



# Antitrust Damages Claims Under Eu And National Law: A Transportation Sector Focus

## ***Antitrust Damages Claims Under Eu And National Law: A Transportation Sector Focus***

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### 1. INTRODUCTION. PRECEDENTS OF CARTELS IN THE TRANSPORTATION SECTOR THAT RESULT IN CLAIMS FOR DAMAGES

Damage claims for breach of the European and national antitrust laws are undoubtedly one of the most exciting areas of business law. Indeed, this is a field which lies at the crossroads between enforcement of competition law (an area of which primarily focuses on the economic general interest) and satisfying the private interest of those companies that have been harmed by a cartel or by anticompetitive conduct more generally. Although this may still be considered to be an emerging area, there are already quite a few cases in the transportation sector. On this session, we'd like to cover the European law of antitrust damages and its application to some specific examples drawing from our law firm experience.

#### 1. Cartel in the trucks sector

In July 2016, the European Commission (EC) fined five truck manufacturers due to a cartel, and punished them with the highest fine imposed on a cartel. In 2011, the EC confirmed unannounced inspections in the truck manufacturing sector: initial investigations were conducted against MAN, Volvo/Renault, Daimler, Iveco and Scania. MAN finally and voluntarily revealed the existence of a cartel to the EC. The cartel operated during 14 years (1997 through 2011). The cartel coordinated:

- (i) Prices at "gross list" level for medium and heavy trucks in the European Economic Area (EEA).
- (ii) Timing for the introduction of emission technologies for medium and heavy trucks to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI).
- (iii) The passing on to customers of the costs for the emissions technologies required to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI).

Volvo/Renault, Daimler, Iveco, and DAF plead guilty, in order to reach a settlement with the EC. Such settlement contains a record fine of € 2.926 million. Scania has not joined the settlement and is therefore still under investigation.

#### 2. Other cartels in the transport sector

In recent years, a number of cases have been investigated and decided in which carriers or companies in the transport sector of passengers or all types of goods were finally punished. The most recent sanction in this sector, apart from truck cartel, commented, is

the cartel in “blocktrain”.

In July 2015, the EC imposed fines of € 49 million on Express Interfracht, part of the Austrian railway incumbent Österreichische Bundesbahnen, and Schenker, part of the German railway incumbent Deutsche Bahn, for operating a cartel in breach of EU antitrust rules in the market for so-called cargo “blocktrain” services. The three companies fixed prices and allocated customers for their “Balkantrain” and “Soptrain” services in Europe for nearly eight years (from July 2004 to June 2012). More specifically, in order to limit competition between them, the companies agreed on several restrictive practices:

- They agreed and allocated existing and new customers as well as setting up a customer allocation scheme including a ‘notification system’ for new customers;
- they exchanged confidential information on specific customer requests;
- they shared transport volumes contracted by downstream customers;
- they coordinated prices directly by providing each other with cover bids in respect of customers protected under their customer allocation scheme and coordinated sales prices offered to downstream customers.

## 2.2. Spain

In Spain, the National Markets and Competition Commission (NMCC) has fined in recent years several anticompetitive agreements made by carriers. In 2015, the following cases were punished: the Balearic transport of passengers (in process) and refrigerated transport. In addition, this year the NMCC has punished two transport companies for price and commercial conditions fixing:

(i) In November 2016 the NMCC fined two security companies (Prosegur and Loomis) with € 46.4 million, and two of their managers with € 52,600 by market sharing and manipulation of funds during seven years.

(ii) In September 2016, the NMCC fined fifteen international moving companies with € 4.09 million due to the infringement of Articles 1 of the Spanish Competition Act (SCA) and 101 TFEU consisting of a cartel for more than fifteen years. These companies signed an agreement to fix prices and other commercial conditions in concert, to share the market and to exchange commercially sensitive information.

Foremost, the NMCC has imposed multimillion fines in connection with the Valencia and Barcelona harbors, a key infrastructure in the transportation sector.

## II. THE EU ANTITRUST DAMAGES DIRECTIVE

The questions below are addressed bearing in mind (i) EU Directive 104/2014 and (ii) the national experience.

### 1. The Directive

On 26 November 2014, the European Parliament and the Council launched Directive 2014/104/UE on antitrust damages actions (Directive). The Directive makes it a lot easier for victims of antitrust violations to claim compensation. Amongst other things, it will give victims easier access to evidence they need to prove the damage suffered and more time to make their claims. Up until now it was difficult to exercise this right in practice for all but the biggest companies. By harmonizing procedures all over Europe, litigation to recover losses will become a realistic option for smaller companies, SMEs and consumers. The Directive is designed to achieve more effective enforcement of the EU antitrust rules overall: it fine-tunes the interplay between private damages claims and public enforcement, and preserves the attractiveness of tools used by European and national competition authorities, in particular leniency and settlement programmes.

Because the Directive touches on issues of harmonization in the internal market, Parliament and Council adopted it under the ordinary legislative procedure. First, in the majority of cases where the Commission has established an infringement of EU competition rules, the majority of victims have remained uncompensated. Second, the vast majority of cases have been brought in only three countries: the UK, Germany and the Netherlands, which are the jurisdictions generally perceived as most attractive for a number of reasons. In around 20 Member States there are few or no follow-on actions regarding Commission infringement decisions. Third, the majority of cases are brought by big businesses that purchase directly from the infringers. Indirect purchasers, SMEs and consumers very rarely bring cases.

Once implemented, the Directive will significantly improve the situation of underdeveloped and uneven private enforcement of the EU competition rules. It removes important obstacles to effective damages actions in Member States' national legislation. It also harmonizes national laws in the field of damages.

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