

## UK Supreme Court Rules On The Deadline For Bringing Follow-On Claims For Damages Before The UK Competition Appeal Tribunal

On October 24, 2012, the UK Supreme Court unanimously confirmed a Court of Appeal judgment holding that BCL had missed the deadline to bring a claim for follow-on damages under section 47A of the Competition Act 1998 against BASF. BCL had waited more than two years after a final finding by the European Commission that BASF had participated in the *Vitamins* cartel. Read together with the Court of Appeal's prior ruling, the Supreme Court's judgment means that:

- Where the time limit for bringing an appeal against a prohibition decision<sup>1</sup> has expired, without any challenge as to the existence of the infringement,<sup>2</sup> the decision as it relates to the finding of an *infringement*, is *res judicata*.
- Where the decision on *infringement* is finalised, there is no justification to delay bringing an action (which is based on that decision) for follow-on damages under section 47A of the Act.
- This action must be brought before the Competition Appeal Tribunal within 2 years of the date on which the decision on *infringement* was finalised.
- Accordingly, an appeal challenging only the amount of the penalty imposed does not toll the limitation period; and,
- Once this statutory limitation period for bringing a follow-on damages claim before the CAT has expired, the CAT has no power to grant a time extension.

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<sup>1</sup> This applies to a prohibition decision from the European Commission, the Office of Fair Trading or any other sectoral regulator with concurrent competition powers.

<sup>2</sup> Within its decision, the relevant competition authority will make a finding as to the existence of an infringement of the prohibition. It may also impose a financial penalty on the party for acting in breach of the prohibition. A party may appeal against one or both elements of the decision.

The ruling of the Supreme Court – which is consistent with other recent rulings in this area – provides clarity on the operation of the CAT’s procedural rules and may encourage greater use of the CAT as a forum for private damages actions.<sup>3</sup>

## **I. BACKGROUND TO THE APPEAL**

In November 2001, the European Commission fined, *inter alia*, BASF €296.16 million for its participation in the *Vitamins* cartel, contrary to Article 81 of the EC Treaty (now Article 101 TFEU). BASF appealed to the Court of First Instance (the “CFI”) (now the General Court) but limited its appeal to the amount of the penalty imposed only. BASF did not challenge the existence of or its participation in the infringement. In March 2006, the CFI rendered its judgment and reduced the amount of the penalty to €236.8 million. BASF did not appeal this judgment.

## **II. PROCEEDINGS BEFORE THE CAT AND COURT OF APPEAL**

### 1. The commencement date of the two year limitation period

In March, 2008 – more than six years after the date of the Commission’s decision – BCL sought to bring a follow-on claim for damages against BASF and others before the CAT under section 47A of the Act.<sup>4</sup> Section 47A provides that following a finding of infringement by either the European Commission or the U.K. competition authorities, any person who has suffered loss as a result of the infringement may bring a follow-on claim for damages before the CAT. Part IV of the CAT Rules 2003 imposes a two-year limitation period on bringing such a claim. Under Rule 31(2), this limitation period commences on the later of the date on which the cause of action accrued, the date on which a right to bring an appeal expired, or the date of the final judgment in an appeal.

BASF challenged BCL’s claim as being out of time, arguing that the two-year limitation period commenced once the deadline for appeals against the Commission’s finding as to the existence of an infringement (here, the decision on *infringement*) expired (*i.e.*, on January 31, 2002). BCL contended that the limitation period commenced instead from the date that BASF’s deadline to appeal against the CFI’s judgment expired, even if the appeal concerned the amount of penalty imposed only. This meant that any claim brought before May 25, 2008 would not be time barred.

In September 2008, the CAT held that BCL’s claim was in time. The CAT found that to be able bring a damages claim under section 47A, as of right, there had to be a

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<sup>3</sup> Note that the UK Government has recently consulted on private actions in competition law and has proposed that the CAT become the sole arbiter of follow on claims. See: <http://www.bis.gov.uk/Consultations/consultation-private-actions-in-competition-law>

<sup>4</sup> *BCL Old Co Ltd and others v BASF plc and others* [2008] CAT 24: <http://www.bailii.org/uk/cases/CAT/2008/24.html>

definitive decision. Where the status of the decision was still in doubt, even only as to the penalty imposed, the claim was not yet properly founded. The CAT considered that a commencement date determined by the decision on *infringement* only risked relying on a decision which could be changed on appeal.<sup>5</sup>

In May 2009, however, the Court of Appeal (“COA”) overturned the CAT’s findings, concluding that the wording of section 47A clearly indicated that only the expiration of the deadline for appeals against a decision on *infringement* was relevant for determining the commencement date.<sup>6</sup> In addressing the CAT’s concerns, the COA clarified that a decision establishing an infringement, unless it is itself the subject of an appeal, is binding on the CAT and therefore definitive, regardless of whether an appeal is brought against the penalty (and irrespective of any discussion about the decision on *infringement*, during an appeal against the penalty).

2. The CAT’s power to extend the time limit for claims

BCL applied to the CAT for an extension in which to bring their claim, citing Rule 19(2)(i) of the CAT Rules, which they alleged gave the CAT discretion to abridge or extend any time limits, whether expired or not. BCL’s application was rejected by the CAT in November 2009, on the basis that BCL had delayed in pursuing their claim.<sup>7</sup> In November 2010, the COA dismissed BCL’s appeal against the CAT’s judgment, finding that the CAT had no discretion under the CAT Rules to extend the limitation period for claims brought under section 47A of the Act.<sup>8</sup> BCL was granted permission to appeal to the Supreme Court in March 2011.

**III. PROCEEDINGS BEFORE THE SUPREME COURT**

The COA established that BCL knew BASF was not challenging the decision on *infringement* in its appeal to the CFI. Given this finding of fact, BCL’s appeal to the Supreme Court was limited to two questions: (1) whether there was legal uncertainty regarding the commencement date of the limitation period and the CAT’s lack of any power to extend this limitation period, which had made it “*excessively difficult*” for BCL to pursue its claim against BASF, and so breached the European principles of legal certainty and effectiveness; and (2) what effect, if any, such legal uncertainty had on the application of the limitation period as between civil litigants, where the limitation period applies as a matter of domestic law.

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<sup>5</sup> *Ibid*, at paragraphs 34, 35 and 37 which detail the *ratio* of the CAT’s decision.

<sup>6</sup> *BCL v BASF* [2009] EWCA Civ 434, at paragraph 22-23.

<sup>7</sup> *BCL v BASF* [2009] CAT 29, at paragraph 34.

<sup>8</sup> *BCL v BASF* [2009] EWCA Civ 434, at paragraph 49.

1. The principle of effectiveness

The Supreme Court recalled that the principle of effectiveness as established in *Courage Ltd v Crehan*<sup>9</sup> imposed a responsibility on national courts to avoid implementing procedural rules that would “render practically impossible or excessively difficult the exercise of rights conferred by Community law.” The Supreme Court cited the judgment of the European Court of Justice in *Danske Slagterier v Germany*,<sup>10</sup> in which it was held that there may be a breach of the principle of effectiveness where individuals were, as a result of “significant legal uncertainty... unable to determine the applicable limitation period with a reasonable degree of certainty” and therefore could not obtain reparation for loss or damage resulting from a breach of EU law. The Supreme Court found that the principles of effectiveness and legal certainty did not impose a requirement on Member States for “clarity beyond doubt.” Instead, the test for legal certainty was whether the true effect or interpretation of national limitation periods, and the rules regarding their application, was “sufficiently foreseeable or clear” to enable litigants to exercise their rights under Community law.

2. The commencement date of the limitation period

The Supreme Court upheld the COA’s judgment that, given its plain and ordinary meaning, the Act drew a clear distinction between a decision on the infringement of a prohibition and a decision to impose a penalty; and that the relevant commencement date was determined by reference to the decision on *infringement* only. In this case, it was accepted that BASF’s appeal was against the penalty imposed only.

BCL cited *Emerson Electric v Morgan Crucible*,<sup>11</sup> in which the CAT had held in similar circumstances that the two-year limitation period under Section 47A had not yet commenced “as long as ‘any’ proceedings have been brought in the European Court.” BCL noted that the CAT had applied *Emerson Electric* in the present proceedings but that this had subsequently been reversed by the COA. BCL argued that this inconsistency indicated that the position under the Act was unclear.

The Supreme Court rejected this argument, finding that the commencement date of the limitation period was sufficiently foreseeable. *Emerson Electric* addressed a different issue; specifically, whether a Commission decision establishing a cartel infringement referred only to the cartelist defending the follow-on damages claim (and therefore an appeal by another cartelist against the infringement decision was irrelevant) or referred to all undertakings implicated in the infringement (meaning that an appeal by one cartelist may

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<sup>9</sup> Case C-453/99, at paragraph 29.

<sup>10</sup> Case C-445/06, at paragraph 32.

<sup>11</sup> *Emerson Electric Co and others v Morgan Crucible and others* [2007] CAT 28.

postpone the time limit for follow-on damages claims against co-cartelists that have not appealed). BCL’s appeal, on the contrary, concerned whether an appeal against the European Commission’s decision imposing a penalty was “*in any sense a relevant appeal which can postpone the time for a follow-on claim*” against BASF, where BASF had not appealed against the finding of *infringement* made against it.

The Supreme Court held that the COA had therefore rightly concluded that the language and effect of the Act were clear. While it was unfortunate that the CAT had at first instance reached a different view, it was in the nature of an appellate court system to correct such legal errors. The ordinary operation of the appellate system could not be interpreted as indicating a lack of legal certainty or effectiveness.

3. The CAT’s power to extend the limitation period for commencing proceedings

The Supreme Court held that it was entirely foreseeable that the CAT did not have any power to extend the limitation period provided for by the Act. Analysing the procedural rules of the CAT, it was clear that the CAT’s discretionary power to extend relevant time limits *during the course of* proceedings did not extend to time limits for the *commencement of* proceedings. Accordingly, on a proper construction of the CAT Rules, it was clear that the Secretary of State had not intended to confer upon the CAT a power to extend the time limit applicable to follow-on damages claims under section 47A of the Act. BCL’s ground of appeal on this point was therefore dismissed.

4. Appropriate relief for breach of the principles of effectiveness and legal certainty

Although it was not necessary to do so, the Supreme Court nevertheless considered what relief might have been appropriate, in the event that the CAT’s procedural rules had been in breach of the principles of legal certainty and effectiveness. Citing *Commission v Ireland*,<sup>12</sup> the Supreme Court observed that while an action may have lain against the State for breach of its obligations under European law, BASF would nevertheless have been entitled to rely upon the unlawful rule for the purposes of domestic civil litigation. European law could not require the setting aside of a limitation defence as between civil parties, which a defendant (independent of the State), had successfully established under domestic law, on the basis that the existence or scope of such rule under domestic law was uncertain until the court decision establishing it. To hold otherwise would deprive the national limitation period of effectiveness and the national law of legal certainty.

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<sup>12</sup> Case C-456/08 [2010] ECR I-859.

#### IV. IMPLICATIONS OF THE SUPREME COURT'S JUDGMENT

The Supreme Court's findings are relevant where a defendant appeals against a decision by the European Commission or Office of Fair Trading (or any other sectoral regulator with concurrent competition powers) as to the level of penalty imposed only. The judgment clarifies that: (1) the two year limitation period for bringing a follow-on claim for damages begins to run once all appeals challenging the decision on *infringement* have been exhausted (regardless of any pending appeals on penalty or costs),<sup>13</sup> and (2) the CAT has no power to grant an extension once this statutory limitation period has expired.

The ruling appears consistent with the recent judgment of the CAT in *Deutsche Bahn v Morgan Crucible*<sup>14</sup> (this judgment has been appealed to the Supreme Court). In that judgment, the CAT held that the limitation period for Deutsche Bahn's follow-on claim against a cartel whistleblower, Morgan Crucible, would not start to run until the conclusion of appeals by co-cartelists challenging the existence of a cartel infringement.

In *BCL v BASF* it was noted that counsel for BCL had advised against bringing proceedings against BASF at an earlier date, on the (mis)understanding that such a claim would be premature. By resolving any ambiguity on this procedural issue, the Supreme Court's judgment may encourage greater use of the CAT as a forum for private damages actions.

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If you have any questions, please feel free to get in touch with your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (<http://www.clearygottlieb.com>).

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<sup>13</sup> See the COA's judgment in *Deutsche Bahn v Morgan Crucible* [2012] EWCA Civ 1055, which provides that the two year limitation period does not commence until all appeals are determined, even if the person from whom damages are sought did not itself bring an appeal on liability. However, Morgan Crucible is seeking leave to appeal against this judgment to the Supreme Court.

<sup>14</sup> Case 117/5/7/10.

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