

## E-ALERT | Antitrust Litigation

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### RECENT JUDGMENT CONFIRMS CARTEL WHISTLEBLOWERS COULD FACE DAMAGES CLAIMS EARLIER THAN OTHER PARTICIPANTS

In *Deutsche Bahn AG and others v Morgan Advanced Materials Plc*, the UK Supreme Court ruled that separate timelines apply for bringing damages claims against addressees of European Commission infringement decisions, depending on whether addressees appeal against the infringement decision. In practice, this means that defendants who don't appeal the infringement decision, including immunity applicants, will likely face claims earlier than those who do appeal. The Court also clarified that a successful appeal by an addressee will not impact on the finding of infringement against non-appealing parties.

#### Background

In a decision of 3 December 2003, the European Commission found that several manufacturers of electrical and mechanical carbon and graphite products participated in a cartel, and thereby infringed Article 81 of the EC Treaty<sup>1</sup> (the "Graphite Cartel Decision"). Morgan Crucible cooperated with the European Commission's investigation and avoided a fine under the leniency regime. Other participants were fined, several of whom appealed the Graphite Cartel Decision to the General Court of the European Union, but the Court upheld the Commission's decision on appeal.

On 15 December 2010 Deutsche Bahn and others filed a "follow-on"<sup>2</sup> claim in the Competition Appeals Tribunal, (the "CAT") in England. The claim sought damages for losses allegedly caused by the cartel. There is a relatively narrow window for bringing damages claims in the CAT: absent special permission, claims cannot be brought before expiry of the period for appealing against an infringement decision by the European Commission (or determination of such appeal);<sup>3</sup> but claims are time-barred two years after the later of these events.<sup>4</sup>

#### The Supreme Court Decides

The Supreme Court had to decide whether the claim against Morgan Crucible was time-barred. The outcome turned on whether the Graphite Cartel Decision was: a decision against Morgan Crucible, which had not appealed the Graphite Cartel Decision; or a decision against all cartel members, some of whom appealed, but who were unsuccessful. Taking the former approach, the two year CAT limitation period for claims against Morgan Crucible began on 13 February 2004 (when time expired for it to appeal against the Graphite Cartel Decision). Under the latter approach, the limitation period began on 18 December 2008 (when time expired for the appealing parties to challenge the General Court's ruling upholding the Graphite Cartel Decision).

In a unanimous [judgment](#) the Supreme Court held that infringement decisions of the European Commission are a series of decisions addressed to individual addressees, which remain binding whether or not other addressees appeal. A successful appeal by one addressee of a decision

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<sup>1</sup> Now article 101 of the Treaty on the Functioning of the European Union (the "TFEU").

<sup>2</sup> Follow-on claims are brought subsequent to findings of competition-law infringement by the European Commission or the Competition and Markets Authority. As liability has been determined, these claims only concern causation and damages. At present, the CAT does not have jurisdiction for "stand-alone" claims, being claims which are not reliant on an infringement decision, and where the claimant must prove liability.

<sup>3</sup> Section 47A(8) Competition Act 1998.

<sup>4</sup> Competition Appeal Tribunal Rules 2003, rule 31.

does not impact on the validity of the decision against a non-appealing addressee. Accordingly, the Supreme Court preferred the former approach to calculating the limitation period for damages claims in the CAT, concluding that the claim against Morgan Crucible was time-barred.

## Comment

This judgment confirms that there are separate timelines for bringing a claim against each potential defendant to a damages claim in the CAT, turning on whether or not each potential defendant appeals against the infringement decision of the European Commission. Accordingly, and given the short limitation period for bringing claims in the CAT, claimants are likely to sue non-appealing addressees (including “whistleblowers” such as leniency applicants) earlier than those who appeal.

The Consumer Rights Bill, which is presently passing through the UK Parliament, will significantly reform antitrust damages claims,<sup>5</sup> including granting the CAT jurisdiction over “stand-alone” claims, which can be brought prior to an infringement decision.<sup>6</sup> If the Bill is enacted, potential damages claimants will be presented with strategic timing decisions at the very outset of their litigation. While the Bill will mean that claimants do not have to wait for an infringement decision or exhaustion of appeals by each addressee before bringing a claim in the CAT, (such that they will have the option of launching proceedings against all parties simultaneously), it is still the case that it is materially easier for claimants to wait for an infringement decision and take advantage of the evidentiary heavy-lifting and conclusions regarding breach of Article 101 TFEU that are inherent in such a decision.

Beyond this, the judgment further complicates the decision-making of potential leniency applicants in deciding whether or not to approach the European Commission regarding potential infringements of European competition law. It underlines the need to weigh up potential immunity from fines with the risk of facing damages claims earlier than other participants.

Finally, infringers are ordinarily jointly and severally liable for all losses flowing from cartel conduct, subject to rules on causation and remoteness. A successful appeal by a fellow addressee will not obviate the decision against non-appealing parties, leaving non-appealing parties as the sole defendants to damages claims. In these circumstances, the defendants will not be able to deny existence of, or their liability for, the cartel, but, depending on the facts, they might be able to argue that successful appeals by fellow addressees show that the adverse impact of the cartel was lower than previously understood, thereby reducing their exposure to damages. This consideration applies both to claims brought in the CAT and in the High Court.

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<sup>5</sup> See [here](#) for further information.

<sup>6</sup> The High Court presently has jurisdiction for stand-alone claims, so claimants have the option to initiate proceedings simultaneously against all intended defendants, even if some are not addressees of infringement decision and/or are appealing an infringement decision.