October 2018

UK Competition Law Newsletter

Highlights

— High Court hands down first cartel damages judgment in *BritNed Development Limited v ABB*

— CMA launches market study into statutory audit market

— CMA prohibits Vanilla Group Ltd./Washstation Ltd.

— Government publishes draft "no deal" statutory instrument

High Court Hands Down First Cartel Damages Judgment

On 9 October, the High Court handed down its judgment in *BritNed Development Limited v ABB*. This is the first time a UK court has issued a reasoned judgment awarding damages in a cartel follow-on action.[1] In reaching his decision to award BritNed around €12 million of its €180 million claim, the Court conducted a detailed examination of the factual background and economic analysis underpinning the claim. The 550-paragraph judgment provides valuable insights into how the English courts are likely to approach future cartel damages claims.

Background

BritNed is a joint venture between National Grid and TenneT, the operators of the UK and Dutch electricity grids. BritNed owns and operates a submarine cable system connecting these grids.

The cable element of BritNed's system was supplied by ABB pursuant to a tender that took place during a period in which the European Commission found a global cartel in the market for high voltage submarine and underground power cables. ABB was found to have participated in this cartel. [2]

In 2015, BritNed issued proceedings against ABB in the High Court in reliance on the Commission's decision finding an infringement, which is binding on the Court. BritNed claimed damages of €180 million under three heads of loss:

— **Overcharge**. BritNed claimed that ABB had deliberately inflated the price it charged to BritNed above the level it would have been absent the cartel.

— **Lost profit**. BritNed claimed that the inflated price ABB proposed during the tender process persuaded BritNed to reject a higher capacity cable, which would have generated additional revenues.

[1] The Court handed down a supplementary judgment on 1 November 2018, following a consequential hearing which took place on 18 October.

[2] Case AT.39610 *Power Cables*, Commission decision of 2 April 2014.

— **Compound interest**. BritNed claimed compound interest on the basis that it had incurred higher capital costs in commissioning the cable system than would otherwise have been the case under competitive conditions.

Judgment

The Court partially accepted BritNed's claim.

In respect of the overcharge claim, the Court rejected BritNed's argument that ABB had deliberately inflated its costs when responding to the tender. Nevertheless, the Court found that the final contract price contained an "*overcharge*" of around €12 million consisting of two elements:[3]

— "***Baked-in inefficiencies***". The cartel insulated ABB from inefficiencies in its own production (namely, the use of more copper, which meant that the cable was thicker than it needed to be), the additional costs of which ABB would have absorbed in a properly competitive environment.

— "***Cartel savings***". ABB derived savings in the form of a general reduction in its common costs resulting from the allocation of projects between the cartel members.

The Court rejected the lost profit claim on the basis that BritNed would not have chosen a higher capacity cable (which the evidence established to be more expensive and technologically unproven) irrespective of the cartel. The compound interest claim failed because the relevant loss was sustained not by BritNed but by its joint venture parents (as a result of their equity contributions to BritNed).

Analysis

Facts matter in cartel damages cases

Claimants in cartel damages cases often downplay the relevance of facts in an effort to secure speedy resolution of their claims, contending that liability is established and loss can be readily assessed (if not assumed) through the use of econometric models. Defendants resisting these attempts will frequently point to the fact that claims can rarely be decided on the basis of abstract econometric analysis alone (without regard to the realities on the ground) and that cartel infringements do not automatically mean that all customers have suffered loss.

Claimants' tactics in this regard are perhaps best exemplified by the use of a decade-old academic study to contend that sales of cartel products are on average subject to an overcharge of 26%, a figure that may bear no relation to the particular facts and circumstances of any given case.[4]

The judgment's detailed approach to assessing both the existence and the amount of an overcharge, notwithstanding the Commission's finding that ABB had infringed EU competition rules, confirms the importance of facts in cartel damages actions and the need for claimants to establish, based on evidence, their particular loss and damage.

Devoting around a third of the judgment to a detailed examination of the facts, the Court conducted an in-depth analysis of the evolution of the tender process and the negotiating dynamics between BritNed and ABB, including the influence (or lack thereof) of cartel participants on this particular tender. The Court attributed significance to the following factors in particular:

— BritNed conducted negotiations in a "*skilful and hard-nosed manner*" and was able to put competitive pressure on ABB (or increase its perception of competition) despite the limited responses to the tender (which the Court found was a direct result of the cartel, which sought to allocate bids among suppliers).

— BritNed ensured that non-cartelist Siemens remained a participant in the tender, pressed comparisons with the costs of an earlier project, stressed deficiencies in ABB's capability and specifications, and threatened not to go ahead if the price was too high.

[3] The Court had originally awarded BritNed €13 million in damages, but reduced this by approximately €1 million on 1 November 2018. The Court assumed that the regulatory cap on BritNed's profits extended to the damages awarded and reduced these damages to ensure that BritNed was not over-compensated.

[4] Oxera et al (2009), "*Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts*".

— ABB was keen to win the tender as it had spare capacity – which BritNed knew and used in negotiations.

— While some ABB employees involved in the cartel were in a position to influence the tender, significantly, neither the ABB employee responsible for compiling the detailed pricing of its tender response, nor the employee with overall responsibility for the tender, were found to have participated in the cartel.

As a result, the Court was unwilling simply to assume that BritNed had suffered an overcharge, and held that BritNed would need to prove that the relevant project was tainted by ABB's unlawful conduct.

Quantification of the overcharge

The parties put forward different economic models to quantify the overcharge: BritNed used a regression analysis to identify the extent to which prices were influenced by the infringement (as opposed to other economic factors),[5] while ABB compared the margins achieved during the cartel period against those achieved after the cartel had ended.

Although much of the Court's analysis was necessarily fact-specific, the Court's wholesale rejection of BritNed's model provides the following insights into the methodological tools likely to be used by the English courts in future cases:

— **Scrutiny over a model's susceptibility to errors**. The Court was sceptical of BritNed's regression analysis on the basis that it was "*significantly more complicated*" and "*inherently more prone to error*". The Court noted that ABB's approach, which compared the price of the BritNed tender to prices offered by ABB in relation to projects post-cartel, represented "*a much more straightforward exercise*".

— **Preference for actual data over proxies**. The Court determined that "*where there is a choice between actual data and a proxy for that data, the former ought to be preferred, unless there is good reason for not relying on the actual data*". By contrast, BritNed's cost proxies were so "*insufficiently aligned with the actual – highly individual – costs of submarine projects*" that "o*utcomes of [the] model are so unspecific that they simply cannot be relied upon*". The Court therefore preferred ABB's model, which used ABB's actual direct costs to quantify the overcharge.

In this way, the Court was able to distinguish between two rival econometric models that arrived at very different quantifications of the overcharge.

Expanding the concept of overcharge?

As is usual, the Court defined the overcharge as the difference between the price agreed between BritNed and ABB and the price that would have been agreed in the absence of the cartel, whether with ABB or another supplier (*i.e.*, the "counterfactual" price). The Court concluded, based on the factual and expert evidence, that there was no deliberate inflation in the price ABB had charged BritNed (which formed the subject of the experts' analysis).

The Court found, however, that the concept of "overcharge" was broad enough to encompass inflations in price caused not only by a deliberate inflation of the price charged to BritNed, but also by "*baked-in inefficiencies*" and "*cartel savings*" (as explained above), which meant that ABB offered a less competitive price to BritNed than would otherwise have been the case. Neither of these heads of overcharge, which the Court appears to have raised largely of its own accord, was pleaded in this form by BritNed, nor were they the subject of detailed expert evaluation. Even so, whilst conscious of the need to avoid over-compensation, the Court was prepared to apply a "*broad-brush*" approach in assessing the overcharge, grounding this to the extent possible on the (limited) evidence available.

[5] A regression analysis is a statistical method that seeks to "*investigate patterns in the relationship between economic variables and to measure to what extent a certain variable of interest (e.g., ...price) is influenced by the infringement as well as by other variables that are not affected by the infringement*" (Commission Practical Guide for Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union).

Conclusion

The judgment is an important step in clarifying the English courts' likely approach in future cartel damages claims. Defendants are likely to welcome the Court's affirmation of the importance of the factual background to a claim, as well as the low level of overcharge awarded (which translates into approximately 4% of the total contract price). Claimants, on the other hand, may be encouraged by the Court's apparent readiness to find some level of overcharge, even if their expert's analysis is ultimately rejected. It remains to be seen whether the Court of Appeal will endorse the approach adopted by the High Court.

Judgments, Decisions, and News

Court Judgments

Unwired Planet International Ltd v. Huawei Technologies Co. Ltd. On 23 October 2018, the Court of Appeal upheld the lower court's ruling that Unwired Planet (UP) had not infringed Article 102 of the Treaty on the Functioning of the European Union (TFEU). UP holds several standard essential patents (**SEPs**) and had given an undertaking to license them on fair, reasonable and non-discriminatory (**FRAND**) terms. Huawei claimed that UP had abused its dominant position by issuing injunctive proceedings in respect of Huawei's use of UP's SEPs, without having first made a license offer (let alone an offer on FRAND terms). The Court held that UP need only have given prior notice to Huawei. Huawei also claimed that UP's attempt to bundle UK with non-UK SEPs and insist on a global licence was not FRAND. The Court concluded that although the lower court had erred in finding that there was only one FRAND rate for any given set of circumstances, it was entitled to find that only a global licence would be FRAND in all the circumstances. Huawei had claimed that UP's offer was not on non-discriminatory terms because the global royalty rate offered was higher than the rate in Samsung's global licence. The Court rejected this "*hard edged approach*", which would require SEP owners to grant the same or similar terms to similarly positioned licensees: once the hold-up effect is addressed by ensuring that a licence is available at a rate that does not exceed what is fair and reasonable, the SEP owner should be free to grant licences at lower rates. The Court did, however, leave open the possibility of competition law-based redress should such differential pricing lead to a distortion of competition between licensees.

Antitrust / Market Studies

FCA Launches Market Study On General Insurance Pricing Practices. On 31 October 2018, the Financial Conduct Authority (**FCA**) published terms of reference for a new market study into general insurance pricing practices, focusing primarily on home and motor insurance. The FCA intends to examine three main areas: (i) harm from pricing practices and what drives this, (ii) the fairness of pricing practices, and (iii) the impact of pricing practices on competition. The FCA is aiming to publish an interim report in Summer 2019.

CMA Opens Investigation Into Atlantic Joint Business Agreement. On 11 October 2018, the CMA announced that it had opened an investigation under the Chapter I prohibition of the Competition Act 1998 (**CA98**) (and, to the extent applicable, Article 101 TFEU) into the Atlantic Joint Business Agreement between American Airlines, British Airways, Iberia, and Finnair. Following an EU competition investigation, in 2010, the European Commission accepted commitments from the participants in relation to six routes. These included a commitment to make landing and take-off slots available to competitors at either London Heathrow or London Gatwick. These commitments are binding until 2020, at which point the European Commission may re-assess the agreement but is not obliged to do so. As five of the six routes depart from the UK, and to prepare for the time when the European Commission may no longer have responsibility for competition in the UK, the CMA has decided to review the competitive impact of the agreement afresh.

CMA Launches Market Study Into Statutory Audit Market. On 9 October 2018, the CMA announced a detailed study of the audit sector. The CMA explained that the study comes amid "*growing concerns about statutory audits, in particular following the collapse of construction firm Carillion and the criticism of those charged with reviewing the organisation's books, as well as recent poor results from reviews of audit quality*". The CMA intends to examine three main areas: (i) choice and ease of switching, (ii) the implications of the "Big Four" (Deloitte, KPMG, E&Y, and PwC) being "*too big to fail*" for long-term competition, and (iii) whether the fact that companies, rather than their investors, choose their auditors may dampen incentives to produce challenging performance reviews. The statutory deadline is currently 8 October 2019.

Merger Developments

PHASE 2 INVESTIGATIONS

Rentokil Initial/Cannon Hygiene. On 18 October 2018, the CMA published its provisional findings in relation to Rentokil Initial's completed acquisition of Cannon Hygiene, indicating that the transaction may result in a substantial lessening of competition (**SLC**) in the supply of waste disposal services to national and multi-regional customers. The CMA has provisionally found that the transaction is not expected to give rise to competition concerns in the supply of the following services to facilities management companies: healthcare waste, mats, non-waste disposal washroom, and waste disposal.

J Sainsbury/Asda. On 16 October 2018, the CMA published an issues statement setting out the scope of its review of Sainsbury's anticipated acquisition of Asda. The CMA will examine, at both a local and national level, groceries (in-store and online), fuel, and other items such as toys, small electricals and children's clothing. The CMA will consider whether the transaction may lead to a worse outcome for consumers through higher prices, a poorer shopping experience, or a reduction in the range or quality of products offered. The CMA will also consider whether the merged entity could use its increased buyer power to squeeze suppliers and whether and the extent to which this may have knock-on effects for consumers. In doing so, the CMA will take into account the level and extent of competition exerted by newer and growing retailers (including Aldi and Lidl).

Nielsen/Ebiquity. On 12 October 2018, the CMA provisionally found that Nielsen's anticipated acquisition of Ebiquity's advertising intelligence division is not expected to result in an SLC in the supply of Deep Dive AdIntel and International AdIntel products to UK customers. AdIntel is a tool which analyses advertising spend. Ebiquity is an independent marketing and multi-media consultancy and part of its business is the provision of AdIntel products. Nielsen measures and analyses what consumers buy and watch and supplies advertising intelligence products.

Vanilla Group Ltd./Washstation Ltd. On 11 October 2018, the CMA published its final report in relation to Vanilla Group's completed acquisition of Washstation. The CMA found that the transaction resulted in an SLC in the supply of managed laundry services to customers in the UK. The CMA concluded that the parties were each other's closest competitors, other providers exercised only a weak constraint, and entry or expansion would not be likely, timely, or sufficient. In order to address these concerns, Vanilla Group must sell Washstation's higher education business to a new owner, to be approved by the CMA.

SSE Retail/Npower. On 10 October 2018, the CMA published its final report in relation to the anticipated merger between SSE Retail and Npower (two of the six largest energy companies in the UK). The CMA concluded that the proposed transaction would not result in a SLC in the supply of electricity and gas to domestic customers in the UK (excluding Northern Ireland). The CMA found that: (i) the parties were not particularly important constraints on each other, (ii) the reduction in the number of large energy firms from six to five would not significantly change how the remaining players benchmark their price levels, and (iii) neither party appeared to have a price leadership role. The CMA further concluded that the merged entity would not have the incentive to (totally or partially) foreclose Utility Warehouse, a mid-tier

energy supplier with which Npower has an exclusive wholesale supply agreement.

PHASE 1 CLEARANCE DECISIONS

CME Group/NEX Group. On 31 October 2018, the CMA cleared CME's anticipated acquisition of NEX Group. CME operates options and futures exchanges. NEX is focused on electronic markets and post trade business.

Tradebe Environmental Services Limited/ Avanti Environmental Holdings Limited. On 25 October 2018, the CMA cleared Tradebe Environmental Services' completed acquisition of Avanti Environmental Holdings. Both parties provide environmental and waste service solutions.

Post Office Limited/Payzone UK. On 19 October 2018, the CMA cleared the Post Office's anticipated acquisition of the bill payments business of Payzone UK. The Post Office operates a network of retail branches offering a range of products including postage stamps and banking services. Payzone is a consumer payments provider.

The Stars Group Inc./Sky Betting and Gaming. On 11 October 2018, the CMA cleared The Stars Group's completed acquisition of Sky Betting and Gaming. Both parties provide online gaming and gambling services. The CMA had launched this inquiry on its own initiative.

John Swire & Sons Limited/Simadan Group. On 9 October 2018, the CMA cleared John Swire & Son's anticipated acquisition of Simadan. John Swire & Sons is the parent of a conglomerate active in the production of biodiesel. The Simadan Group is a biodiesel producer and operator of tank storage for edible oils, fats, and biodiesel.

ONGOING PHASE 1 INVESTIGATIONS

Parties	Decision due date
Tayto Group Limited/The Real Pork Crackling Company Limited	15 November
Nicholls' (Fuel Oils) Limited/ DCC Energy Limited in Northern Ireland	14 November
Barry Callebaut AG/Burton's Foods	16 November
Cox Automotive UK Limited/ Auto Trader Limited	21 November
PayPal Holdings, Inc/iZettle AB	26 November
Valeo Foods/Tangerine Confectionery	5 December
Thermo Fisher Scientific/Roper Technologies	19 December
Aer Lingus Limited/Cityjet Designated Activity Company	24 December
Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd	TBC
Rentokil Initial plc/MPCL Limited (formerly Mitie Pest Control Limited)	TBC
Baxter, Inc/Hospira UK Limited's Compounding Business	TBC
CareTech Holdings plc/Cambian Group plc	TBC

Other Developments

FCA Discussion Paper On Fair Pricing In Financial Services. On 31 October 2018, the FCA published a discussion paper on fair pricing in financial services. The FCA is examining and seeking stakeholder views on the following pricing practices: (i) firms charging different prices to different consumers based solely on differences in consumers' price sensitivity, and (ii) firms charging existing customers higher prices than new customers.

Government Publishes Draft "No Deal" Statutory Instrument. On 29 October 2018, in preparation for a "no deal" scenario, the Government laid before Parliament draft Competition (Amendment etc.) (EU Exit) Regulations 2019, together with a draft explanatory memorandum. On the following day, the CMA published guidance on how it intends to proceed in merger and antitrust cases in the event of "no deal":

— *Role of EU Competition Law.* The UK courts and competition authorities will continue to be bound by an obligation to ensure no inconsistency with pre-exit EU competition principles and case law when interpreting UK competition law. They may, however, depart from this where appropriate in light of certain

specific factors (*e.g.*, differences between the UK and EU markets).

— *Antitrust*. The CMA will be free to open an investigation into breaches of UK competition law occurring before or after exit day, even in cases in which the European Commission had relieved the CMA of competence, provided that the Commission's investigation has not reached an infringement decision (and such a decision has not subsequently been annulled). The EU Block Exemption Regulations, which currently apply in the UK as parallel exemptions to the UK competition prohibitions, will continue to apply.

— *Mergers*. To the extent that a merger under investigation by the European Commission remains live (*i.e.*, a decision has not been reached) on exit day, the CMA will have jurisdiction to review the UK aspects of that merger if the thresholds in the Enterprise Act 2002 are met. If parties anticipate that such a scenario may occur in relation to their transaction, the CMA advises them to engage with it at an early stage, particularly if the transaction may raise competition concerns in the UK.

— *Damages Actions*. European Commission decisions pre-exit will continue to bind the English courts, even if they are only made final post-exit. Claimants will continue to be able to bring stand-alone claims for alleged breaches of EU law based on conduct that occurred while the UK was an EU Member State.

CMA Launches New Cartel Awareness Campaign. On 22 October 2018, the CMA announced the launch of a new campaign to educate businesses about anti-competitive practices and encourage them to report cartels. The campaign is targeting a number of sectors the CMA has identified as particularly susceptible to cartels, including construction, manufacturing, recruitment, estate agents, and property management and maintenance.

No Deal Brexit: Geo-Blocking of Online Content Technical Notice. On 12 October 2018, the UK government published a technical notice on geo-blocking in the event of "no deal". Geo-blocking refers to the e-commerce practice used by traders active in one EU Member State to block or limit access to their online interfaces to customers from other EU Member States. In the event of "no deal", traders from the UK, EU, and third countries would not be prohibited from discriminating between EU and UK customers. For example, a UK trader would be able to offer different terms to a UK customer compared with a French customer. However, UK traders who want to continue operating in the EU will continue to be bound by the provisions of the EU's Geo-Blocking Regulation, which prohibits discrimination between customers from different Member States, when dealing with EU customers.

CMA/FCA Joint Report On Lessons Learned About Consumer Facing Remedies. On 1 October 2018, the CMA and FCA published a paper setting out the lessons learned from the UK Competition Network's project to examine consumer facing remedies. The project was launched after the National Audit Office's 2016 report on the competition regime recommended that the CMA and the sectoral regulators work together to further their understanding of consumer behavior to inform proposed remedies. The aim of this initiative was to investigate when and how competition authorities and regulators can intervene to tackle problems arising on the demand-side of markets to best help consumers. The CMA and FCA emphasized that "*markets, supplier behaviour and technology are constantly changing so, as regulators, we should continually challenge ourselves to raise standards.*" The key lessons learned include the need to better understand both the demand- and supply-side of markets, think broadly in identifying possible remedy options, let consumers stay in control, leverage the experience and resources of the private sector and adequately test and review the effectiveness of remedies.

LONDON TEAM

London Office
2 London Wall Place
London EC2Y 5AU

Maurits Dolmans
+44 20 7614 2343
mdolmans@cgsh.com

Nicholas Levy
+44 20 7614 2243
nlevy@cgsh.com

Romano Subiotto QC
+32 22872092
rsubiotto@cgsh.com

Paul Gilbert
+44 20 7614 2335
pgilbert@cgsh.com

David Little
+44 20 7614 2338
drlittle@cgsh.com

Richard Pepper
+32 22872181
rpepper@cgsh.com

Paul Stuart
+44 20 7614 2207
pstuart@cgsh.com

John Messent
+44 20 7614 2377
jmessent@cgsh.com

Esther Kelly
+32 22872054
ekelly@cgsh.com

Carlos Martínez Rico
+32 22872185
camartinez@cgsh.com

Ricardo Zimbron
+44 20 7614 2307
rzimbron@cgsh.com

Vass Karadakova
+44 20 7614 2221
vkaradakova@cgsh.com

Henry Mostyn
+44 20 7614 2241
hmostyn@cgsh.com

Romi Lepetska
+44 20 7614 2292
rlepetska@cgsh.com

Alexander Waksman
+44 20 7614 2333
awaksman@cgsh.com

Wanjie Lin
+44 20 7614 2359
wlin@cgsh.com

Alexandra Hackney
+44 20 7614 2371
ahackney@cgsh.com

John Kwan
+44 20 7614 2293
jkwan@cgsh.com

Shahrzad Sadjadi
+44 20 7614 2235
ssadjadi@cgsh.com

Nina Fischer
+44 20 7614 2244
nfischer@cgsh.com

Niccolò Torrigiani
+44 20 7614 2298
ntorrigiani@cgsh.com

Lanto Sheridan
+44 20 7614 2308
lsheridan@cgsh.com

Hayk Kupelyants
+44 20 7614 2228
hkupelyants@cgsh.com

Sienna Smallman
+44 20 7614 2299
ssmallman@cgsh.com

Emmett Saigal
+44 20 7614 2386
esaigal@cgsh.com

18.0917.02_112118