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Alert Memo

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U.K. CAT Narrows The Scope For "Follow-on" Claims

On March 21, 2011, the U.K. Competition Appeal Tribunal (the "CAT") struck out a follow-on claim for damages brought by Emerson Electric and others ("Emerson") against Le Carbone (Great Britain) Ltd ("Carbone GB") under Section 47A of the Competition Act 1998 (the "Competition Act").[1] The CAT held that the claim could not proceed because Carbone GB was not an addressee of the European Commission's 2003 infringement decision (the "Decision"),[2] and that the claim would thus not be a true "follow-on" claim for the purposes of the Competition Act (*i.e.*, liability against Carbone GB would need to be proved).

The judgment seems to circumscribe further the circumstances in which the CAT will allow a cartel claim to proceed. In practice, it seems that the CAT will only hear cartel claims where (1) the defendant is domiciled in the UK, (2) the defendant is an addressee of the Commission's decision, and (3) there are no appeals of the infringement decision pending (including, potentially, appeals that only go to the level of the fine). This approach stands in stark contrast to the pragmatic approach adopted by the U.K. High Court (the "High Court") in recent decisions (notably *Cooper Tire*[3] and *National Grid*[4]). More specifically, the High Court has been more willing to permit cartel claims to proceed with U.K. jurisdiction where the defendant is not named in the infringement decision provided that an arguable case can be made that it participated in or knew of the infringement. In addition, the High Court has been willing to allow elements of a cartel claim to proceed

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1 Case No: 1077/5/7/07 *Emerson Electric Co and others v Morgan Crucible Company plc and others* [2011] CAT 4, judgment of March 21, 2011 ("*Emerson Electric Co*").

2 Case No. Comp. 38.359 – *Electrical and mechanical carbon and graphite products*.

3 *Cooper Tire & Rubber Company Europe Ltd & Ors v Dow Deutschland Inc & Ors* ([2010] EWCA Civ 864), judgment of July 23, 2010 ("*Cooper Tire*").

4 *National Grid v. ABB and Ors* [2009] EWHC 1326 (Ch), judgment of June 12, 2009 ("*National Grid*").

while an appeal of an infringement decision is pending. The pragmatic approach of the High Court is in part enabled by the fact that it is not bound by the confines of Section 47 of the Competition Act and in part because acartel claim in the High Court is (at least nominally) a standalone action. In practice, therefore, notwithstanding the CAT's expertise in competition related matters, there seems to be tangible benefit in commencing cartel claims in the High Court rather than the CAT, especially for those cases where a challenge to jurisdiction seems likely or an appeal of the infringement decision is pending.

Section I below summarizes the background to the claim, Section II outlines the CAT's judgment, and Section III considers the implications of the judgment.

I. BACKGROUND

Emersons's damages action followed the Decision, which found that certain companies had breached Article 101(1) of the TFEU by participating in an illegal carbon and graphite products cartel. The addressees of the Decision included Le Carbone-Lorraine S.A. ("Carbone S.A."), a French company and the parent of Carbone GB, who was fined €43 million for its alleged involvement.

In 2009, Emerson and other customers of Carbone S.A. and Carbone GB brought an action in the CAT, naming both Carbone S.A. and Carbone GB as defendants. The claimants alleged that they had purchased products at artificially inflated prices and so suffered monetary loss. Importantly, the claimants argued that Carbone S.A. and Carbone GB formed a single infringing undertaking and that the parent company had been named in the Decision in a representative capacity.

In September 2010, Carbone GB applied for strike out of the elements of the claim that concerned it on the basis that it had not been named in the infringement decision.[5]

[5] The application was made under Rule 40 of the CAT Tribunal Rules, which allows the CAT, of its own initiative or on the application of a party, to reject (in whole or in part) a claim for damages under section 47A at any stage of the proceedings if *inter alia* it considers that there are no reasonable grounds for making the claim (Competition Appeal Tribunal Rules 2003 (SI 2003 No.1372)).

II. THE CAT'S JUDGMENT

The CAT did not accept Emerson's argument that Carbone S.A. had acted in a representative capacity and on behalf of Carbone GB, in part because there was nothing in the infringement decision suggesting that Carbone GB had been involved in the infringing behavior.[6] Although the Decision referred to a U.K. subsidiary, Carbone S.A. had more than one subsidiary in the U.K. at the time of the infringement. There was nothing to suggest that the Commission was identifying Carbone GB in its reference or, indeed, that anything in the Decision amounted to a finding that it was part of the same undertaking as Carbone S.A. at the material time. Furthermore, even if Carbone S.A.'s U.K. subsidiary were to be shown to be a reference to Carbone GB, that of itself may not be sufficient to amount to a finding by the Commission that Carbone GB had infringed Article 101(1). Accordingly, the CAT held that it was compelled to strike out the claim against Carbone GB because of the limitations of Section 47A of the Competition Act.

III. IMPLICATIONS OF THE CAT'S JUDGMENT

The CAT's exclusion of a party not named in the infringement decision from follow-on damages proceedings is perhaps not surprising, in particular given the case law of the Community courts.[7] However, the judgment serves to underline the limited scope of the CAT's jurisdiction under Section 47A of the Competition Act and emphasizes that the CAT will only remain an attractive forum to an increasingly narrow class of claimants, namely those that have a claim against a U.K. defendant that is an addressee of the infringement decision (and provided that there are no appeals of the infringement decision pending, including appeals that simply go to the level of the fine).

The restrictions on follow-on damages actions before the CAT stand in contrast to the approach to jurisdiction and cartel claims taken by the High Court in recent cases

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6 The Claimants sought to rely on the Commission's decision in *Cartonboard* (OJ 1994 L 243), which referred to the fact that the corporate group was being represented by the parent company. However, there was nothing to indicate that the Commission meant that, although the parent company was named as the addressee, the decision was also being directed to other legal persons who were, therefore, equally bound by it.

7 *See, e.g.*, Case T-358/06 *Wegenbouwmaatschappij J. Heijmans v Commission* [2008] ECR II-110, in which the Court of First Instance (now the General Court) ruled that the applicant was not an addressee of the Commission's eventual decision and that its appeal was thus inadmissible.

(notably *Cooper Tire* and *National Grid*), which reinforces the prevailing view that the High Court is the forum of choice for cartel claims.

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