

No Reversing Allowed: *Trucks* Defendants in Follow-on Cases Required to Stand by Their Admissions to the Commission

December 7th, 2020

The Court of Appeal has handed down an important judgment clarifying the ability of parties that settle European Commission (**Commission**) antitrust investigations to challenge the Commission's findings in follow-on damages actions.

The judgment concerns an appeal relating to a preliminary issue arising in seven claims for damages following on from the 2016 Commission *Trucks* settlement decision (the **Settlement Decision**).¹ The Court of Appeal held that the five truck manufacturers (the **Appellants**) could not deny facts they had admitted in settling with the Commission – facts that were subsequently recorded in the Settlement Decision.

The decision may have significant implications for the role of the English courts in follow-on damages claims after the end of the Brexit transition period, in circumstances where Commission infringement decisions would otherwise not bind the English courts.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

LONDON

Jonathan Kelly
+44 20 7614 2266
jkelly@cgsh.com

Nicholas Levy
+44 20 7614 2243
nlevy@cgsh.com

Paul Gilbert
+44 20 7614 2335
pgilbert@cgsh.com

Paul Stuart
+44 20 7614 2207
pstuart@cgsh.com

Ranulf Outhwaite
+44 20 7614 2228
routhwaite@cgsh.com

Fay Davies
+44 20 7614 2276
fdavies@cgsh.com

¹ *AB Volvo (PUBL) v Ryder Ltd* [2020] EWCA Civ 1475. Infringement decision adopted by the European Commission on 19 July 2016 in Case AT.39824 – *Trucks*.
clearygottlieb.com



Background to the Court of Appeal decision

Trucks

In July 2016, the Commission fined the Appellants² - five European truck makers -- €2.93 billion for their participation in collusive arrangements on pricing and gross price increases in the EEA for medium and heavy trucks; and the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards. In 2017, the Commission fined a sixth truck maker a further €880 million.³ The Commission found that the cartel operated between 1997 and 2011.

The Commission adopted the Settlement Decision in accordance with its cartel settlement procedure.⁴ Under the procedure, in exchange for acknowledging their participation in the cartel and their liability for it, the parties received a 10% reduction in fines. Crucially for the purposes of the Court of Appeal judgment, the Appellants were required to acknowledge at the time of the settlement that

*[their] liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including [their] role and the duration of their participation in the infringement in accordance with the results of the settlement discussions.*⁵

Accordingly, certain facts in relation to the infringement admitted by the Appellants were recorded in the Settlement Decision.

Over a thousand follow-on damages claims have been brought in various EU member states in connection with the *Trucks* Settlement Decision, including a large number in the UK.⁶

Follow-on damages proceedings in the CAT

The CAT's judgment concerned a preliminary issue arising in seven damages claims brought by parties who purchased or leased trucks made by the Appellants during the period of the infringement. The claims are based on an allegation that the prices paid by the claimants for those trucks were artificially inflated by the Appellants' unlawful conduct.

In each claim, the Appellants (here, the **Defendants**) pleaded that they denied or did not admit some of the facts pleaded by the Respondents even though those facts were recorded in the Settlement Decision. The CAT therefore sought to decide, as a preliminary issue, to what extent the *Trucks* Settlement Decision was binding for the purposes of domestic damages claims.

The Settlement Decision comprises a short operative part that sets out what the Commission has decided, and a number of recitals explaining the background and reasoning. The parties' disputed the binding effect of Article 2 of the operative part, which sets out details of the fines imposed on the Defendants, and a number of recitals that describe the nature and scope of the infringement and the relevant legal principles for the infringement and imposition of fines. The CAT conducted an analysis of which facts could be said to be binding and which could not.

The CAT held:

- As a matter of EU law, settlement decisions contain essential facts and non-essential facts. Essential facts form the 'essential basis' of or 'necessary support' for a decision, whilst non-essential facts do not.⁷
- Article 16 of Regulation 1/2003 provides that "[w]hen national courts rule on ... decisions ... under Article [101] which are already the subject of a Commission decision, they cannot take decisions running

² Daimler, DAF, MAN, Volvo/Renault, and Iveco. MAN's fine was reduced to zero under the Commission's 2006 Leniency Notice as it revealed the existence of the cartel to the Commission.

³ Scania. This decision is still under appeal.

⁴ The settlement procedure is set out in amendments to Regulation 773/2004 (as amended), accompanied by the Commission Notice on the conduct of settlement

procedures (2008) Official Journal C 167/01 (the **Settlement Notice**).

⁵ Settlement Notice, point (20)(a). *See also AB Volvo (PUBL) v Ryder Ltd* [2020] EWCA Civ 1475, at 10.

⁶ *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 14, at 3.

⁷ *See AB Volvo (PUBL) v Ryder Ltd* [2020] EWCA Civ 1475, at 35.

counter to [that] decision". The CAT held that, as a matter of EU law, only the essential facts of the Settlement Decision were legally binding on the CAT, and not the non-essential facts.⁸

- However, as a matter of English law, the Defendants were not able to deny the non-essential facts of the Settlement Decision, as to do so would be an abuse of process. Although the CAT provided for a limited set of circumstances in which the Defendants could challenge the facts of the Settlement Decision without it being an abuse of process,⁹ no such circumstances applied in this case. Accordingly, the CAT held that a finding of an abuse of process was appropriate in circumstances where:
 - The Defendants had been aware of the potential for private damages claims following the Commission's decision; and
 - The Defendants had benefitted from the settlement procedure, including their receipt of a 10% reduction in their fine from the Commission.¹⁰

The Court of Appeal's findings

The Appellants appealed to the Court of Appeal on four grounds.

Issue 1: Whether the application of the English law doctrine of abuse of process is consistent with EU law

The Appellants argued that the application of the abuse of process doctrine to non-essential facts contravened the supremacy of EU law for three reasons.

1. Article 16, Regulation 1/2003

The Appellants submitted that applying the abuse of process doctrine to non-essential facts failed to give

full effect to (or "*clashed*" with) Article 16 of Regulation 1/2003. This was because Article 16 did not prevent defendants from challenging non-essential facts.¹¹

The Court of Appeal rejected this argument. It first stated that Article 16 was directed at preventing the national court from arriving at a conclusion that ran counter to a Commission decision. However, there is nothing in Article 16 to direct a national court as to how it should treat non-essential facts.¹²

Accordingly, a domestic rule which treats non-essential facts as true does not "*clash*" with Article 16,¹³ as doing so does not run-counter to the factual findings of a Commission Decision.

2. Articles 47 and 48 of the Charter of Fundamental Rights

Article 47 refers to a defendant's right to an effective remedy and fair trial. Article 48 refers to a defendant's presumption of innocence and right of defence.

The Appellants argued that non-essential facts could not be appealed to the European General Court. As a result, it was submitted that it would be a breach of Article 47 and Article 48 for the UK courts to treat the non-essential facts as binding, as the Appellants benefited from a presumption of innocence.¹⁴

The Court of Appeal rejected this argument, holding that:

- The Appellants *had* had the opportunity to challenge the non-essential findings under the Commission's settlement procedure;¹⁵
- The Commission's procedure in any event provides a number of procedural safeguards that ensured observance of the Appellants' rights under Articles 47 and 48.¹⁶

3. Article 4(3) TEU

The Appellants held that the CAT's decision would deter future cartellists from using the Commission's

⁸ *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 14, at 68.

⁹ *Id.* at 141.

¹⁰ *Id.* at 128 onwards.

¹¹ *AB Volvo (PUBL) v Ryder Ltd* [2020] EWCA Civ 1475, at 54.

¹² *Id.* at 55.

¹³ *Ibid.*

¹⁴ *Id.* at 68.

¹⁵ *Id.* At 129.

¹⁶ *Id.* at 131.

settlement procedure, and that this deterrent effect amounted to a breach of the Court's duty of sincere cooperation under Article 4(3) TEU.¹⁷

The Court of Appeal rejected this, holding that:

- The settlement procedure provides a number of advantages to cartelists. Accordingly, the creation of any countervailing disadvantage under national law was not in breach of Article 4(3). In this regard the Court of Appeal noted that nothing in the Damages Directive¹⁸ stated that cartelists should be provided with additional domestic protection from that provided by the settlement procedure.¹⁹ Accordingly, the Court was entitled to treat the Appellants' freely made admissions as being true;
- In any event, as the settlement procedure provides adequate procedural safeguards to the Appellants, Article 4(3) is not engaged by a national court holding the Appellants to their freely-made admissions.²⁰

Issue 2: Whether the matter should be referred to the Court of Justice under Article 267 TFEU

The Court of Appeal held the questions of EU law raised by Issue 1 were *acte clair*, and that accordingly no reference for a preliminary ruling to the CJEU was required.²¹

Issue 3: Whether the non-essential facts were final and binding on the Appellants

As a matter of English law, the abuse of process doctrine applies only to decisions that are final and binding on the parties to which they are addressed. The Appellants submitted that the non-essential facts in the Settlement Decision were *not* final and binding, as they were incapable of being appealed. Accordingly the Appellant's submitted that the abuse of process doctrine could apply to non-essential facts.

The Court rejected this argument for three principal reasons.

First, there was no support in EU law for the proposition that only appealable facts are final and binding.²²

Second, the Court held that the distinction between essential and non-essential facts was irrelevant to the English law of abuse of process, which does not distinguish between the essential and non-essential parts of a decision.²³ As a result, the Court refused to allow the importation of European concepts of essential and non-essential facts to influence how the English law doctrine of the abuse of process should be applied.²⁴

Third, the Appellants' submission ignored the fact that they had been afforded ample opportunity to challenge any of the non-essential facts in the Settlement Decision. Instead the Appellants voluntarily admitted to all the non-essential facts they now challenged. Against this background, Sir Geoffrey Vos LJ concluded that the inability to appeal the non-essential recitals did not prevent the non-essential facts from being final and binding as a matter of English law.²⁵

The Court therefore held that the abuse of process doctrine was properly engaged in respect of the entire Settlement Decision.

Issue 4: Whether the CAT applied a sufficiently high threshold

The Appellants further submitted that the CAT had failed to apply the high threshold required to make a finding of an abuse of process. While the Court agreed that a high threshold was required in order to make such a finding, the Court was satisfied that the CAT had applied the necessary threshold in this case.²⁶

In determining this issue, both Rose and Sir Geoffrey Vos LJJ emphasised their agreement with the reasons given by the CAT. As a result, the Court held that the

¹⁷ Id. at 80.

¹⁸ Directive No 2014/104/EU.

¹⁹ *AB Volvo (PUBL) v Ryder Ltd* [2020] EWCA Civ 1475, at 82-84.

²⁰ Id. at 131.

²¹ Id. at 147.

²² Id. at 93.

²³ Id. at 142.

²⁴ Id. at 194.

²⁵ Id. at 141.

²⁶ Id. at 103.

two (non-cumulative) limbs of the *Bairstow* test for an abuse of process were satisfied, as²⁷

- It was “*manifestly unfair*” for the Defendants to deny the findings of the Settlement Decision;
- To allow the Defendants to do so would “*bring the administration of justice into disrepute.*”

Implications

This judgment indicates that there are limited circumstances in which defendants can challenge the factual findings of Commission decisions in follow-on damages cases. Parties will likely exercise significant caution before agreeing to any non-essential facts when settling, and it may even cause some companies to question the merits of settling altogether.

Defendants, however, should be able to challenge non-essential facts in some circumstances, most notably in the event that new evidence comes to light to which defendants could not reasonably have had access during proceedings before the Commission. Furthermore, if after the end of the Brexit transition period Commission decisions are no longer binding on English courts, a defendant may have greater scope to challenge the essential facts of a Commission decision on one of the grounds identified by the CAT.

The judgment could have significant implications for follow-on damages litigation in the English courts after the end of the Brexit transition period. There has been some speculation that if future Commission decisions will no longer bind English courts, defendants to follow-damages litigation may be permitted to challenge the factual findings of those decisions.

However, the Court of Appeal’s judgment suggests that there are circumstances where this is unlikely to be the case. Even if future Commission decisions are no longer legally binding, defendants may still be precluded from challenging the factual findings of those decisions, where they are adopted under the Commission’s settlement procedure, where to do so would be an abuse of process in English law.

The judgment may therefore provide claimants with additional confidence that England & Wales remains an attractive jurisdiction to bring follow-on damages claims even after Brexit.

...

CLEARY GOTTlieb

²⁷ Id. at 106-107, 145.