SLAUGHTER AND MAY

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BritNed loses in Court of Appeal on cartel damages quantum and must repay "surplus sums"

On 31 October 2019 the Court of Appeal rejected BritNed Development Ltd's appeal against an **earlier decision of the High Court** in full, and allowed ABB AB and ABB Ltd's cross-appeal. The judgment reduced the quantum of the damages awarded to BritNed and ordered BritNed to repay "surplus sums".

Background

In April 2014 the European Commission found that a power cable cartel had operated between 1999 and 2009, contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU).

During this time BritNed had purchased cable from a member of the cartel, ABB. In January 2016 BritNed claimed over €180 million in damages from ABB in the High Court, for loss suffered as a result of ABB's participation in the cartel. Specifically, BritNed claimed (i) it had paid more for the cable than it would if there had been no cartel (the "overcharge claim"), (ii) had there been no cartel, BritNed would have invested in a higher capacity cable, which it claimed would have generated additional revenues and higher profits (the "lost profit claim"), and (iii) it incurred higher capital costs because of the overcharge (the "compound interest claim").

In October 2018 the High Court ordered ABB to pay €13,009,568 plus interest to BritNed in respect of the overcharge claim (in a subsequent judgment, the award was reduced by 10 per cent, to €11,708,611.20, to avoid over-compensation). [1] The High Court dismissed BritNed's claim for lost profits and compound interest.

Both BritNed and ABB were given leave to appeal to the Court of Appeal. BritNed sought, amongst other things (i) an increase in the damages awarded in respect of the overcharge claim, and (ii) to overturn the dismissal of the lost profit claim. [2]

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

[1] The High Court found overcharges resulted from "baked-in efficiencies" (i.e. the cartel insulated ABB from inefficiencies in its products) and "cartel savings" (i.e. the cartelists derived savings from not having to compete, leading to higher margins on projects).

[2] BritNed also sought to challenge the judge's reduction of the damages award by 10 per cent.

ABB cross-appealed in relation to the damages awarded for "cartel savings", but otherwise sought for the judgment to be upheld.

The Court of Appeal's judgment

Assessment of competitive price

BritNed argued that the High Court judge had taken the wrong approach to assessing a competitive price for the cable and had *"erred on the side of under-compensation"*. In particular, BritNed argued that the need to provide "full compensation" must be read in line with the recent European Court of Justice (CJ) judgment in **Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions Oy, and others judgment of 14 March 2019**, in which BritNed contended the CJ had endorsed punitive damages.

The Court of Appeal rejected this argument, finding that the compensatory damages available under English law satisfy the EU requirement of effectiveness and provide "full compensation", and were therefore the correct basis for assessing BritNed's loss.

Assessment of the overcharge

As for whether the High Court had erred in assessing the amount of the overcharge, the Court of Appeal did not consider this to have been the case. In particular, the Court of Appeal recognised that:

- The High Court judge had correctly stated that the basis for calculating the overcharge was the difference between (i) the price agreed between ABB and BritNed, and (ii) the price that would have been agreed, whether with ABB or with another provider, had the cartel not operated. While in theory the judge would therefore have considered possible bids by suppliers other than ABB or other cartel members, the judge was forced "*to work with the evidence he had*" which *"fell short of what would ideally be required"*. The judge therefore assessed the expert evidence before him – evidence of bids made by ABB both during and after the cartel period, whether or not successful – and was *"fully entitled to accept [this] approach and to conclude there was no direct overcharge"*.

- The scope for the price actually agreed to have been affected by the cartel was reduced (if not eliminated) by the fact that the ABB employees in charge of the tender process had no knowledge of the cartel.

Lost profit claim

Regarding the High Court's rejection of BritNed's claim for lost profits, the Court of Appeal noted that, having decided that BritNed's appeal in relation to the overcharge should be dismissed, there was no reason to revisit the High Court's decision in respect of lost profits. Nevertheless, it considered that the judge's findings in this regard (i.e. that, had the cartel not existed, BritNed would not have made a different purchasing decision) were "unassailable".

Cartel savings

With respect to ABB's appeal that the judge was wrong to award damages on the basis of "cartel savings" (rather than on the basis of loss to BritNed) the Court of Appeal found that *"the award of damages on the basis of savings made by the cartelist, rather than loss to the victim of the cartel […] is based on an error*

of law and must be set aside". Even if it were possible to award damages on the basis of savings to the cartelist, the judge had expressly found that in this case any cartel savings had been "competed away" (that is to say, they had no effect on the price charged to BritNed).

Conclusion

This case will be of considerable relevance to other damages claims. What seems clear is that cartel damages claims will be treated in the same way as other damages claims, with the onus on the victim to establish the loss suffered.

Other developments

Merger control

UK government accepts national security remedies in Inmarsat/Connect Bidco

The UK government has **accepted** national security undertakings offered by Connect Bidco, a private equity consortium, relating to its proposed acquisition of UK-based satellite operator, Inmarsat.

The undertakings address national security issues identified by the Ministry of Defence, and require the parties to maintain existing security measures and implement enhanced controls to protect technology and sensitive information. The parties will also maintain a UK registered company, to ensure that the services provided by Inmarsat remain under the UK's jurisdiction.

The government said it believed the undertakings *"ensure the continued supply of key services used by the Ministry of Defence"*.

On 16 July 2019 the UK Competition and Markets Authority (CMA) announced the launch of its merger inquiry into the anticipated acquisition, and subsequently brought the acquisition to the attention of the Secretary of State for Digital, Culture, Media & Sport as the CMA considered the transaction may have raised public interest considerations under section 58 of the Enterprise Act 2002.

On 22 July 2019 the Secretary of State then issued a public interest intervention notice on grounds of national security. The parties subsequently offered undertakings to provide assurances that sensitive information is protected and enhanced security controls are in place to ensure the continued supply of key services used by the Ministry of Defence. The undertakings have now been accepted and the acquisition will not be referred to the CMA for a phase 2 investigation.

On a similar note, the UK government is **currently considering** the national security implications of the proposed acquisition of UK defence company Cobham plc by AI Convoy Bidco Ltd, a subsidiary of Advent International.

Antitrust

CAT approves claimants' third-party funding agreements in trucks case

The UK Competition Appeal Tribunal (CAT) issued its **judgment** on 28 October 2019 on a preliminary issue regarding the funding arrangements of class action applicants in the truck cartel dispute, which stems from a 2016 European Commission decision.

The CAT found that the funding arrangements entered into by UK Trucks Claim Limited (UKTC) and the Road Haulage Association (RHA), a trade association, did not (after various amendments had been made) provide a ground for refusing to authorise these claimants as a class representative.

DAF, MAN and Iveco had argued, inter alia, that the litigation funding arrangements constituted damages-based agreements (DBAs) and were therefore unenforceable and unlawful. The CAT, however, found that the litigation funding agreement in the form of the RHA and UKTC funding agreements, whereby the consideration paid to the funder is determined by reference to the amount of damages recovered in the litigation being funded, is not a DBA. It further found that the funding arrangements entered into by the RHA (once certain amendments had been made) did not provide a ground for refusing to authorise it as a class representative. In the case of UKTC, the CAT imposed certain conditions on the authorisation, as well as accepting amendments proposed by UKTC.

The non-funding aspects of whether the applications should be certified has been postponed until after the Supreme Court judgment is handed down in MasterCard.

China Guangdong regulator plans to fine 19 concrete firms USD 1.1m over suspected price-fixing

The Guangdong Administration for Market Regulation (GAMR), a provincial competition regulator in Southern China, recently acted on a complaint it received that alleged price-fixing amongst several concrete manufacturers in Maoming City. Following an investigation by the GAMR, the regulator found that 19 competitors in the concrete manufacturing market had reached an agreement to collectively raise prices through physical meetings and online WeChat messaging.

The GAMR determined that the price-fixing conduct had violated Paragraph 1 of Article 13 of the Anti-Monopoly Law, which prohibits competitors from entering into agreements to fix or change prices.

Upon receiving approval from the State Administration for Market Regulation, the GAMR ordered a halt to the anticompetitive conduct and has **decided** to impose a cumulative fine of CNY7.65m (approximately USD1.1m) on the 19 concrete manufacturers.

Nine of the concrete manufacturers had requested a hearing, which took place on 29 October 2019. The decision of the hearing is yet to be issued.

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