

## client alert

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### UK SUPREME COURT CONFIRMS THAT TIME LIMITS FOR DAMAGES CLAIMS RUN AGAINST INDIVIDUAL CARTEL MEMBERS SEPARATELY

editorial

Adam Rooney  
Partner

Under the UK Competition Act 1998, the limitation period for a private law damages claim is two years. Such claims typically follow a decision of the European Commission or Office of Fair Trading in the UK that there has been an infringement of competition law, and if that decision is appealed, the outcome of any appeal is unlikely to be known within that two-year period. So what should potential claimants do if one cartel member appeals but the others do not, and when can potential defendant cartel members be secure in the knowledge that any claim against them, if not already made, will be time-barred?

#### LEGAL BACKGROUND

Section 47A of the 1998 Act gives a person who has suffered loss or damage by virtue of an infringement of EU or UK competition law the right to bring a monetary claim before the Competition Appeal Tribunal (CAT). A claim can be brought following a decision by the European Commission finding that either Article 101(1) or Article 102 of the Treaty on the Functioning of the European Union (TFEU) has been infringed (Article 47A(6)(d)), or a decision by the OFT (or regulator with concurrent powers) finding that Article 101 or 102 and/or either the Chapter I or Chapter II prohibition of the 1998 Act has been breached.

Under Rule 31 of The Competition Appeal Tribunal Rules 2003 (SI 2003/1372) claims must be brought within the later of two years from:

- The date on which the right to bring an appeal against the relevant decision expires.
- The date on which such an appeal is determined.
- The date on which a cause of action accrued.

#### PROCEDURAL BACKGROUND

On 3 December 2003, the European Commission issued a decision finding that members of a carbon and graphite products cartel had infringed Article 81(1) of the EC Treaty (now Article 101 of the TFEU) by price fixing and market sharing.

Morgan, as whistleblower, escaped any fine. The Commission imposed total fines of EUR101.44m on the other six cartel members.

The cartel members had until 13 February 2004 to appeal the decision. Most of the cartel members appealed to the General Court, contending that it should annul the decision or substantially reduce the fines. The General Court dismissed their appeals on 8 October 2008, and the time for any further appeal to the Court of Justice against the finding of infringement expired on 18 December 2008.

On 15 December 2010, Deutsche Bahn AG and 30 other claimants (the "**Claimants**") brought a damages claim against the cartel members, including Morgan, in the CAT.

Morgan applied for an order rejecting the claims against it on the grounds that they had not been brought within the two-year time limit which, it contended, expired on 13 February 2006. It claimed that the suspension of the time period for bringing a damages action did not apply to it where it had not appealed the Commission's decision.

The CAT accepted this submission, and struck out the claim against Morgan as being out of time.

In July 2012, the Court of Appeal allowed an appeal by the Claimants and overturned the ruling of the CAT. The Court of Appeal held that the limitation period for bringing a damages action is extended while *any* appeal against the Commission's cartel infringement decision is pending before the European Courts, or where the decision could still be appealed, even though the individual defendant had not itself appealed the decision.

In reaching its decision, the Court of Appeal considered, *inter alia*, that a decision by the Commission that a cartel exists relates to a single infringement, rather than to any particular party.

According to the Court of Appeal, the time limit for bringing a damages action against Morgan was, therefore, the same as for bringing actions against those cartel participants that had appealed the European Commission's cartel decision, being 18 December 2010 (i.e. two years from 18 December 2008). The Claimants' claims were, it concluded, brought in time.

## DECISION OF THE SUPREME COURT

The Supreme Court reversed the decision of the Court of Appeal, and restored the judgment of the CAT striking out the Claimants' claims against Morgan.

The Supreme Court held that a Commission Decision regarding the existence of a cartel constitutes a bundle of decisions addressed individually to the cartel members and which remain binding or not according to the outcome of any individual appeal. "*A successful appeal by one addressee, establishing that there was no cartel, has no effect on the validity and effects of the Decision determining that there was such a cartel and levying a fine as against another addressee who has not appealed*" [para 21].

It followed that the relevant decision establishing an infringement by Morgan was the Commission Decision dated 3 December 2003, and that once the time for Morgan to appeal had expired on 13 February 2004, the Claimants had two years within which to bring a claim. The Claimants' claim made on 15 December 2010 was therefore out of time.

## COMMENT

Whilst the decision brings some clarity regarding time-limits, the position remains complicated. In any particular cartel, certain members might be processed through the settlement procedure, and others be investigated outside of it. Even if a decision follows the settlement procedure, it can still be (and has been) appealed. In a very recent example, four cartel members (A, B, C and D) have been fined through the settlement procedure, and D has appealed against the amount of its fine. Three other alleged cartel members (E, F and G) are being investigated through the normal procedure. Accordingly:

- Time for bringing a damages claim is running against A, B and C;
- Time has stopped running against D, pending its appeal; and
- Time has not yet begun to run against E, F and G, because no decision has been made against them yet.

The position is yet more complicated for cartel members who may face claims for a contribution from the other members, or may face damages claims under some other legal basis (such as a claim for conspiracy, under general English tort law, which has a longer six-year limitation period).

The decision of the Supreme Court highlights the importance for potential claimants to act swiftly when considering damages claims reliant upon decisions of the Commission or OFT, particularly if they wish to negotiate a settlement without bringing any proceedings at all. This may, however, have negative impacts for immunity recipients or those who settle with the Commission, making them easy and early targets for such actions. The proposed EU directive on antitrust damages may address this issue to an extent. Cartel members are jointly and severally liable for the whole of any loss which their anti-competitive conduct causes, but under the draft directive:

- The liability of small-to-medium-sized (SME) members may be limited only to their direct or indirect customers, unless they took a lead in the infringement, coerced any other members or are repeat offenders; and
- The liability of an immunity recipient may be similarly limited, and it will only have to compensate other injured parties if they cannot obtain full compensation from the other cartel members.

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## CONTACTS

ADAM ROONEY

[adam.rooney@gide.com](mailto:adam.rooney@gide.com)

LAURENT GODFROID

[godfroid@gide.com](mailto:godfroid@gide.com)

You can also find this legal update on our website in the News & Insights section: [gide.com](http://gide.com)

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