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Follow-On Damages Claims in the U.K.

On December 21, 2009, the U.K. Competition Appeal Tribunal ("CAT") handed down a judgment in the first follow-on damages claim to reach trial in the U.K.

The claimant, Enron Coal Services Limited ("Enron"), had brought a claim against English Welsh and Scottish Railway Limited ("EWS") based on a 2006 decision (the "Decision") by the Office of Rail Regulation ("ORR"), the antitrust regulator for the U.K. rail sector. The Decision had determined that EWS had abused its dominant position, contrary to Article 82 EC Treaty (now Article 102 of the Treaty on the Functioning of the European Union), by engaging in price discrimination in the supply of rail haulage services that Enron needed for its coal supplies, thereby foreclosing Enron from the possibility of supplying coal to U.K. customers. The substance of Enron's claim related specifically to the lost opportunity of supplying coal to electricity firm Edison Mission Energy ("Edison").

The CAT held that Enron had failed to show that: (1) it was more likely than not that Enron would have sought to negotiate with Edison to supply coal; and (2) there was a real or substantial chance that any negotiations between Edison and Enron would have led to the award of a contract.

This memorandum summarizes the Decision, Enron's claim, and the CAT's judgment. It also discusses the implications of the CAT's judgment.

I. DECISION OF THE ORR

Until 2001, EWS was the sole provider of rail coal haulage in the U.K. In 2000, Edison invited coal suppliers to tender for supplies to two power stations in England for the period 2001-2004. Enron submitted a bid but was ultimately unsuccessful; the contract was awarded to EWS.

In January 2001, Enron complained to the ORR that EWS had acted to foreclose, deter or limit Enron's participation in the U.K. coal industry. In the Decision, which was rendered in 2006, the ORR defined the relevant product market as that for coal haulage by rail in mainland Britain. Capacity constraints and price differentials meant that road haulage was not considered to be a substitute for rail haulage. The ORR found that EWS was dominant in that market and had abused its position, *inter alia*, by engaging in

discriminatory pricing practices that placed Enron at a competitive disadvantage in its contractual negotiations with Edison.

The ORR imposed a fine of £4.1 million on EWS. EWS chose not to appeal the Decision and paid the fine in full.

II. ENRON'S CLAIM

In 2008, Enron commenced a follow-on claim for compensation for its alleged loss resulting from the infringement identified by the ORR. Although the scope of Enron's claim was wider, the issue that came to trial concerned the contract to supply Edison allegedly lost by Enron. Enron's case was, essentially, that the discriminatory prices it had been charged for EWS's rail haulage services had deprived it of a real or substantial chance of winning the contract to supply Edison from 2001 to 2004. Enron claimed £19.1 million, the estimated value of that contract.

III. THE CAT'S DECISION

The CAT rejected Enron's claim on two grounds. First, the CAT held that because Enron's conduct was not consistent with a company in aggressive pursuit of an attractive business opportunity, Enron had failed to show that it was more likely than not to negotiate an agreement with Edison. Second, the CAT determined that, even if EWS's prices to Enron had been discriminatory, non-economic factors suggested that Enron would not have been able to conclude a supply contract with Edison in any event (*e.g.*, Enron had a difficult business relationship with Edison, Enron's inflexible contract terms were unlikely to have been attractive to Edison, and Enron would have had to deal with a third party rail freight operator, as well as Edison).

As an aside, the CAT indicated that it did not consider itself bound by findings of fact contained in the Decision, where those facts did not constitute an element of the infringement. Accordingly, the CAT left open the possibility of revisiting and examining evidence and findings contained in the Decision where necessary.

IV. IMPLICATIONS OF THIS CASE

As the first follow-on action to reach trial, this case provides some indication of the CAT's intended approach to causation in follow-on actions. Taken in isolation, the judgment would suggest that the CAT is likely to take a relatively strict approach to causation. This judgment therefore reinforces the view that a defendant is able to resist a claim by showing that the loss claimed did not result from the infringement, but was, for example, due to the claimant's own (unrelated) business shortcomings.

The importance of this judgment lies in the CAT's distinction between findings of infringement from mere findings of fact, holding that only the first category is binding

on the court. The CAT's willingness to revisit and examine certain findings of fact may mean that follow-on actions concern more than simply a determination of the loss that flowed from an infringement, as was commonly thought to be the case.

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Please feel free to be in touch with any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CLEARY GOTTLIEB

Office Locations

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

PARIS

12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

MOSCOW

Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

COLOGNE

Theodor-Heuss-Ring 9
50668 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

ROME

Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

MILAN

Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

BEIJING

Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax