

Bulletin

Water

Energy

Retailing

Transport

Financial services

Healthcare

Telecoms

Media

Post

→ **Competition policy**

Policy analysis and design

Regulation

Strategy

Contract design and evaluation

→ **Dispute support services**

Market design and auctions

APRIL 2010

What if, but for?

ENRON VERSUS EWS

The first follow-on claim for damages to reach trial in the UK Competition Appeal Tribunal (CAT) was triggered by a finding of unlawful discrimination between customers by the Office of Rail Regulation (ORR). The claim was unsuccessful; and the case offered important insights into the standard of evidence required of claimants. In particular, it illuminated the way a court will consider arguments about how parties might have behaved in a “but for” world - one in which competition law infringement had not taken place. Frontier’s Zoltan Biro provided expert economic evidence for the defendants.

In 2006, the ORR found that English Welsh and Scottish Railways (EWS) had engaged in unlawful discrimination between its customers, contrary to the UK Competition Act 1998 and Article 82 of the EC Treaty. EWS was found to have quoted an intermediary, Enron Coal Services (Enron), selectively higher prices in 2000 for the provision of coal haulage services by rail than it charged a final customer, Edison Mission Energy (Edison), for the same services.



In 2008, the liquidator of Enron brought a follow-on claim for damages against EWS in the CAT. Enron alleged that EWS's discriminatory behaviour had caused it to lose both a tender for the haulage of coal by rail to power stations operated by Edison, and a real or substantial chance of winning a four-year end-to-end (E2E) contract to supply coal to one of those power stations, Ferrybridge.

The ORR had concluded that EWS's discriminatory treatment of Enron had placed it at a competitive disadvantage in tender negotiations in relation to the provision of coal haulage services to Edison. However, it was not possible for the ORR to conclude that Enron was thereby displaced from supplying coal haulage services to Edison; nor did the ORR consider whether Enron would have had the opportunity to secure a four-year E2E coal supply contract to Ferrybridge power station. These were matters for the CAT.

CAUSE AND EFFECT

The issue of causation was at the centre of the litigation. Enron relied heavily on the ORR's finding of competitive disadvantage arising from EWS's abusive conduct. If, Enron contended, it was materially hindered in its efforts to secure business from Edison, it necessarily followed that a real chance to win that business had been lost: there was no need for the CAT to consider further evidence in order to establish causation. The CAT disagreed:

...a finding of discrimination that results in competitive disadvantage is not the same as a finding that loss was caused thereby to a trading partner of an undertaking in a dominant position. The finding of competitive disadvantage (which EWS accepts, as it must) means that EWS hindered the competitive position of ECSL in relation to the EME tender. This is certainly relevant to, but not determinative of, the question of causation. It is relevant because it means that ECSL was impeded in its ability to offer EME competitive rates for coal haulage and supply. It is not determinative because the Decision does not establish that ECSL was well-placed to win a coal supply contract with EME absent the abuse."

The CAT held that two main questions had to be decided.

- Whether Enron would have sought to negotiate with Edison for a four-year E2E contract to supply coal to Ferrybridge in the "but-for" world. The CAT considered that this depended only on the actions of the claimant, which had to show what, on the balance of probabilities, it would have done.
- Whether negotiations between Edison and Enron would have led to the award of a four-year E2E contract to supply coal to Ferrybridge "but for" the infringement. The CAT considered that this depended on the actions of a third party (Edison), and so the claimant had to show that there was a real or substantial chance the third party would have acted in the way that the claimant alleged.

What if, but for?

The key issues considered by the CAT were:

- the nature of the commercial arrangement that would have been agreed between Enron and EWS in the “but for” world - the coal haulage prices and performance terms - and whether these would have differed from EWS’s offer to Edison;
- whether Enron would have decided to contract with EWS for coal haulage services to Edison in the “but for” world or - as it did in the real world - with another haulier, Freightliner Heavy Haul;
- the nature of Enron’s bid in the “but-for” world - whether and how its terms would have differed from those actually offered to Edison;
- whether Edison would have preferred Enron’s bid to provide coal haulage services in the “but for” world – taking into account the reasons why Edison rejected Enron’s bid in the real world; and
- whether Enron would have had a chance of being awarded a four-year E2E coal supply contract to Ferrybridge power station if it had been awarded the Edison coal haulage contract.

The CAT was provided with documentary evidence on many of these issues, and statements by employees of Enron, EWS and Edison. Of particular importance was a statement by the individual who had been responsible for negotiating and managing Edison’s coal supply and haulage contracts; this described how Edison assessed the bids that it received, the reasons why it rejected Enron’s bid, and Edison’s coal purchasing strategy in relation to Ferrybridge.

According to this statement, a previous breakdown of their relationship would have deterred Edison from awarding the haulage tender to Enron; moreover, for various commercial reasons, Edison would not have wished to enter into a long-term coal supply contract of the type that Enron was claiming. The CAT concluded that Enron had not proven that it would have sought to negotiate with Edison for a four-year contract to supply coal to Ferrybridge in the “but for” world, and that the award of such a contract was only a speculative prospect.

NOW FOR THE ECONOMICS

That, however, was not the end of the story. Each side called on economics experts. On behalf of Enron, the following was submitted.

- The CAT should consider what a rational economic decision-maker in Edison’s position would have done in the “but for” world.
- Based on EWS’s discriminatory offer, Enron was prepared to accept significant negative margins in its actual bid to Edison for the provision of coal haulage services, presumably in anticipation of making profitable follow-on coal sales to Edison. In the “but for” world, Enron would similarly have been prepared to accept significant negative margins to supply

What if, but for?

Edison with coal haulage services, but with a lower cost base comparable to the non-discriminatory prices that EWS offered to Edison. Hence, Enron would have undercut EWS's coal haulage prices by a significant amount.

- The historical relations between Enron and Edison were not relevant to the outcome of the Edison tender in the “but for” world, as a rational economic decision-maker would look for best future value and not allow an incident in its previous commercial dealings to cloud its judgment.
- The statement by the individual responsible for negotiating and managing Edison's coal supply and haulage contracts should be disregarded, since he was not sufficiently removed from what had actually happened in the real world and his views had been tainted by EWS's abuse.
- Since coal supply on an E2E basis would have produced economic advantages for power generators, EWS caused Enron to suffer injury in the form of a significant diminution in its chance to win a four-year coal supply contract to Ferrybridge.

On behalf of EWS, Frontier's Zoltan Biro submitted that the evidence did not indicate that Enron would have been prepared to undercut EWS's coal haulage prices significantly in the “but for” world. He argued that it would have been entirely rational for Edison to take into account various “non-price” factors associated with Enron's coal haulage offer, and there was no reason to expect that a long-term coal supply agreement would have been associated with the Edison rail haulage contract.

At the hearing, EWS challenged the admissibility of the evidence of Enron's economic expert, on the basis that there was direct evidence of fact (from a former employee of Edison) indicating what Edison would have done absent EWS's abuse; in these circumstances, it was argued, inferences about what Edison might have done as a rational economic decision-maker were irrelevant. The CAT decided that while the evidence of Enron's economic expert was admissible, limited weight should be placed on it.

CONCLUSION

In the first follow-on claim for damages to reach trial in the CAT, Enron failed to prove that a competition law infringement by EWS had caused it loss. Whilst the CAT cautioned against attempts to prejudge implications for the outcome of future claims, this case confirms that claimants are unlikely to be able to rely on an infringement decision alone, and will usually need to adduce additional evidence to establish any loss. It also illuminates the role of inferential evidence by economic experts where there is direct evidence of fact relating to the “but-for” conduct of an affected party.

CONTACT	Zoltan Biro zoltan.biro@frontier-economics.com
	David Parker david.parker@frontier-economics.com
	Frontier Economics Ltd
	FRONTIER ECONOMICS EUROPE BRUSSELS COLOGNE LONDON MADRID
	www.frontier-economics.com