Kluwer Competition Law Blog

Dutch court establishes the liability of the cartelists in first step towards the award of damages for loss caused by the Trucks Cartel

Janneke Kohlen (Bird & Bird, Netherlands) and Matteo Stainer (Bird & Bird) · Monday, July 5th, 2021

In this latest instalment of the Trucks Cartel saga, the Amsterdam District Court ("**District Court**") refutes the cartelists' arguments by ruling that the issue of the award of damages is still on the table.[1] The liability of the cartelist is thereby established. This is the first step in the actual award of damages. The next step is for the claimants to substantiate their claim. It is up to the individual claimants to plausibly prove the existence of a causal link between the unlawful act and the loss suffered.

Background

In 2016 the European Commission ("**EC**") fined several trucks producers for participating in a cartel. The cartel came to light when truck producer MAN applied for leniency. The infringement covered the entire European Economic Area ("**EEA**") and lasted from January 1997 until January 2011. During that period the cartelist coordinated the gross price levels for medium and heavy trucks, the introduction of new emission technologies, and the passing-on to customers of the costs of these new technologies.

As per usual, the EC, in its press release, informed the public of the possibility to bring proceedings before the national courts to seek damages. The present case demonstrates the effectiveness of the EC's call for private enforcement. With numerous claimants, many of which are incorporated under foreign laws, and some of which are so-called claim vehicles, this case shows the (growing) importance of the Netherlands as a forum for follow-on actions.

Present case

The District Court renders its judgment by considering two legal issues. The first being the scope of the EC's decision. The second issue being the cartelists' argument that the cartel did not cause loss whatsoever.

First legal issue – the scope of the decision

The cartelists argue that merely the operative part of the EC's decision should be considered by the District Court. As a result, it obliged to disregard the recitals that contain the EC's reasoning. The claimants respond to this by stressing that the EC's decision came about after a settlement procedure, which leads to a conservative description of the unlawful conduct. The claimants further state that severely limiting the parts of the decision that may be taken into consideration, hinders effective private enforcement.

The District Court concludes that it is bound to all parts of the EC's decision, rather than just the operative part. In recitals 52, 54 and 59 of the decision, the District Court sees ground for looking beyond the unlawful conduct described therein. It continues by saying that the infringement must be further interpreted by the follow-on actions brought before the court. This leaves room for the claimants to elaborate on why the cartelists conducted other unlawful behaviour than that already described in the decision. There is even room for the cartelists to challenge parts of the decision, as long as this is supported by sufficient reasons. Finally, the District Court disproves the cartelists' argument that the infringement concerned only the exchange of information. The EC clearly stated that the cartelists are guilty of colluding on pricing and gross price increase.

In another attempt to limit the scope of the EC's decision, the cartelists argue that since the infringement concerned lorries, vehicles that do not qualify as such are unaffected by the competition law infringement. Awaiting the preliminary ruling from the Court of Justice in the Daimler case,[2] the District Courts holds off answering whether specialised vehicles are affected by the cartel. However, it does mention that in this stage of the proceedings, it is already clear that vehicle weight is decisive in determining loss.

The cartelists further argue that lorries rented or leased fall outside the scope of the EC's decision. The District Court easily rejects this argument, stating that the price paid for a new lorry undeniable influences the rental price or lease price of that lorry.

The cartelists also try to limit the geographical scope of the EC's decision. They try so by referring to the part of the decision in which the EC specified which countries were, during which period, part of the EEA. From this, the cartelists conclude that the infringement only affected claimants in as far as the country in which lorries were bought, was part of the EEA. The District Court agrees with the cartelists in stating that an action for damages based on the EC's decision is bound to the infringement laid down in that decision. The claimants must therefore provide evidence of purchasing lorries in a country that at the time of the infringement was part of the EEA.

A final discussion point regarded the scope of the EC's decision and revolves around the lingering effects of the cartel. The claimants pose that even after the infringement has ended, it may have caused loss. The District Court agrees with the claimants but points out that the loss incurred after the period of the cartel, must be further substantiated in future proceedings.

Second legal issue – loss caused by the cartel

In the second part of the judgment, the cartelists argue that the cartel could not have caused any loss whatsoever. According to them, the cartel concerned the exchange of information only, which did not affect price (i.e. no price collusion/agreements). Since there was no effect on price, no loss

could have been incurred by the claimants. In trying to show no harm was caused, the cartelists presented several economic reports. One worth emphasising is the report by Oxera. In this report Oxera explains that the mere sharing of information does not per se result in an increase of price. For an increase of price to occur, more far-reaching coordination is required. For instance, it must be possible to effectively punish cartelist for deviation from the coordinated behaviour.

The District Court rejects the cartelists' arguments that the cartel caused no harm whatsoever. It does so by referring to a report brought forward by the claimants. In this Harrington & Schinkel-report the *Airtours*-criteria[3] referred to by Oxera are filled in. By colluding on the setting of gross lists prices the increase in actual purchase prices was inevitable. The District Court thus fails to see how the exchange of information was done out of reasons other than for pure gain.

Final remarks

The judgment must come as a relief for those seeking damages for losses incurred due to the Trucks Cartel or any other cartel. With the question of liability of the cartelists out of the way, what remains for the claimants is to demonstrate their loss incurred. Surely the upcoming cases in which the claimants elaborate on the loss incurred will be very interesting and are worth close watching.

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[1] Amsterdam District Court 12 May 2021, ECLI:NL:RBAMS:2021:2391.

[2] See the request for a preliminary ruling by the Landgericht Hannover (Germany) 10 November 2020, C-588/20.

[3] See Court of First Instance 6 June 2002, T-342/99, ECLI:EU:T:2002:146 (*Airtours*), Par. 62.

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