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Hybrid settlements

Cartel facilitation and procedural safeguards in *Icap*

by **Tatiana Siakka** and **Will Sparks**

The General Court of the European Union (GC) handed down a significant judgment in *Icap PLC, Icap Management Services Ltd, and Icap New Zealand Ltd v the European Commission* (Case T-180/15) on 10 November 2017 (ICAP), partially annulling the infringement decision of the European Commission (Commission) against Icap. As well as being only the second case to deal with the concept of 'cartel facilitation' and upholding the notion that undertakings that facilitate the implementation of cartels may be held liable for infringing Article 101 of the Treaty on the Functioning of the European Union (TFEU), the judgment also highlights the procedural difficulties that face the Commission in so-called 'hybrid settlement' procedures (in which some, but not all, parties to an infringement agree to a settlement). The Court emphasised that the Commission must observe the principle of the presumption of innocence with regard to a non-settling party, in particular when adopting the settlement decision in relation to the other parties. The Court's ruling is also noteworthy insofar as it suggests that an infringement of a fundamental legal principle, such as the presumption of innocence, does not necessarily affect the validity of an act.

Background

In February 2015, the Commission issued an infringement decision against Icap, an interdealer broker and post-trade services provider, fining it €14.9m for facilitating six cartels concerning the yen interest rates derivatives (YIRD) market.[1]

The Commission had already reached a settlement with five banks and one broking firm in connection with their participation in the YIRD cartels, having issued a separate settlement decision in December 2013. Icap was the only non-settling party, having withdrawn from the settlement procedure in November 2013.

In its infringement decision the Commission found that Icap had facilitated the commission of the cartel infringements in three ways, namely:

(a) by circulating spreadsheets of quotes for the daily yen LIBOR rates to participating banks and other financial institutions who were members of the yen LIBOR panel – these spreadsheets provided information on price and volumes available and aimed to facilitate agreements between the participating banks and panel banks;

(b) by disseminating misleading information to certain panel banks outside the cartel regarding its expectation of where yen LIBOR rates would be set; and

(c) by acting as a communication channel between traders at two participating banks, enabling them to coordinate their respective yen LIBOR benchmark submissions.

In April 2015, Icap filed an action for annulment against the Commission's infringement decision. In November's judgment, the GC partially annulled that decision. Specifically, the Court annulled one finding of infringement in full due to the Commission's failure to adduce sufficient evidence of Icap's knowledge of such infringement. The Court also partially annulled four of the infringements due to lack of evidence as to their duration. Finally, the fine imposed on Icap was annulled in full due to insufficient reasoning regarding the calculation of the fine.

Key findings and arguments on appeal

Cartel facilitation – *AC-Treuhand* restated

In its action for annulment, ICAP claimed that the test for 'cartel facilitation' that the Court of Justice of the European Union (CJEU) had established in *AC-Treuhand v Commission* (Case C-194/14 P (22 October 2015)) was not satisfied on the facts of the case. Its complaint was two-fold: first, that the facilitation test that the Commission had applied was "*too broad and a novelty*"; and second, that the role played by Icap did not meet the 'facilitation' standard in *AC-Treuhand*. Whilst AC-Treuhand's activities had made the cartel infringement by the participants in the cartel possible, Icap argued that its conduct merely contributed to the YIRD cartels. Put differently, the collusion between the banks would have taken place even without Icap's conduct. Icap also argued in this regard that the Court's jurisprudence in respect of 'cartel facilitation' is recent and undeveloped,

Icap being only the first case dealing with it after *AC-Treuhand*. Consequently, Icap could not have foreseen that its actions could amount to a breach of Article 101 TFEU.

In *AC-Treuhand* the CJEU held for the first time that an undertaking which contributes actively and intentionally to the implementation of a cartel is in breach of Article 101 TFEU, even if it is not active on the market affected by the cartel. The Court upheld the Commission's findings that AC-Treuhand, a consultancy firm, had played an essential role in facilitating the implementation of a cartel. AC-Treuhand had organised the meetings where the key decisions were taken, monitored the implementation of agreements on sales quotas and fixed prices, collected and supplied sales data to the cartel members, and acted as a moderator when disputes arose between the cartelists.

In *ICAP*, the GC began by reiterating the legal test for cartel facilitation that the CJEU had established in *AC-Treuhand*. This provides that an undertaking can be held liable for a breach of Article 101 TFEU provided that it: (a) actively and intentionally contributed to the common objectives pursued by the cartel participants; and (b) was aware of the actual conduct planned or implemented by the cartel participants, or could reasonably have foreseen that conduct and was prepared to take the risk.

The GC went on to examine whether the test was made out on the facts of the case. To this end, the Court held that Icap's role was "*key*" in influencing the yen LIBOR panel submissions in the direction desired by the participant banks (*Icap*, paragraph 171). The Court also observed that there was a "*high degree of complementarity*" between the banks' conduct and that of Icap, such that the changes to the yen LIBOR rates would have been much less likely to succeed if based solely on the coordinated submissions of the participating banks, without involving Icap's conduct (*Icap*, paragraph 171). This, the Court held, together with Icap's knowledge of the existence of collusion between the participating banks, necessarily meant that Icap intended to contribute to the achievement of the common objectives pursued by the banks.

As regards the requirement of 'awareness', the GC engaged in a very detailed assessment of the evidence in the Commission's decision, after recalling the relevant legal principles that govern the assessment of evidence and related burden of proof. For five of the six infringements, the GC found that the Commission had adduced sufficient evidence to prove Icap's awareness of the conduct in question, including evidence that an Icap staff member was informed by a UBS trader in "*unambiguous terms*" of an unlawful agreement with an RBS trader. (*Icap*, paragraph 130). For one infringement, however, the GC held that the underlying evidence was inconclusive. In particular, the Court noted that an internal Icap email discussing the interests of two banks could also be interpreted as expressing Icap's own view on the matter, rather than its knowledge of the banks' collusion (*Icap*, paragraph 142). The GC proceeded to annul the Commission's decision insofar as Icap was found liable for facilitating that cartel.

However, the GC gave short shrift to Icap's argument that its conduct was materially different from that in *AC-Treuhand* such that Icap could not have foreseen that it would be in breach of Article 101 TFEU. Consistent with the CJEU's earlier reasoning in that case, the GC held that by virtue of its position as a professional firm, Icap should have anticipated its conduct to be contrary to EU competition rules, "*if necessary after taking appropriate legal advice*" (*Icap*, paragraph 196). The GC therefore confirmed the CJEU's suggestion in *AC-Treuhand* that companies offering professional services have a high duty of care in assessing the antitrust compliance risk that their activities entail, and that duty will often be met through recourse to legal advisers.

The presumption of innocence in hybrid settlements

In its 2013 settlement decision, the Commission had referred to Icap's role in facilitating the implementation of the cartel despite the fact that Icap was not an addressee of that decision. At the time that the Commission issued the settlement decision, in December 2013, its investigation against Icap was still ongoing. A formal finding of infringement against Icap was not adopted until 14 months later.

In its action for annulment, Icap argued that the references to its conduct in the 2013 settlement decision, were contrary to the principles of the presumption of innocence and good administration, since they prejudged the outcome of the Commission's formal investigation of Icap. Therefore, Icap argued, the infringement decision against it had been adopted in breach of these principles and should be annulled.

The GC agreed that the Commission had breached the presumption of Icap's innocence. To this end, the GC firstly reiterated the *Pergan* principle,[2] according to which, the presumption of innocence precludes any findings or even allusions to the liability of an accused person in a Commission decision that the accused person cannot challenge.

The Court then noted that although the references complained of in the 2013 settlement decision did not include a legal classification of Icap's conduct, they nevertheless "*reveal very clearly the Commission's position on Icap's participation*" (*Icap*, paragraph 259) and consequently its liability in respect of the infringements committed by the banks. The Commission had therefore already made a formal finding of infringement regarding Icap in the settlement decision. Icap did not have an opportunity to exercise its rights of defence in relation to this finding, since it was not an addressee of that decision and therefore could not challenge it.

Significantly, the GC dismissed the Commission's argument that the efficiency of the settlement procedure may require it to include references to the conduct of third parties in settlement decisions in order to assess the conduct of settling parties. To this end, the Court observed that the presumption of innocence is a fundamental right that has the same legal value as the Treaties, while the

settlement procedure is provided for in a regulation that has been adopted by the Commission alone. It follows, the Court held, that "*the principle of presumption of innocence cannot be distorted by considerations linked to the safeguarding of the objectives of rapidity and efficiency of the settlement procedure, no matter how laudable those objectives may be*" (*Icap*, paragraph 266).

On the contrary, the GC emphasised that it is for the Commission to apply its settlement procedure in a manner that is compatible with the presumption of innocence. That principle requires the Commission, where unable to determine the liability of settling parties without taking a view on the conduct of non-settling parties, to take "*necessary measures*" to ensure that the presumption of innocence is observed (*Icap*, paragraph 268). These measures could include adopting the settlement decision and infringement decision on the same date, the Court suggested.

Somewhat incongruously, following these compelling statements regarding the fundamental importance of the presumption of innocence, the Court went on to find that the infringement of that principle in Icap's case did not justify the annulment of the contested infringement decision. This was based – in a somewhat narrow interpretation – on the fact that it was adopted under a separate and independent procedure from the offending settlement decision.

Significance and practical implications

The judgment is of particular importance for a number of reasons. First, it confirms the principle established in *AC-Treuhand* that a third party that contributes actively and knowingly to the implementation of a cartel may be found liable for an infringement of Article 101 TFEU, even if it is not active on the affected market. The judgment therefore serves as a reminder of the paramount importance for entities that could be seen as assisting a cartel of pro-actively minimising antitrust risk. Such entities could include professional service providers and similar organisations, as well as trade associations.

Second, the judgment has significant implications for the future of hybrid settlements. In this regard, the GC's criticisms of the Commission's conduct and its observations in respect of the relevant legal principles are of particular interest. By emphasising that the presumption of innocence is a fundamental right that cannot be balanced against procedural rules, the Court confirmed that the presumption of innocence constitutes an overriding principle. This is welcome insofar as it reminds the Commission of its duty to observe the procedural rights of a non-settling party. The Commission will likely take heed of the GC's ruling and reconsider the practicality of adopting separate decisions, at different times, in future hybrid settlement cases. In practice, in order to ensure that the procedural rights of the non-settling party are not prejudiced by the adoption of the settlement decision, the Commission may well follow the approach it had previously adopted in the *Feed Phosphates* case[3] and issue both decisions simultaneously.

Third, the Court's finding that infringing the presumption of Icap's innocence did not justify the annulment of the contested infringement decision is somewhat troubling as it limits the practical usefulness of the ruling for non-settling parties. Indeed, the proposition that the breach of a fundamental principle can have no legal consequences appears to sit at odds with the very nature of the right as fundamental. An appeal against the GC's judgment is currently pending before the CJEU. It therefore remains to be seen whether the CJEU will uphold all aspects of the GC's ruling.

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Endnotes

1. Case COMP/39861 – Yen Interest Rate Derivatives, Commission decision of 4 February 2015.
2. Case T-474/04, *Pergan Hilfsstoffe für industrielle Prozesse v Commission*, judgment of 12 October 2007.
3. Case COMP/38.866 – Animal Feed Phosphates, Commission decision of 20 July 2010.

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