



Trucks cartel: Follow-on claims set to soar

ANGELA BILBOW 07 DECEMBER, 2017

Anticipated to bring a showcase of litigation in the coming years, claims following the European Commission's July 2016 finding on the trucks cartel are gathering speed, and while liability has already been established, proving pass-on will be a complex task.

The claim

In July 2016, the **European Commission** released its decision finding truck manufacturers **MAN**, **Volvo/Renault**, **Daimler**, **Iveco** and **DAF** guilty of participating in a cartel, with all but MAN – which had blown the whistle on the cartel – receiving a fine totalling EUR 2.93 billion. Manufacturer **Scania**, owned by **Volkswagen**, chose not to settle and was later found guilty of participation in the cartel, receiving an EUR 880 million fine in September 2017.

The Commission found the cartel had colluded on the price of medium and heavy trucks at 'gross list' level over a 14-year period between 1997 and 2011, as well as on the timing of introducing low-emission technology and passing on the cost of that technology to customers.

Speaking in September at the time of the *Scania* ruling, Competition Commissioner **Margrethe Vestager** said the trucks affected account for three-quarters of inland transport of goods in Europe, with a total of 30 million trucks on European roads, and play a vital role in the European economy. "Instead of colluding on pricing, the truck manufacturers should have been competing against each other – also on environmental improvements."

While defendants are assessing the scope of follow-on damages claims in the United Kingdom, mainland Europe and beyond, huge claims are building, with some having already been filed in jurisdictions with shorter limitations periods, including in Germany, the Netherlands and Ireland.

According to the Road Haulage Association, which is building a claim for members and non-members, around 650,000 trucks are thought to have been affected in the UK alone, with some

experts estimating that the compensation per truck could be in the region of GBP 6,000. Additionally, claimant law firm **Hausfeld & Co** is also bringing claims on behalf of large fleet owners.

Back in July this year, **Scott Campbell**, who is leading the trucks litigation at Hausfeld, predicted it could be a long road ahead for claimants if the cartelists decide to fight it out – as has been seen in other competition follow-on damages actions such as *MasterCard*.

He said: “When the claims are up and running, they will run into the hundreds of millions [of pounds]. What we have seen recently is defendants often playing a long game, particularly in the English courts. We have seen a lot go to trial recently, so the ball is in the defendants’ court.”

Speaking to *CDR*, one London-based claimant partner says the trucks cartel is particularly good for claimants. “Claimants will truly have a choice of where to sue because many of the trucks are bought locally from dealers across Europe. Then it becomes a choice as to the benefits of each jurisdiction; England is still the preferred choice of jurisdiction by far,” largely because of disclosure rules.

With Scania having been found guilty, more information is now in the hands of claimants who previously only had access to the very limited information provided in the cartel settlement decision. That said, even had the Commission not found Scania liable, claimants could still have recovered for Scania trucks as the manufacturer was likely to have raised the prices of its vehicles in line with the market.

“Settlement decisions have become part of the defence strategy, which is an interesting dynamic in litigation,” they said. However, now claimants have access to a full decision which will likely contain details such as communications, emails for example, between the cartelists, “which will undermine the cartelists attempts of keeping all of that information out of the public domain”.

The defence

Representing the defendants in the UK are **Freshfields Bruckhaus Deringer** for Volvo/Renault, **Slaughter and May** for MAN, **Herbert Smith Freehills** for Iveco and **Quinn Emanuel Urquhart & Sullivan** for Daimler.

For defence lawyers, perhaps unsurprisingly, there are all kinds of issues they foresee arising.

First comes the strategy around a settlement, and with limitation periods in Europe ranging from three-to-six years from the Commission’s decision, defendants may well play the long game.

“One of the challenges at the moment is that there is still quite a lot of time left to run in most European jurisdictions. The world of claims isn’t yet known,” said defence partner one, “If I were acting for a defendant, I would be concerned that if I start settling some of the claims brought earlier on, how that is going to impact the broader picture.”

While claimants may file in jurisdictions with shorter limitation periods to force the hand of defendants, building a claim, which could involve thousands of people, takes a long time.

“I would assume that there are going to be a lot more claims to come and they will be coming for the next five years,” defence partner one predicts.

At the moment, assuming that most of the claims are broadly direct claims, defendants will want to have a feel for potential indirect claims, as well as for how the different types of claim are going to sit together.

In *Sainsbury's v MasterCard*, an avalanche of fresh claims followed the Competition Appeal Tribunal's judgment. Where a claim is seen to have merit, either through a settlement or a judgment, it encourages other claims.

It may be rational, from the defence side, to reach a settlement at a reasonable or palatable number, "but at this stage you can't help but have an eye to the future, which will make a defendant more cautious about early settlement," explains defence partner two.

Part of that strategy is assessing the potential types of claimants, which range from the obvious direct purchasers of trucks, to indirect purchasers, such as the customers of supermarkets that bought large fleets of cartelised trucks, who may have had those costs passed on to them; therefore, there is a class action waiting in the wings.

Another indirect claim could be where trucks were not brought directly, but via an intermediary, who retailed them on to smaller purchasers.

It's complicated

"I've never met a cartelist who thought their cartel caused an increase in price. That is a joke, although it's true" – Anonymous

Establishing quantum in all cartel and follow-damages cases is always complex; with the trucks cartel there is the additional factor of delaying the introduction of emissions technology.

"It will be said that the new technology would presumably have led to cheaper running costs," asserts defence partner two, "but then the price of a truck may have increased because new technology is expensive. Some of those areas will be complicated to establish".

One of the challenges on the economics of pass-through are multiple layers of claims – direct and indirect. This presents big concerns for the defendant because all of the associated issues may not ever be considered in a single tribunal or at the same time, says defence partner one.

They add: "Different jurisdictions will have different approaches to pass-through and that brings up a lot of challenges about proving economics."

Managing multiple proceedings

At this stage, the defence will be in information-gathering mode about the different models that exist, as well as assessing the attractiveness – or otherwise – of particular arguments that can run in different types of claims.

"They will be trying to get an overview of where they see their biggest exposure and where their weaknesses are so that they can try to put together an overall strategy to address the claims," defence partner two says, adding that the extent to which the legal points they are prepared to raise to effectively park the litigation, will also be under consideration.

The defendants will have been thinking about this for a long time, they continue. "I would be surprised if they knew where and when exactly they wanted to fight at the moment."

In agreement, defence partner one says it comes back to the limitation point. "Defendants will want to delay the proceedings that are already afoot as much as possible so that they know the world of the problem before they start to really tackle it."

While the perfect strategy on managing the proceedings can be devised today, the uncertainty around which claims will come means that defendants must be poised to deal with whatever appears in front of them.

“I would expect that there will be as many delaying tactics as possible until limitation expires, while dealing with what arises in the meantime, because when a claim is brought then they have to do something about it,” concludes defence partner one.

Trucks cartel – a view from the funders

With the likes of **Therium Capital Management** and **Burford Capital** already committed to known claims in the United Kingdom, *CDR* gets a funder’s view on the potential merits of trucks cartel claims.

Funders love predictability and, even more so, they love seeing cases not go to trial. But with multiple claims of varying types being faced by the cartelists in different jurisdictions, predictability seems a faint possibility.

While early settlement is desirable, even though that may attract heavy discounts on the amount claimed, it frees up claimants from long and drawn-out proceedings, and the associated costs that would eat into any award of damages.

Susan Dunn, co-founder of **Harbour Litigation Funding**, is continually surprised at how rarely parties seize the opportunity to settle early on in a dispute, before positions become entrenched and settlement amounts are inevitably higher.

In this case, she says: “Conversely, when there is an unknown number of potential claimants in a claim such as this, defendants might prefer to wait until the limitation period for new claims has expired before they enter into settlement negotiations as they will then know the extent of their liabilities. There is no reason why a party cannot deploy both approaches as there is always something to be learned for both sides in engaging in settlement dialogue.”

Matthew Denney, managing director at **Chancery Capital**, believes there could be a chance of settlement within the first two-to-three years. However, should cases go to trial, the chances of claimants’ success in relation to overcharge are high. “Liability has been established, and, provided the claimants obtain from the defendants the necessary disclosure relating to overcharge, this will establish the loss suffered.”

The chance of success in relation to the emissions technology delay is less so, he adds, “as the data needed to analyse this part of the claim is held by the defendants and will only be available at a later stage in discovery”.

Dunn agrees that there is little the defendants can raise on liability, given the European Commission’s finding that they had been operating a cartel. “The focus is on value of amount claimed. The main arguments will be on valuation and the extent to which there has been pass-on by the claimants to their customers. The way in which claimants bought their trucks can vary quite considerably, so it is important claimants can spell out their losses clearly and convincingly,” she says.

“The defendants are likely to argue that the illegal conduct did not result in an overcharge, but instead the price of the trucks bought was established competitively,” says Denney.

In the event that overcharge is established, it can be argued that purchasers simply passed that on to their customer, which is “likely to have considerable impact on the level of recoverable damages”.

As such, he explains that preliminary work to analyse these points is vital, such as evidencing that the prices paid by the claimant were based on list prices that were subject to the cartel, and that its product pricing was not set by taking into account the capital cost of the trucks.