

Perspectives

Trucks Litigation: Competition Appeal Tribunal Issues Judgment on Binding Recitals and Abuse of Process

In an important judgment for follow-on damages claims, the Competition Appeal Tribunal has ruled that a number of findings made by the European Commission in its Trucks ‘settlement’ Decision are binding on the defendants and the Tribunal; and that, subject to limited exceptions, it is an abuse of process for defendants to deny in follow-on damages claims findings that are contained in ‘settlement’ Decisions with the European Commission.

On 4 March 2020, the UK’s Competition Appeal Tribunal (“CAT”) handed down a much-awaited judgment in the *Trucks* litigation.¹ The judgment addresses two issues: first, which parts of the European Commission’s *Trucks* ‘settlement’ decision (“Decision”)² are binding on the defendants and the CAT, such that they cannot be contested in follow-on damages claims; and second, whether it is an abuse of process for the defendants to contest the Decision’s findings, given they reflect their settlement with the Commission. As regards the first

issue, the CAT held that a number of the Decision’s findings are binding – rejecting in particular the argument of one defendant that *none* were binding. As regards the second issue concerning abuse of process, the CAT sided with the claimants, holding that it is an abuse of process for defendants who have agreed the settlement Decision with the Commission to later disavow findings in that Decision when follow-on damages claims are brought against them – save in certain limited circumstances.

The effects of this judgment will no doubt reverberate beyond the *Trucks* litigation. In particular, it could affect many follow-on damages actions that rely at least in part on findings made by the Commission following its ‘settlement’ procedure.

Background to the judgment

The judgment arises in the context of a ‘preliminary issue’ ordered by the CAT in seven sets of claims being heard against the Trucks cartelists in the UK. A hearing took place over three days in December 2019. The preliminary issue concerned the question of whether/which of the Commission’s findings in the Decision,

¹ See the [full text of the preliminary issue judgment](#) [2020] CAT 7 – hereinafter “Judgment”

² [Settlement decision in case AT.39824 - Trucks](#)

which was concluded pursuant to the Commission's settlement procedure (described below), are binding on the defendants³ and the CAT in the follow-on damages claims before it.

Commission decisions contain several 'recitals' (paragraphs describing the infringing conduct, the undertakings involved, setting out how the fine is calculated, etc.) and an 'operative part' (the 'articles' at the end of a decision that summarise the infringing conduct, specify the fines to be imposed, identify the names and addresses of the undertakings involved in the conduct, etc.). Specifically, the question arising in the preliminary issue was which recitals/parts of recitals not otherwise admitted by the defendants are binding on the defendants in the context of these follow-on claims? The claimants argued that a number of the recitals are binding, such that the defendants and the CAT cannot contest them; one of the five defendants argued that *none* of the recitals are binding; and the other defendants argued that only a very few recitals were binding.

The claimants also argued that, in the circumstances of the case, it would be an 'abuse of process' to allow the defendants in the follow-on damages claims to deny/not admit the Decision's findings that they had accepted as part of the settlement procedure with the Commission. Thus, the question of whether it is an abuse of process for the defendants to disavow in the follow-on damages claims findings that are contained in the Decision also fell to be determined by the CAT.

Genesis of a settlement decision

In July 2016 the European Commission issued the Decision, imposing record-

³ Strictly speaking, the question being decided was only whether non-admitted recitals were binding on the defendants that are addressees of the *Trucks* Decision. Whether they would also be binding on the non-addressee companies (related companies of the

breaking fines against five leading truck manufacturers – Daimler, Volvo/Renault, Iveco, MAN and DAF – for participating in a cartel concerning the pricing of trucks and the timing and costs associated with the introduction of low-emission technologies.

The *Trucks* Decision is a 'settlement' decision, i.e. the cartelists admitted engaging in anti-competitive behaviour. That choice triggers a process of careful negotiations with the Commission over the scope of the admissions to be made, which eventually resulted in a public settlement decision the contents of which the cartelists had expressly agreed as part of the settlement procedure.

As recognised by the CAT, for the cartelists the advantage of settling is primarily twofold: first, a 10% reduction in the fine imposed (significant even for well-resourced companies); and second, a decision which, being shorter and containing limited details of the infringing conduct, "*presents a handicap to claimants seeking to recover [damages], and a corresponding benefit [to the cartelists]*".⁴ With thousands of claims against the Trucks cartelists now underway across Europe, it is hard to underestimate such a benefit in the context of this litigation.

What parts of the Decision are binding on the defendants and the CAT?

The CAT acknowledged that EU legislation (Article 16 of Regulation 1/2003) prevents national courts from making a decision that would be inconsistent with ("run counter to") a decision of the Commission: "*If a judgment of the Tribunal were to be inconsistent with recitals in the Decision that were the 'essential basis' or 'necessary support' for the operative part, ... in our view that*

addressee defendants joined in the *Trucks* damages actions) was therefore not in issue. See paragraph 21 of the Judgment

⁴ Judgment, paragraph 129

would, on any sensible interpretation of Article 16, be inconsistent with the Decision.”⁵

The CAT also held that *“if a finding in a decision cannot be challenged in proceedings before the EU Courts, then it would ordinarily be a denial of justice for that finding to be binding in national proceedings.”*⁶

It concluded that, *“Accordingly, we consider that the principles which determine whether a finding in a recital to a decision is susceptible to challenge before the EU courts are appropriately applicable to determine whether a finding is binding for the purpose of Article 16: the criterion is that the finding in the recital is an essential basis or the necessary support for a determination in the operative part, or necessary to understand the scope of the operative part.”* And while *“[...] the criteria of ‘essential basis’ or ‘necessary support’ are not necessarily confined [...] to ‘legal assessments’ or a very narrow category of findings of fact”,* the CAT considered that the assessment as to which recitals (or parts thereof) are binding in follow-on litigation *“is a fact specific exercise in each case”*.⁷

In relation to the *Trucks* Decision specifically, the CAT concluded that several findings were binding, including:

- A number of recitals setting out that the cartelists *“exchanged gross price lists and information on gross prices, including planned future gross price increases, and most of them exchanged truck configurators containing detailed gross prices as those came to replace gross price lists”* and that, between 1997 and 2004, the cartelists *“occasionally ... also discussed net prices for some countries”*;⁸ and
- That *“the infringement was committed intentionally”*.⁹

⁵ Judgment, paragraph 64

⁶ Judgment, paragraph 67

⁷ Judgment, paragraph 68

⁸ Judgment, paragraph 148(a)

The damages claims can therefore be expected to proceed on the basis that these matters are now beyond challenge by the defendants (or, indeed, the CAT).

When is denying the Commission’s findings abusive?

The second issue arising in the judgment – that of ‘abuse of process’ – is of wider significance, as the principles enunciated by the CAT are potentially relevant to other follow-on claims stemming from a settlement decision.

The claimants argued that the manufacturers denying now in the *Trucks* litigation facts already admitted to the Commission would be an abuse of process, i.e. that doing so would be unfair and/or bring the administration of justice into disrepute.

The CAT in large part agreed with the claimants. It framed the question as *“whether it would bring the administration of justice into disrepute and/or be unfair to the claimants if the defendants are simply able to deny facts which the Decision records them as having admitted, or to ‘not admit’ those facts in their defences to these claims and thus require the claimants to prove them. In our judgment, it would be an abuse of process here on both counts.”*¹⁰ In reaching this conclusion, the judgment placed particular weight on two factors.

First, the information asymmetry between the claimants and the cartelists: *“[t]he defendants would be placing on the claimants the very significant burden of proving all these facts, in circumstances where the relevant information is largely held by the defendants, some of it may be undocumented and insofar as it is documented the claimants would have*

⁹ Judgment, paragraph 148(j) referring to recital 104 of the Decision

¹⁰ Judgment, paragraph 131

to obtain it by an extensive disclosure exercise involving very expensive inspection.”¹¹

Second, the fact that the earlier admissions had been made in the context of the Commission’s settlement procedure: *“the factual findings in the Decision were formally admitted by the Addressees in a structured process, where their rights were fully protected, in quasi-criminal proceedings. We do not regard this as remotely comparable to admissions made in correspondence or a press statement, which would be simply admissible but which the admitting party could explain or controvert in civil proceedings.”*¹²

Thus the CAT considered that in the context of the *Trucks* litigation before it, *“[i]t is an abuse of process for a defendant simply to deny or not admit facts set out in a recital relied on by a claimant”*.¹³

The CAT took a different approach to denials that are coupled with a ‘positive case’ challenging a particular finding in a Decision. In those circumstances, the CAT did not consider it to be an abuse of process for defendants to advance a positive case or evidence inconsistent with a recital where:

- (1) the claimants do not object to it;
- (2) the denial/positive case seeks to show that a finding in the Decision does not accurately reflect the underlying document it refers to;
- (3) a defendant relies on new evidence it could not reasonably have had access to at the time of the proceedings before the Commission;
- (4) a claimant pleads allegations that are more detailed or go beyond the Decision’s findings, and (i) the denial is

aimed at those allegations rather than at the Decision’s finding itself, and (ii) the denial does not amount to a denial that is not otherwise justified by (1), (2) or (3) above; or

- (5) the denial is not covered by (1) to (4) above, but the defendant is able to otherwise persuade the CAT that it should be allowed.¹⁴

In relation to (3), the CAT was clear however that a defendant can only rely on this ground if it does so at the time of pleading its defence. Notably, this precludes a defendant awaiting disclosure from the claimant in the hope that it will provide a basis for then advancing a positive case contrary to the Decision’s findings. This is important, because it limits the scope of what might otherwise be a get-out-of-jail card capturing any new material available to the defendant only later in the litigation.

The judgment also makes clear that the burden of showing that a denial is *not* an abuse of process lies in the first instance with the defendant denying the Decision’s findings – i.e. it is for the defendant to demonstrate that its denial falls within one of the five grounds above. If the claimant objects, it is then for the CAT to rule on the matter.¹⁵

Conclusion

The CAT’s judgment stresses that it is limited to the specific factual parameters of the application before it, and the specific circumstances in which the *Trucks* Decision came to be. Nevertheless, the judgment is a first in some important respects.

It is the first time a UK court has considered, in detail, precisely which findings in a Commission settlement decision are binding in follow-on litigation.

¹¹ Judgment, paragraph 131

¹² Judgment, paragraph 132

¹³ Judgment, paragraph 141(1)

¹⁴ Judgment, paragraph 141(2)-(6)

¹⁵ Judgment, paragraph 144

While the outcome is of course highly specific to the *Trucks* litigation in issue, the CAT's approach to this exercise could well be of application in other follow-on claims.

It is also the first time UK courts have considered have considered the circumstances in which defendants disavowing findings contained in a Commission settlement decision will be an abuse of process in subsequent follow-on litigation. This aspect of the CAT's judgment sets out guidance that is not just important for the claimants in this case, but potentially for claimants in many other follow-on claims stemming from a settlement decision.

Hausfeld acts for three groups of claimants in these proceedings: Case 1292/5/7/18 (T) Suez Groupe SAS & Ors v Fiat Chrysler Automobiles N.V. & Ors; Case 1293/5/7/18 (T) Veolia Environnement S.A. & Ors v Fiat Chrysler Automobiles N.V. & Ors; and Case 1294/5/7/18 (T) Wolseley UK Limited & Ors v Fiat Chrysler Automobiles N.V. & Ors.

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