that third parties that are deemed to have facilitated the creation and operation of a cartel would face financial exposure by way of a fine, albeit at a level significantly lower than the industry participants. However, it would be another six years before the Commission adopted a second decision issuing a fine under such circumstances. In November 2009, AC Treuhand (again) was found liable as a co-perpetrator in the *Heat Stabilisers* cartel.[23] In that decision, AC Treuhand was not fined a 'symbolic' amount as it had been in *Organic Peroxides* but rather a sum of EUR 348,000. This fine comprised two lots of EUR 174,000 – reflecting that the cartel operated in two distinct markets – each of which were only marginally less than 10% of AC Treuhand's turnover in the previous year.

18 Case T-99/04, *AC-Treuhand v Commission*, Judgment of 8 July 2008, 164.
19 Case T-99/04, *AC-Treuhand v Commission*, Judgment of 8 July 2008, 117.
20 Case T-99/04, *AC-Treuhand v Commission*, Judgment of 8 July 2008, 130.
21 Case T-99/04, *AC-Treuhand v Commission*, Judgment of 8 July 2008, 133.
22 Case T-99/04, *AC-Treuhand v Commission*, Judgment of 8 July 2008, 136.
23 Case COMP/38589 – Heat Stabilisers, Decision of 11 November 2009, note that it was appealed unsuccessfully to the CFI (Case T-27/10, *AC-Treuhand v Commission*, Judgment of 6 February 2011) and appeal to the ECJ is pending (C-194/14, *AC-Treuhand v Commission*).

Between *Organic Peroxides* and *Heat Stabilisers*, there were two other notable cases involving cartel facilitation. In 2005, AC Treuhand escaped a finding of liability in relation to the *Monochloroacetic acid* cartel. The facts of this case were closer to those of the 1980s and 1990s, in which it also avoided sanctions, than they were to *Organic Peroxides*.[24] In *Monochloroacetic acid*, AC Treuhand provided the parties with "*aggregated statistical data and general market information*" and organised a series of "*legitimate*" meetings.[25] The Commission found that the cartelists used these meetings as cover for other bilateral or multilateral exchanges at which they allocated volume quotas and customers, agreed price increases, and exchanged sales price and volume data. There was no suggestion that AC Treuhand contributed to or knew of such secret meetings and exchanges.

> The judgment in AC Treuhand I suggests that there are firms who, by the very nature of their business, will be presumed to know that the conduct they facilitate is illegal

More surprisingly, in January 2009 the Commission chose not to hold PW Consulting liable in relation to the *Marine Hoses* cartel, even though it was found to have played a central role in organising a global, long-running bid-rigging conspiracy. The contribution of PW Consulting to the cartel does not seem to have been in any doubt, given that it was identified in the public version of the Commission's decision as "*[Cartel coordinator's company]*" and Peter Whittle, its sole executive, was imprisoned for three years in related English criminal proceedings.[26] Given that this decision came less than six months after the Court of First Instance's judgment in *AC Treuhand I*, the Commission's apparent inconsistency caused significant surprise at the time. In response, it issued a statement justifying its position.[27] Citing to the "*exceptional circumstances*" of the case, the Commission stated that the principle of 'double jeopardy' could apply since the corporate vehicle that would have been the subject of an EU sanction consisted solely of the individual who was the subject of criminal prosecution at national level. The Commission also noted that PW Consulting itself was essentially a shell with no assets, and that imposing a 'symbolic' fine as it had in *Organic Peroxides* would have had limited deterrent effect since Mr Whittle had already been sentenced to jail in the UK.

3. ICAP: the cartel broker?

After *Organic Peroxides* and *Heat Stabilisers*, the third instance of a party being fined by the Commission for cartel facilitation is much more recent. In February 2015, the broker ICAP was fined EUR 14.9 million for its role in six cartels that were implemented between 2007 and 2010 in relation to yen interest rate derivatives ("YIRD").[28] ICAP was the only party to the case that did not settle with the Commission, which had already imposed fines of EUR 669.7 million on five banks and one other broker in December 2013. ICAP did, however, pay combined fines of EUR 65.4 million to the UK's Financial Conduct Authority and the US Commodity Futures Trading Commission in September 2013, having admitted breaching their respective trading rules.

In the *YIRD* decision, which has yet to be published, the Commission found that ICAP's contribution to the cartel consisted of three elements: disseminating misleading information to banks outside the cartel regarding its expectation of where yen LIBOR rates would be set; using its contacts with non-cartel banks to influence their yen LIBOR rate benchmark submissions; and acting as a communications channel between traders at Citigroup and RBS that enabled them to coordinate their own submissions. Despite being characterised

24 Case COMP/E-1/.37.773 – MCAA, Decision of 19 January 2005.
25 Commission fines members of the monochloroacetic acid cartel, Competition Policy Newsletter, Number 1 — Spring 2005, 71.
26 *R. v Whittle (Peter)* [2008] EWCA Crim 2560.
27 See MLex Report, 29 January 2009, 17:05 GMT: 'EC Statement: EC clarifies approach to cartel facilitator in marine hose antitrust decision'.
28 Case COMP/M.39861 - Yen interest rate derivatives (YIRD), Decision of 4 February 2015.

by the Commission as a cartel facilitator, ICAP's position in *YIRD* can be distinguished from that of AC Treuhand in *Organic Peroxides* and *Heat Stabilisers*. Whereas AC Treuhand's relationship to the other parties in those cases was solely one of service-provider/client, and it was not active on any market related to those affected by the cartels, ICAP's relationship with the other *YIRD* cartelists was more direct and its connection to the affected market much closer. Although ICAP did not trade in yen-backed derivatives, it brokered such trades between dealers and was thereby vertically related to both the cartelists and the directly-affected market.

ICAP has announced that it will appeal the decision, although an appeal has not been filed to date.[29] ICAP is understood to be challenging the evidence upon which the Commission based its findings, as well as arguing that it did not benefit from the cartel and claiming that it has already been sanctioned for the same conduct in the UK and US.

4. Avoiding exposure as a data aggregator

4.1 Exposure arising from the case law

As described above, the Commission's decision-making practice with regard to third party liability to date has been sporadic and arguably lacks a degree of consistency. That said, the CFI's judgment in *AC Treuhand I* and the subsequent ruling in *AC Treuhand II* with regard to *Heat Stabilisers* (which is currently under appeal before the European Court of Justice[30]) clarified the legal test for establishing the liability of a co-perpetrator for an infringement. As noted above, the Court's interpretation of this test poses a potential threat to many types of service provider, in particular data aggregators.

The requirement that an undertaking must both contribute (objectively) and intend to contribute (subjectively) to a cartel, in order to be found liable for its implementation, is unsurprising. However, the Court's application of this test to AC Treuhand, and by extension to other third parties, is a cause for concern. The implication that some undertakings will be presumed to have knowledge of the anticompetitive nature of conduct that they are facilitating, due to their professional experience, greatly increases their exposure to liability for an infringement. In principle, it would be sufficient for the Commission to show that a firm is an experienced service provider that performs such functions as part of its ordinary business in order for it to conclude that "*it cannot but be aware*" of the anticompetitive nature of an agreement that it is helping to implement. The danger of this approach is that it may undermine or hinder the provision of legitimate data aggregation services that deliver efficiency benefits in the market. This is particularly the case for the many service providers who are engaged in monitoring consumer behaviour and who, by necessity, provide data that is focussed on sale volumes and prices.

For example, there exists a whole sector of data aggregators that provide both suppliers and retailers of Fast Moving Consumer Goods ("FMCG") with information on the performance of specific branded goods. Such services are available from various sources in each Member State, and exist in many forms. Fundamentally, all are based on providing aggregated information on sales volumes and prices at the retail level to retailers and/or manufacturers, either by gathering data from items scanned at the point of sale, or on the basis of data gathered through in-store surveys and audits of shelf space and stocking. Data is provided to the retailers/manufacturers in aggregated form, showing general market trends, with individualised information relating only to the specific recipient. In the FMCG sector, especially, there is a practical need for such data and its pro-competitive benefits are borne out by economic analysis. However, in light of the existing case law on third party liability, even where data aggregation services are intended to (and do have) a pro-competitive object, it is necessary to consider their effect in the market to limit any potential exposure to liability for a cartel infringement.

4.2 Pro-competitive benefits of data aggregation services in the FMCG sector

It is well-established that data aggregation services can have a positive impact at more than one level of the market. The Commission has long accepted the competitive benefits of information exchange, even between competitors, providing that it falls within the scope of their guidelines on

29 ICAP statement, 4 February 2015 (http://www.icap.com/news/2015/20150204_icap_response_ec_decision.aspx).
30 C-194/14, *AC-Treuhand v Commission*.

horizontal co-operation agreements.[31] Specifically, the Commission has regarded it as a "*common feature of many competitive markets*" and a tool to drive market efficiency through benchmarking against other competitors' practices.[32] The Commission has also highlighted its ability to reduce costs, *e.g.*, through the reduction of inventories by responding more effectively to consumer demand. This, in turn, can benefit consumers by reducing search costs and improving choice.[33]

From the perspective of an economist, it can be argued that the analysis of aggregated data helps companies to interpret performance results more easily when evaluating demand and enables them to differentiate between internal and external market factors; for example, establishing whether the low sales of a particular item were due to poor product selection or a trend in the wider market. Through more accurate interpretation of demand data, a company can make more efficient commercial decisions and generate efficiencies that are passed on to the consumer. Demand information also drives product innovation by enabling a company to harmonize with consumer preferences.[34] As well as benefiting consumers, by providing them with greater choice and avoiding incorrect product capacity, it also improves competition in product innovation.

Accurate demand information gathered from retail data can also increase a retailer's bargaining power against manufacturers. Typically, manufacturers benefit from a broader perspective on the market since they supply many retailers, and therefore gain a general understanding of market demand, whereas a single retailer will ordinarily only have access to internal demand data. The change in the balance of bargaining power which aggregated market data provides can have the effect of lowering wholesale prices and marginal costs, benefits which again can be passed on to consumers.

31 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C11/1.

32 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C11/13.

33 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C11/13.

34 Sandvik. I.L. and K. Sandvik,. The impact of market orientation on product innovativeness and business performance, International Journal of Research in Marketing (2003). Vol.20: 355-377.

4.3 Antitrust investigations into data aggregation services in the FMCG sector

Despite their potential pro-competitive benefits, the nature of data aggregation services is such that they will not infrequently be exposed to antitrust scrutiny. As described above, such services are predicated on some form of information exchange between competitors that can, at least potentially, reduce uncertainty in the market. However, examples of antitrust enforcement against data aggregators and other market research service providers – with the notable exception of AC Treuhand itself – are relatively infrequent. The majority of investigations into market research services have concluded with a finding of no infringement or, less typically, a decision or settlement requiring the provider to alter the nature of its service.

One such example involved an investigation into the provision of retail data services in the FMCG sector in Finland. In 2008, the national competition authority addressed a Statement of Objections ("SO") to the three main Finnish FMCG retailers and the sole provider of retail data services. The SO alleged that the services provided to those retailers were incompatible with competition rules on the grounds that, firstly, they introduced a high level of transparency into the FMCG market; secondly, the concentrated nature of the Finnish market allowed the retailers to determine and monitor each other's market shares from the aggregated data; thirdly, the service could and did lead to price uniformity; and fourthly, in light of these findings, the parties (including the service provider) had entered into an agreement the object or effect of which was to restrict competition.

The authority's investigation led to a decision prohibiting the retailers from receiving any market reports unless there was further aggregation of the data, so as to prevent them from identifying each other's market share and pricing.[35] Since the decision, Finnish retailers no longer release their sales data to any third party aggregator. As a consequence, Finland is now the only EU Member State in which FMCG suppliers no longer have access to any data on brand competition at national level. While arguments could be made that the Finnish decision is not only inconsistent with the practice of almost every other national competition au-

35 *See* www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?luku=tiedotteet&-sivu=tied/t-2008-11.

thority but flawed in itself – for instance, for failing to take account of pre-existing transparency in the market and for overestimating the possibility of collusion in the FMCG sector – the case serves as a further reminder of the exposure that data aggregators can face. With that in mind, it is useful to consider how a service provider of this nature might avoid being considered a cartel facilitator.

> The current jurisprudence risks undermining legitimate data aggregation services that deliver efficiency benefits in the market

4.4 Protecting legitimate service providers

As discussed above, the CFI's application of the test in *AC Treuhand I* places a low burden on the Commission to prove that a data aggregator (or other service provider) is liable as a co-perpetrator of an infringement. Provided that the firm in question can be considered experienced in its business, it will be presumed to be aware when customers are using its data to implement an anticompetitive agreement.

The Commission's practice in earlier cases such as *Polypropylene* suggests that a data aggregator should not be found liable for any illicit or unauthorised use of the information that it provides. However, the judgment in *AC Treuhand I* arguably removed this safe harbour by raising the possibility that third parties may be presumed to have knowledge of even illegal uses of their data. It can be debated whether or not this presumption is reasonable; however, while it informs the Commission's decision-making practice, it must also inform the compliance practice of service providers. If the Commission can presume that data aggregators know the use to which their information is put, this suggests that the prudent data provider should take whatever steps are reasonable to ensure that the data is used for its intended legitimate purpose. In this regard, a clear distinction can be made between providers of data packages which are designed and developed by the provider itself for the purpose of providing market insights, on the one hand, and data providers who operate at the behest and control of a group of competitors, on the other. In the former case, the data package is intended to achieve a legitimate end result and that, it is submitted, should be sufficient to give rise to a presumption that the data is being used for that purpose. In the case of a data package which is designed and compiled on the instructions of a group of competitors, arguably there will be a greater onus on the provider to ensure that the data aggregation is not a component of a wider cartel. But even in the latter case, is it reasonable to expect the service provider to actively monitor its customers' use of the data that it provides in order to assess whether or not this gives rise to an infringement? In most cases, the cartelists can be expected to have taken steps to hide their true intentions and, faced with such subterfuge, even the most prudent of data aggregators may find themselves operating in the dark. One would like to think that both the Commission and, certainly, the Court would emphasise that any obligation is limited to the taking of reasonable steps and that the failure to have discovered the misuse is not in itself evidence of complicity.

In this light, a data aggregator may be well advised to take precautionary steps such as providing the equivalent of a 'health warning' with their service agreements and reports, specifying the need to comply with the competition rules and not to use data for the avoidance of competition. Such an approach could extend to obtaining written commitments from their customers that the data will be used solely for its intended pro-competitive purpose. Arguably, such steps would be viewed as mitigating a data aggregator's exposure to allegations that it should have been aware that its services were being misused for anticompetitive ends. Finally, the conclusion in the Finnish case cited above suggests that a data aggregator should monitor not only the use of its reports but also their impact on the market, in order to address the risk that its services could be held to have an anti-competitive effect despite their pro-competitive object. Having regard to factors such as the degree

of concentration in the market and the likelihood of coordination, data aggregators should consider whether the specificity and frequency of the statistics that they provide pose a risk of reducing or otherwise harming competition, and tailor their services to the economic context in which their customers operate.

5. Conclusions

It is difficult to argue against the principle that a third party which contributes actively and intentionally to the implementation of a cartel – despite not being a competitor of the cartelists or active on the affected market – should face liability for that infringement of Article 101 TFEU. However, the Court's interpretation of its own test as to when such liability can be established arguably goes too far in allowing the Commission to presume the intent (by way of knowledge) of certain types of third party. This potentially places in jeopardy the provision of legitimate, pro-competitive services such as data aggregation.

The judgment in *AC Treuhand I* shows that providers of such services cannot afford to take a 'head-in-the-sand' approach to protecting their interests, or even less to turn a blind eye to the use to which the data that they provide is put. Rather, they would be well advised to take proactive steps to limit their exposure including by specifying what would constitute a non-permitted, and potentially anticompetitive, use of their services. Such measures should, in principle, form a first line of defence against allegations that their behaviour had an unlawful object. In addition, to mitigate the risk that their services could be deemed to have an anticompetitive effect, third parties such as data aggregators should take account of the likely impact of those services in the market in particular in light of the specific economic context in which their customers operate.