

## Insights

# BOUND BY PRIOR ADMISSIONS: COURT OF APPEAL UPHOLDS THE CAT'S ABUSE OF PROCESS JUDGMENT AGAINST TRUCK CARTELISTS

Nov 11, 2020

## SUMMARY

The Court of Appeal has strongly dismissed an appeal against the Competition Appeal Tribunal's ("CAT's") decision that it would be an abuse of process for certain truck manufacturers to seek to challenge the facts recorded in the Trucks Cartel Settlement Decision in follow on damages actions save for in certain limited circumstances.

The Court of Appeal's Judgment is likely to have wide implications for Claimants bringing damages proceedings arising out of a Commission Settlement Decision as well as those companies who have, or intend to, settle competition investigations with the Commission.

## BACKGROUND TO THE APPEAL

In 2016, the European Commission issued a settlement decision in which it found a number of trucks manufacturers liable for participating in a cartel concerning the collusion of pricing and gross prices and the timing and passing on of costs for emission technologies (the "**Settlement Decision**").

In a series of damages claims against certain truck manufacturers, the Claimants sought to rely on the facts set out in the Settlement Decision in support of their claims. To varying degrees, the Defendants sought to not admit or deny a number of those facts in an attempt to force the Claimants to have to prove at trial that each of those facts were correct.

As a result of this, the CAT held a preliminary issues hearing in December 2019 to determine the extent to which the CAT and/or the Defendants were already bound by the findings of fact set out in the Settlement Decision. In its judgment in March 2020, the CAT held that a number of the facts set out in the Settlement Decision were binding as a matter of EU law because they constitute the essential basis for the operative part of the Commission's Settlement Decision (the 'essential facts').

This meant that the CAT could not reach a decision which was inconsistent with 'essential facts' due to Article 16 Regulation 1/2003 ("**Article 16**").

In respect of those facts in sections 3, 4 and 7 of the Settlement Decision that were found not to be binding as a matter of EU law (the 'non-essential facts'), the CAT held that it would be an abuse of process for the Defendants to seek to deny or not admit those facts unless the defendants could show a legitimate reason for them to do so by reference to the following principles:

1. the Claimant does not object to a positive challenge to a particular fact by a Defendant;
2. the finding in the Settlement Decision does not accurately reflect the underlying document referred to, with the CAT deciding in any such case whether an inconsistency exists between the Settlement Decision and the relevant document;
3. the Defendant relies on new evidence, which the Defendants could not have reasonably had access to at the time of the Commission's investigation;
4. where a Claimant pleads facts which are more detailed than or additional to the findings in a recital of the Settlement Decision, it will not be an abuse of process for a Defendant to plead in response to those detailed or additional facts provided that it does not amount to a denial of a finding in a recital (unless justified by one of the principles at 1-3 above); or
5. If not covered by principles 1-4 above, the Defendant must set out the reasons for advancing a positive case contrary to a finding in a recital and the CAT will determine whether it an abuse of process for that case to be advanced.

The key reason for the CAT's finding on abuse of process was that the Settlement Decision recorded that the *"facts as outlined in this Decision have been accepted by MAN, Daimler, Iveco, Volvo and DAF (the "Addressees") in the settlement procedure"*. The CAT concluded that it would both bring the administration of justice into disrepute and be unfair to the Claimants if the Defendants were permitted to not admit or deny the facts in the Settlement Decision unless they fell within one of the five principles above.

## THE APPEAL

The Defendants appealed the abuse of process aspect of the CAT's judgment to the Court of Appeal. They argued that: (1) Article 16 precludes the application of national rules on abuse of process to determine the extent to which findings are binding, the CAT's Judgment infringed on the Defendants' rights of defence and presumption of innocence or otherwise amounted to a breach of the duty of sincere cooperation (the "**EU Law Questions**"); (2) if the answer to the EU Law Questions was not clearly in the Defendants favour, then these questions ought to be referred to Court of Justice; and (3) the CAT had misapplied the English law doctrine of abuse of process (the "**English Law Question**").

## COURT'S RULING ON THE EU LAW QUESTIONS

### **(i) Article 16**

Article 16 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 counter to [that] decision.”

The Defendants contended that in order to give proper effect to Article 16, they must be permitted to challenge ‘non-essential’ facts in national proceedings. This, they argued, was because the EU legislature had set down its own rule in Article 16 for when a finding in a Commission Decision would be binding. As the CAT had decided that only the ‘essential facts’ were binding under Article 16, they argued that it would be inconsistent with this legislative framework to allow national rules of abuse of process to make the ‘non-essential facts’ also binding.

The Court of Appeal strongly disagreed. Article 16 only extends to those pleas in relation to ‘essential facts’ which if the Court found in its final judgment to be incorrect, would place the Court in breach of Article 16. The Court held it would not ‘run counter’ to the Decision for the non-essential facts recorded in the Settlement Decision to be binding under national law.

### **(ii) Right to fair trial and presumption of innocence**

The Defendants argued that since ‘non-essential’ facts in the Settlement Decision cannot be appealed to the EU General Court, it would infringe the right to the presumption of innocence if those facts could not be challenged in national courts in damages proceedings.

The Court rejected this. It explained that the elephant in the room in the Defendants’ position, was that they had freely admitted the conduct to the Commission in the settlement process. Furthermore, the Court noted that the settlement procedure provided the Defendants an opportunity to challenge the non-essential facts: the Commission had issued a statement of objections, provided access to the Commission’s administrative file and the Defendants could have brought a procedural appeal in the European Courts if the Settlement Decision did not reflect the admissions made in their settlement submissions.

### **(iii) Duty of sincere cooperation**

The Defendants argued that the CAT’s Judgment amounted to a breach of the duty of sincere cooperation in Article 4(3) Treaty of European Union. This, they argued, was because the CAT is required to cooperate with the Commission in promoting the use of the settlement procedure and that the CAT’s judgment would deter cartelists from using the settlement procedure.

The Court explained that the EU legislature has struck a careful balance between the goal of detecting cartels and encouraging cartelists to admit their conduct through the settlement procedure, and the goal of encouraging and facilitating damages actions in national courts. Whilst

the EU legislature have put in place certain safeguards preventing the disclosure of leniency statements and settlement submissions, it has not chosen to place limits on the application of national rules to determine how courts will treat the non-essential facts recorded in settlement decisions. There is, therefore, no breach of the duty of sincere cooperation by the CAT in its decision to apply the abuse of process doctrine.

#### **(iv) Reference to the Court of Justice?**

The Court was confident that the EU Law Questions could be disposed of without a reference to the Court of Justice of the European Union, which had been requested by the Defendants. The Chancellor, in his Judgment, noted that these questions were “*acte clair*” such that no reference was necessary.

#### **COURT’S RULING ON THE ENGLISH LAW QUESTION**

The Defendants also argued that even if the application of the abuse of process doctrine was not precluded under EU law, the CAT had erred in its application of the abuse of process rules as a matter of English Law.

First, the Defendants argued that the ‘non-essential facts’ did not form part of a ‘final decision’ and so the ‘Hunter-type’ abuse of process test applied by the CAT was not engaged. The Court rejected this and found that the whole of the Settlement Decision amounted to a ‘final decision’.

Second, the Defendants argued that the CAT had failed to apply a sufficiently high threshold to the case given that the parties to the Settlement Decision and the follow on damages actions were not the same. The Court held that there was “no *substance*” to this argument. It held that the ‘high threshold’ that is required in such circumstances is inherent in the “Bairstow” test that the CAT applied under which an abuse of process will only arise in cases of manifest unfairness or where the administration of justice is brought into disrepute.

The Court found that the CAT was “*entirely justified*” in finding that it would create great unfairness on claimants to require them to prove facts that have already been admitted by the Defendants to the Commission. It also agreed that “*it would be an affront to most people’s ideas of justice*” for the Appellants to be allowed to resile from their admissions and to put the claimants to proof on the non-essential facts.

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BCLP’s Competition Litigation team lead by Ed Coulson acted for a number of Claimants in the appeal. Should you require any further information about this case, or cartel damages generally, please do contact [Ed Coulson](#).

#### **RELATED CAPABILITIES**

- Antitrust

## MEET THE TEAM



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