

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° : 500-06-000736-153

DATE : DECEMBER 21, 2021

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

TRANSPORT TFI 6, S.E.C.
Plaintiff

v.

ESPAR INC.
and
ESPAR CLIMATE CONTROL SYSTEMS
and
EBERSPAECHER CLIMATE CONTROL SYSTEMS INTERNATIONAL BETEILIGUNGS-
and
EBERSPAECHER CLIMATE CONTROL SYSTEMS GMBH & CO. KG
and
EBERSPAECHER GRUPPE GMBH & CO. KG
and
ESPAR PRODUCTS INC.
and
WEBASTO SE
and
WEBASTO THERMO & COMFORT SE
and
WEBASTO THERMO & COMFORT NORTH AMERICA, INC.
Defendants

JUDGMENT
(Objections to pre-discovery undertakings)

[1] The plaintiff is the class representative in a suit brought against the defendants, who manufacture and sell heaters incorporated into the cab of commercial vehicles.¹ The plaintiff alleges that between 2001 and 2012 the defendants conspired to limit competition and raise the price of their heaters, causing damage to class members in Québec who paid artificially inflated prices to purchase or lease the heaters or vehicles containing the heaters.

[2] Espar and Webasto argue in defence that the plaintiff has failed to define a relevant market for the purpose of proving anti-competitive practices, or to show that class members in Québec suffered damage as a result of the defendants' alleged conduct. Although the defendants acknowledge they were found to have participated in anti-competitive practices in Europe and the United States, they argue that there is no evidence these practices had the effect of raising prices for their products in Québec.

[3] The Superior Court of Québec authorized the plaintiff's class action in 2017. The class is defined as :

Toute personne qui a acheté au Québec un ou des appareils de chauffage de cabine de véhicule commercial ou qui a acheté, loué ou sous-loué au Québec un ou des produits équipés d'un ou de plusieurs appareils de chauffage de cabine de véhicule commercial entre le treize septembre 2001 et le trente et un décembre 2021.

[4] In December 2019, the plaintiff addressed approximately 120 document production requests to each of Espar and Webasto in order to prepare the pre-trial discovery of the defendants' witnesses.

[5] Since then, Espar has delivered approximately 169,000 documents to the plaintiff, while Webasto has delivered 1,732 documents.² However disagreements persist: the plaintiff claims that many of its document requests have been refused or not fully satisfied. It adds that Espar has poorly identified the documents delivered in electronic format, making it difficult or impossible for plaintiff's counsel and experts to classify and search through the voluminous records.

¹ The defendants will be referred to respectively as Espar and Webasto.

² Espar turned over to the plaintiff the documentary record it had submitted in 2015 to the US Department of Justice.

[6] The defendants object in particular to providing business information going as far back to 1995, which is prior to the class period starting in 2001. They also object to providing information regarding their European and US activities, arguing there is no evidence that US sales data is relevant or that devices manufactured in Europe (principally Germany and Austria) made their way into the Québec market. The defendants claim they have made reasonable efforts to respond to the document requests and that it is time the plaintiff commenced pre-trial examinations.

[7] This decision deals with the plaintiff's application to dismiss the defendants' objections and to order the further production of documents prior to pre-trial examinations.

[8] It has been two years since the plaintiff made its document requests. Clearly, this matter has dragged on far too long. Nevertheless, the Court is of the view that some relevant information has still not been provided by the defendants and that it should be furnished prior to oral discovery. This case will essentially turn on the documentary record and on expert opinion on the question of whether or not foreign price fixing had an impact in Québec. Consequently, in this case in particular, documentary discovery is a useful prelude to oral examinations.

[9] The European Commission and US Department of Justice found that the defendants had engaged in anti-competitive practices during the period from 2001 to 2012. The central issue in this case is whether those practices had an effect on class members in Québec. The plaintiff proposes to address this question by producing an econometric analysis by Prof Marcel Boyer.

[10] Prof Boyer writes that the objective of an econometric analysis is to measure the "but-for-price" of a product, meaning its price in a conspiracy-free market. To arrive at the but-for-price, the econometric model must make "a careful selection of the relevant control variables to include".³ The Court understands this to mean that the model will attempt to assess free-market price factors and distinguish them from non-market price influencers. Plaintiff's counsel argues plausibly that the model requires "a large quantity of good data" in order to distinguish the different elements bearing upon the price of a given product.

[11] To support Prof Boyer's study the plaintiff has requested the defendants to provide information concerning their production costs, products (model numbers and codes), channels of distribution (product and country), customers and sales revenues, both in aggregate form and on a transactional basis. They have also requested copies of the documents provided by the defendants to the European and US authorities. The document request is extensive and detailed.

³ Marcel Boyer, Rachidi Kotchoni, *The Economics of Cartel Overcharges*, 2011 hal-00631429.

[12] Webasto has provided information respecting its production costs. Espar has not.

[13] Webasto has provided information for the period from 2003 to 2016, arguing that it is unable to retrace records prior to 2003. Espar has provided information from 2006 to 2018.

[14] Both parties have refused to provide any information for the US and Europe, except the information furnished by Espar to the US Department of Justice.

[15] The plaintiff argues that Prof Boyer requires information concerning the defendants' commercial activities prior to and following the period of their known anti-competitive practices in order to perform a comparative analysis. Since the defendants' illegal acts are known to have occurred from 2001 to 2012, the total period for which information is requested (1995 to 2019, or 24 years) is necessarily very long. The defendants complain that too much is being demanded of them, but they have not demonstrated that Prof Boyer's approach is baseless or that all the information requested is unavailable, (except prior to 2003 in Webasto's case).

[16] Likewise, the plaintiff argues that information respecting the defendants' commercial activities in Europe and North American is required for the econometric model, because the defendants' anti-competitive activities in these jurisdictions may have influenced prices paid in Québec. This possibility was acknowledged by Justice Deziel when he authorized the class action suit in 2017.

[17] An econometric model is only as good as the data on which it is based. Prof Boyer cannot conduct a useful study without access to all the relevant data. Consequently, the defendants are required to produce the documents and information in their possession that covers the period 1995-2019 for Europe and North America.

[18] The defendants argue they should not be required to create documents where none exist. However, on oral discovery, they could be required to gather information, such as a list of their products, identified by number and product code. They could also be asked to identify what products were sold where, to whom, and through what channels. It is unlikely a witness will have all this information readily at hand during discovery. If it is not, the information will have to be compiled by the defendants. This will take time, and likely lead to a second round of examinations. It will be a better use of the parties' time and resources if the defendants prepared this information in written form prior to examination. The same is true for Espar's production costs, for the relevant territories and period.

[19] Where the defendants have been asked to provide particular documents and they declare that none exists, their response shall be considered satisfactory for present purposes. The same holds for their response that they have delivered everything they

can reasonably locate in their records. These responses may be tested on oral discovery.

[20] If requested, the defendants are required to deliver to the plaintiff as pre-discovery undertakings the documents they provided to the European Commission and US Department of Justice. There is no privilege attached to these documents in the context of this litigation.

[21] The defendants shall identify the documents being provided by reference to the plaintiff's numbered request. Where possible, metadata should be provided in order to classify and search the documents provided.

FOR THESE REASONS, THE COURT:

[22] **WITH RESPECT TO WEBASTO:**

[23] **ORDERS** it to provide the documents and information requested in Section 1 ("Overarching Objections") of the attached table of objections, subject to the Court's comments above;

[24] **DECLARES** that it is not required to provide further pre-undertakings in response to requests 1.5.7 and 2.17, the latter of which is overly broad;

[25] **ACKNOWLEDGES** its undertaking to provide further pre-undertakings in response to request 2.16.

[26] **WITH RESPECT TO ESPAR:**

[27] **ORDERS** it to provide the documents and information requested in Section 1 ("Overarching Objections") of the attached table of objections, subject to the Court's comments above;

[28] **ORDERS** it to provide the documents and information requested in Section 2, III a), b), c), d), e) and f), subject to the Court's comments above;

[29] **ACKNOWLEDGES** its explanation that all US Department of Justice documents have been provided to the plaintiff (Section 2 IV) and that it is unable to respond to the plaintiff's requests 2.7.1 to 2.7.9 regarding the documents delivered to the European Commission;

[30] **ORDERS** it to provide copies of the documents delivered by it to the European Commission (Request 2.7.10), copies of its financial statements not already provided (Request 2.16) and documents in response to Request 2.18;

[31] **MAINTAINS** its objection to Request 2.17, which is overly broad;

[32] **WITH RESPECT TO ALL PARTIES:**

[33] **ORDERS** that the defendants deliver the additional undertakings to the plaintiff by February 28, 2022 at the latest and that the plaintiff conduct the pre-trial examinations of the defendants' representatives by April 29, 2022 at the latest;

[34] **THE WHOLE** with costs to follow suit.



DAVID R. COLLIER, J.S.C.

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Hearing date : December 7, 2021