IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1518/5/7/22

BETWEEN:

(1) LONDON ARRAY LIMITED

(2) RWE RENEWABLES UK LONDON ARRAY LIMITED (formerly known as E.ON CLIMATE & RENEWABLES LONDON ARRAY LIMITED)

(3) ORSTED LONDON ARRAY LIMITED (formerly known as DONG ENERGY LONDON ARRAY LIMITED)

(4) ORSTED LONDON ARRAY II LIMITED (formerly known as DONG ENERGY LONDON ARRAY II LIMITED)

(5) MASDAR ENERGY UK LIMITED

Claimants

- v -

(1) NEXANS FRANCE SAS

(2) NEXANS SA

Defendants

REASONED ORDER

UPON reading the First to Fifth Claimants' (together, "the Claimants") claim form filed on 8 July 2022 and the application filed on 8 July 2022 pursuant to Rule 31(2) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") for permission to serve the claim form on the First Defendant ("Nexans France SAS") and on the Second Defendant ("Nexans SA"), out of the jurisdiction (the "Rule 31 Application")

AND UPON reading the Exhibit filed in support of the Rule 31 Application

AND UPON reading the further Supplement and Exhibit to the Rule 31 Application filed with the Tribunal on 12 July 2022

IT IS ORDERED THAT:

1. The Claimants be permitted to serve Nexans France SAS and Nexans SA outside the jurisdiction at the addresses provided at paragraph 7 of the Rule 31 Application.

2. This Order is made without prejudice to the rights of Nexans SAS and Nexans SA to apply pursuant to Rule 34 of the Tribunal Rules to dispute the Tribunal's jurisdiction. Any such application should take account of the observations set out in *Epic Games, Inc. v Apple Inc.* [2021] CAT 4 at [3].

REASONS

(1) Background to the Claim

1. This is a follow-on claim for damages pursued under section 47A of the Competition Act 1998 ("the Act"), arising out of the Decision of the European Commission ("the Commission") in Case AT.39610 *Power Cables* dated 2 April 2014 (the "Decision").

(a) The Decision

2. In the Decision, the Commission found that a cartel operated in the high voltage power cables sector between 18 February 1999 and 28 January 2009 ("the Cartel Period") contrary to Article 101 TFEU and Article 53 EEA. The cartel was found to be a single and continuous infringement which applied to supplies of underground power cables of 110 kV and above and to submarine power cables of 33 kV and above, as well as to associated products, works and services supplied where cables were sold as part of a power cable project. The Commission found that the operation of the cartel involved:

   (a) The allocation of customers and territories, in that Japanese and Korean producers agreed not to bid for European projects and *vice versa*; and

(b) The allocation of customers within Europe between European producers, in that only the appointed producer would bid, or bids would be agreed between producers in advance to ensure that the appointed producer's bid would be the lowest and the project would thereby be awarded to the producer to which the European cartel members had previously agreed to allocate it.

3. The undertakings held by the Commission to have participated in the infringement included Nexans France SAS and Nexans SA. In particular, the Claimants refer to the following findings of the Commission:

(a) Nexans France SAS was held to have participated directly in the infringement from 13 November 2000 onwards, both on its own behalf and on behalf of other subsidiaries within the Nexans group, including Nexans Norway A/S (referring to the Decision at recitals (717) and (725); and

(b) Nexans SA was held jointly and severally liable from 12 June 2001 onwards for the infringement, on the basis that it exercised decisive control over Nexans SAS.

4. Nexans France SAS and Nexans SA together pursued appeals against the Decision to the General Court of the European Union and thereafter to the Court of Justice of the European Union ("CJEU"). Those appeals were dismissed in their entirety. The judgment of the CJEU dismissing the final appeal is dated 16 July 2020.[1] The Claimants therefore claim that the Decision became binding from this date (for the purposes of limitation), both as to the operative part of the Decision and such of the recitals as constitute the essential reasoning underlying the operative part.

(b) ***The Parties***

5. Both Nexans France SAS and Nexans SA are members of the Nexans group ("Nexans"), a cable manufacturer headquartered in France with global

[1] Case C-606/18 P *Nexans France and Nexans v Commission* [2020] ECLI:EU:C:2020:571

operations in many jurisdictions including the UK. Both are companies incorporated in France. Nexans SA owns 100% of the shares in Nexans France SAS and is the ultimate parent company of the Nexans group.

6. The Claimants are companies who were at all material times involved in a joint venture to develop and operate the London Array offshore wind farm ("London Array", "the London Array project"), which is located in the outer Thames Estuary off the coast of Kent. The joint venture was organised in part through the First Claimant, a project company called London Array Limited, with whom the remaining claimants (under their former names) participated. The Second, Fourth and Fifth Claimants are, and have at all material times been, members of the consortium involved in the joint venture. The Third Claimant was formerly a member and sues in relation to losses that it suffered at that time. It also sues as assignee of a company to which it sold its share in 2014. The First Claimant is a project company, but the Claimants allege that it is properly a party hereto as, for example, it is the entity which pays the transmission charges referred to below.

7. The development of the London Array project began in 2003. Planning permission for the offshore and onshore elements of the project was granted in 2006 and 2007 respectively. Procurement for construction then began and construction of the wind farm itself began in 2011 and was completed in 2013.

8. At the time of completion of its construction in 2013, London Array was the largest offshore wind farm in the world. It consists of some 175 turbines connected to two offshore substations by means of 33kV submarine cables known as "inter-array" cables. The offshore substations are in turn connected to the onshore electricity transmission and distribution system by means of 150kV submarine cables known as "export" cables.

9. The claim is put differently in relation to both type of cable.

(c) The Claim in relation to export cables

10. The Claimants state that the tender process for the procurement of the export cables took place pursuant to a request for quotation ("RFQ") issued in March

2008. Nexans, in particular Nexans Norway A/S, was selected as the supplier. A contract was entered in to on 30 September 2009 between Nexans Norway A/S and the Second, Third, Fourth and Fifth Claimants for the design, procurement, manufacture, testing, load-out and provision of documents for the export cables ("the Nexans Contract").

11. It is the Claimants' case that the terms and conditions of the Nexans Contract were determined to a substantial extent by the tender process which occurred during the Cartel Period and that price of the export cables supplied under the contract was higher than it would otherwise have been by virtue of the cartel, and that the Defendants are liable in damages accordingly. Alternatively, the Claimants claim that to the extent that such terms, by reason of their timing, did not incorporate the full cartel overcharge, they would nevertheless have incorporated the "overhang effect" (whereby prices in a market affected by a cartel will continue to be inflated for a period of time following the end of the cartel).

12. The Claimants allege that the tender for the London Array contract is specifically referred to at recital (444) of the Decision, which states that: *"between 5 and 7 November 2008 [company representative A2] (Nexans) also contacted […] twice by phone in order to discuss the price level that the companies should apply to their bids for the London Array project."* It is said that, in this context, this must refer to an anti-competitive exchange between Nexans and one of the other cable suppliers invited to bid under the RFQ for the London Array project.

13. Whilst it is acknowledged that the specific company that supplied the export cables was Nexans Norway A/S, which is not a Defendant to the proceedings, the Claimants claim that the Defendants are liable for the loss resulting for that supply since they form part of the same undertaking as Nexans Norway and as a matter of law, it is the undertaking which is taken to have committed the infringement which caused the loss sued for. Further, the Claimants rely on the fact that Nexans SA is the ultimate parent of the whole group, of which Nexans Norway A/S is its indirect wholly owned subsidiary, and in the case of Nexans

France SAS, they say that the Commission held that it had participated in the infringement on behalf of its affiliates, specifically Nexans Norway A/S.

14. As a result, the Claimants claim that they have suffered loss and damage. As result of the regulatory regime introduced by the UK government in 2009, Offshore Transmission Owners ("OFTOs") were established and were granted licenses for offshore electricity transmission. The owners of offshore transmission assets were required to sell them to OFTOs at prices determined by Ofgem. Pursuant to that regime, the London Array transmission assets (including the export cable assets) were transferred to Blue Transmission London Array Limited in September 2013. According to the Claim, the price determined by Ofgem did not include any adjustment to reflect that the cartel overcharge paid by the participants in the London Array project for the export cables purchased from Nexans. It is said that the arrangements for the divestment and subsequent operation of the London Array transmission assets resulted in the whole of the overcharge ultimately coming back to rest with the Claimants.

(d) The Claim in relation to inter-array cables

15. As regards the inter-array cables, the Claimants claim that these were supplied by a company called JDR Cable Services Limited ("JDR", "the JDR Contract"). The JDR Contract was concluded in November 2009, following a tender process. The Claimants accept that JDR was not found by the Commission to be a cartelist; however, the Claimants claim that the effect of the cartel was to inflate the price paid for the inter-array cables above the level which would have prevailed had there been no cartel, by reducing the level of competition in the market as a whole and for the tenders in question in particular. The claim in relation to inter-array cables is therefore pursued as a claim for "umbrella" damages.

(2) Application under Rule 31(2) of the Tribunal Rules

16. I consider that it is likely, as the Claimants contend, that the proceedings are to be treated as taking place in England and Wales for the purpose of Rule 18 of the Tribunal Rules. The task of the Tribunal is to identify the forum in which

the case can be suitably tried for the interests of all the parties and for the ends of justice. The Tribunal therefore approaches service out of the jurisdiction on the same basis as the High Court under the CPR: *DSG Retail Ltd and another v Mastercard Inc and others* [2015] CAT 7 at [17]-[18].

17. The relevant legal principles for applications to serve defendants out of the jurisdiction in Tribunal cases are summarised in *Epic Games Inc and others v. Apple Inc and Others* [2021] CAT 4 [78]. In short, they involve determinations of whether:

    (a) There is a serious issue to be tried on the merits of the claim. This is a test of whether there is a real as opposed to fanciful prospect of success on the claim.

    (b) There is a good arguable case that the claim falls within one of the "gateways" set out in CPR Practice Direction 6B at paragraph 3.1.

    (c) In all the circumstances, England and Wales is clearly or distinctly the appropriate forum for the trial of the claim.

18. I consider that there is a real prospect of success of the claim in that it is a follow-on claim based on the Decision of the Commission of which each of the Defendants is an addressee. The damages are said to arise as a result of the infringements of competition law established by the Decision.

19. I note that in respect of the supply of export cables, the contract in question was concluded with Nexans Norway A/S, which is not an addressee of the Decision. However, it is likely that the Nexans entities would be regarded as part of the same corporate group or undertaking (or a single economic unit) for the purposes of any finding of liability. It is notable that the Commission found that Nexans France SAS had participated in the infringement on behalf of its affiliate companies including Nexans Norway A/S, and that Nexans SA was held liable on the basis that it exercised control over Nexans France SAS as the ultimate parent in the group.

20. I also note that the Nexans Contract was concluded subsequent to the end of the Cartel Period; however, I consider that the Claimants have a more than fanciful prospect of establishing that the price agreed in the Nexans Contract was determined in substantial part by the tender process which took place during the Cartel Period, or, alternatively, that it incorporated an "overhang" effect.

21. Further, whereas there is a dispute resolution clause in Clause 28 of the Nexans Contract, I accept the Claimants' position that this refers to disputes or differences "arising out of, under, or in connection with the Contract", and by contrast their claims are tortious and arise from the Decision, rather than the Nexans Contract. Similarly, Nexans Norway A/S is a party to the Nexans Contract, but the Defendants are not.

22. Finally, the Tribunal is mindful of the existence of an application to commence collective proceedings (under section 47B of the Act) against the Defendants and others on behalf of electricity consumers, arising out of the cables cartel and the Decision.[2] The Claimants to these proceedings state that they are unaware of any particular evidence upon which the proposed class representative in that case intends to rely, and that their understanding is that there was no pass-on by these means as far as the London Array project is concerned. In any event, I accept that complex issues as to pass-on cannot be resolved at this preliminary stage, and that this is not a reason to refuse permission for service out of the jurisdiction.

23. I also note the contents of the Supplement to the Rule 31 Application, which bring to the Tribunal's attention certain matters in respect of the Claimants' duty of full and frank disclosure, namely the existence of the Limitation Waiver signed by the Second Claimant and Nexans SA and Nexans France SAS, and the notes of a meeting between Nexans and the Second Claimant in April 2022. For present purposes, I do not consider that either of these Exhibits negate the real chance of success of the Claimants in establishing their claim.

24. I also accept that there is a real prospect of an expert economist being able to test empirically the extent to which the Claimants have suffered loss as a result

[2] Case No: 1440/7/7/22 Clare Mary Joan Spottiswoode CBE v Nexans France S.A.S. & Others.

of the infringements identified in the Decision. I accept that the Claimants have the right to claim on the basis of an umbrella effect in so far as it is necessary for them to do so.

25. As regards the "gateways" under CPR PD6B, I consider there to be a good arguable case that the claim falls within gateway 3.1(9) (the tort gateway) on the basis that damage is sustained within the UK. The cables were supplied to and installed at the London Array wind farm, which is located in England, and all of the Claimants are companies incorporated under the law of England and Wales and domiciled in this jurisdiction. Further, the transmissions charges, part of which corresponds to the cost of the export cables and which forms part of the Claimant's case regarding loss and damage, arise by virtue of the UK regulatory regime referred to and are paid in England by the First Claimant.

26. Finally, I am satisfied that the UK (and this Tribunal) is the proper place in which to bring the proceedings. The case involves the supply of cables at allegedly inflated prices to a wind farm located in England, resulting in losses claimed by the Claimants, which are all English companies. Further, relevant documents and witnesses are likely to be found within the jurisdiction, (at least, as the Claimants suggest, the preponderance of relevant documents). Further, the OFTO regulatory regime is specific to the UK and to the extent that evidence would be required concerning the operation of this regime, this is likely to come from the UK.

27. Altogether, and basing myself solely on the materials presently before the Tribunal, I consider that the UK (and this Tribunal) is clearly and distinctly the appropriate forum for the trial of this claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction.

Sir Marcus Smith
President of the Competition Appeal Tribunal

Made: 19 August 2022
Drawn: 19 August 2022