



Period of limitations in follow-on competition cases: the elephant in the room?

Pinar Akman

School of Law, University of East Anglia

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Abstract

A series of private competition law cases in the UK has demonstrated that there are significant procedural issues that need to be resolved before private enforcement can take off in the way that the European Commission and the UK Government are currently encouraging. One of these issues is the period of limitations in a follow-on case where there are multiple infringers some of whom appeal the (infringement) decision of the competition authority and some of whom do not. This is an ongoing problem in the UK in the context of follow-on actions before the Competition Appeal Tribunal (CAT) and is currently awaiting resolution by the Supreme Court in *Deutsche Bahn*. This article shows that this seemingly simple question of period of limitations is in fact loaded with serious implications going well beyond a procedural, timing issue. Although the issue is pertinent to all types of infringements of competition law with multiple infringers, it has particular implications for leniency recipients in cartel cases and therefore, for the overall relationship between private and public enforcement of competition law. These implications demonstrate how far from desirable the current legal situation is. This article demonstrates what the overall preferable solution is regarding the treatment of period of limitations in follow-on cases based on Commission infringement decisions in the presence of multiple infringers from a UK and EU law point of view.

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A series of private competition law cases in the UK has demonstrated that there are significant procedural issues that need to be resolved before private enforcement can take off in the way that the European Commission and the UK Government are currently encouraging. One of these issues is the period of limitations in a follow-on case where there are multiple infringers some of whom appeal the (infringement) decision of the competition authority and some of whom do not. This is an ongoing problem in the UK in the context of follow-on actions before the Competition Appeal Tribunal (CAT) and is currently awaiting resolution by the Supreme Court in *Deutsche Bahn*. This article shows that this seemingly simple question of period of limitations is in fact loaded with serious implications going well beyond a procedural, timing issue. Although the issue is pertinent to all types of infringements of competition law with multiple infringers, it has particular implications for leniency recipients in cartel cases and therefore, for the overall relationship between private and public enforcement of competition law. These implications demonstrate how far from desirable the current legal situation is. This article demonstrates what the overall preferable solution is regarding the treatment of period of limitations in follow-on cases based on Commission infringement decisions in the presence of multiple infringers from a UK and EU law point of view.

I Introduction

In a series of private competition law cases in the UK, it has become clear that there are significant procedural issues that need to be resolved before private enforcement can take off in the way that the European Commission (Commission) and the UK Government are currently encouraging.¹ One of these procedural issues relates to the period of limitations in a follow-on case where there are multiple infringers some of whom appeal the (infringement)

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¹ See eg European Commission 'Green Paper – Damages Actions for Breach of the EC Antitrust Rules' COM(2005) 672, 19 December 2005; European Commission 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165, 2 April 2008; 'Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' COM(2013) 404, 11 June 2013; Department for Business, Innovation and Skills 'Private Actions in Competition Law: A Consultation on Options for Reform' 24 April 2012; 'Private Actions in Competition Law: A Consultation on Options for Reform – Government Response' January 2013. For an extensive review of the UK private actions, see eg BJ Rodger 'Why not Court? A study of follow-on actions in the UK' (2013) 1(1) Journal of Antitrust Enforcement 104; BJ Rodger, 'Competition Law Litigation in the UK Courts: A Study of All Cases to 2004' - Parts I–III in [2006] ECLR 241; 279 and 341, respectively; BJ Rodger, 'Competition Law Litigation in the UK Courts: A Study of all Cases 2005–2008' - Parts I and II in [2009] GCLR 93 and 136, respectively; A Robertson, 'UK Competition Law; From Cinderella to Goldilocks?' (2010) 9(2) Comp LJ 275.

decision of the competition authority and some of whom do not. Where the infringement decision is taken by the Commission and the follow-on action has to be decided by a national court, the applicable period of limitations presents a complicated mix of European and national law that one must overcome before finding the correct solution to the case. This is an ongoing problem in the UK in the context of follow-on actions before the Competition Appeal Tribunal (CAT) and is currently awaiting resolution by the Supreme Court in *Deutsche Bahn*.² How this case got to the Supreme Court demonstrates how difficult this problem is to resolve justly given the complexity of the conflicting interests at stake. This seemingly simple question of period of limitations, as this article shows, is in fact loaded with serious implications going well beyond a procedural, timing issue. Although the issue is pertinent to all types of infringements of competition law with multiple infringers, it has particular implications for leniency recipients in cartel cases and therefore, for the overall relationship between private and public enforcement of competition law. These implications demonstrate how sub-optimal the current legal situation is. This article demonstrates what the overall preferable solution is regarding the treatment of period of limitations in follow-on cases based on Commission infringement decisions in the presence of multiple infringers from a UK and EU law point of view.

Similar to the EU, reform is currently taking place in the UK to encourage private actions.³ According to the BIS consultation on private enforcement, businesses view the present approach to private actions as one of the least effective aspects of the UK competition regime.⁴ The legal costs and *complexity* of bringing private actions is an ‘insuperable barrier’ for the vast majority of SMEs and consumers.⁵ The consultation also notes that it is important to avoid damage being caused to the public enforcement system through the introduction of private actions.⁶ Such damage can occur by private actions setting precedents that conflict with the public authority’s approach and/or by private actions changing the incentives that lead to whistleblowers within cartels reporting some of the most serious anticompetitive behaviour.⁷ The UK Government has decided not to take action in this area (the protection of whistleblowers) since there is pending action at the EU level.⁸ The importance of protecting

² The Supreme Court granted permission to appeal on 21 December 2012 in *Deutsche Bahn AG and others v Morgan Crucible Company plc* UKSC 2012/0209. The hearing is due to take place on 11 and 12 March 2014.

³ See BIS Consultation (n 1) and the Draft Consumer Rights Bill, June 2013, BIS/13/925.

⁴ BIS Consultation (n 1) 4.

⁵ Government Response (n 1) 5.

⁶ BIS Consultation (n 1) [7.3].

⁷ BIS Consultation (n 1) [7.3].

⁸ See Commission Proposal for a Directive (n 1).

whistleblowers and leniency programmes is not debated; the first main objective of the EU proposals in the area of private actions is indeed to ‘optimise the interaction between public and private enforcement...’.⁹ Thus far, the tension between private and public enforcement has mostly been debated in relation to the disclosure of leniency documents to potential private action claimants.¹⁰ However, the way limitation periods is treated in follow-on cases can affect the incentives of whistleblowers just as much by unduly exposing them to damages claims and hamper the achievement of an optimal interaction between public and private enforcement.¹¹ This has mostly gone unnoticed by policymakers as well as commentators. *Deutsche Bahn* and the preceding *Emerson* line of cases are a prime example of the problem at hand.

This article proceeds as follows. In section II, the case law relating to the period of limitations and its calculation in follow-on cases before the CAT is discussed. In section III, this case law is analysed with an eye to establishing what the correct approach is in the presence of multiple infringers some of whom appeal the infringement decision and some of whom do not. Section III shows that in many cases, both the CAT and the Court of Appeal have opted for an sub-optimal approach with serious negative implications from a practical and legal perspective. This section also shows that the correct legal approach in certain cases leads to bizarre and unfair outcomes. Section III proposes ways in which the legally correct approach should be improved to make it fairer. This requires EU-level legislation specific to follow-on actions that renders certain established EU law principles inapplicable, as well as domestic legislation to clarify the existing (and envisaged) rules. Section IV concludes.

II The case law: the impossibility of consensus on what ‘decision’ means?

⁹ Commission Proposal for a Directive (n 1) 4. See also ‘Private actions in competition law: a consultation on options for reform’ OFT’s Response to the Government’s Consultation July 2012 (OFT1434resp) 19 et seq.

¹⁰ See eg Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161; European Competition Network (ECN) ‘Protection of leniency material in the context of civil damages actions’ *Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012*; Commission Proposal for a Directive (n 1).

¹¹ For extensive discussions of the relationship between public and private enforcement, see eg WPJ Wils *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing Oxford 2008); MJ Reynolds and DG Anderson ‘Immunity and Leniency in EU Cartel Cases: Current Issues’ [2006] ECLR 82; M Bloom ‘Despite Its Great Success, the EC Leniency Program Faces Great Challenges’ in CD Ehlermann and I Atanasiu (eds) *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing Oxford 2007); WPJ Wils ‘The Relationship between Public Enforcement and Private Actions for Damages’ (2009) 32 (1) *World Competition* 3; AP Komninos ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ (2006) 3 (1) *The Competition Law Review* 5; R Gamble ‘The Cartel Penumbra – Where Public and Private Enforcement Policies Intersect’ (2013) 42 (1) *Common Law World Review* 23.

The issue of the treatment of period of limitations in the presence of appealing and non-appealing parties first arose in *Emerson I*.¹² As with the other private follow-on cases against Morgan Crucible, the *Emerson I* case relies on the Commission's decision in *Electrical and mechanical carbon and graphite products* from 2003.¹³ The Emerson claimants in the UK proceedings were direct purchasers of electrical and mechanical carbon and graphic products. They lodged a damages claim at the CAT pursuant to section 47A of the Competition Act against Morgan Crucible which was one of the cartelists in the infringement decision of the Commission. Morgan Crucible had also applied for leniency to the Commission and obtained full immunity from fines in respect of its involvement in the cartel. Consequently, Morgan Crucible did not appeal the Commission decision to the General Court (GC) whereas some of the other addressees did. At the time of the CAT's decision in *Emerson I* these appeals were still ongoing.

Under section 47A, a claim for damages may be brought before the CAT where it has been established by the OFT, sectoral regulators with concurrent powers, the CAT or the Commission that a competition law infringement has occurred. The infringement of competition law can be that of UK and/or EU law. In such cases, the CAT is bound by the findings of facts and infringement in the underlying decision once the appeal period has expired or once these have been confirmed on appeal (sections 58 and 58A). Therefore, the claimant needs to only prove causation and quantum.¹⁴ Section 47A(5)(b) (in conjunction with sections 47A(7) and (8)) also stipulates that a claim under this section may not be brought – otherwise than with the permission of the CAT – during any relevant appeal period and if there is an appeal, before the appeal is determined. In other words, a claim cannot be brought before the CAT under section 47A whilst there is still the possibility of appealing the decision or if there has been an appeal, whilst the appeal is ongoing. To be precise, regarding the Commission's infringement decisions, section 47A(8) stipulates that the periods during which a claim for damages may *not* be made without the CAT's permission are: '(a) the period during which proceedings against the decision or finding may be instituted in the European Court, and (b) if any such proceedings are instituted, the period before those proceedings are determined'.

¹² *Emerson Electric Co and others v Morgan Crucible (Emerson I)* [2007] CAT 28.

¹³ Commission Decision (Case C.38.359) *Electrical and mechanical carbon and graphite products* (2004/420/EC).

¹⁴ For causation, see eg *Enron Coal Services Ltd v English Welsh and Scottish Railway Ltd* [2009] CAT 36; *Arkin v Bochard Lines Ltd* [2003] EWHC 687, [489]-[570]. For quantum, see eg *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394, [19]. In general, see R Whish and D Bailey *Competition Law* (7th ed OUP 2012) 311-312.

The period of limitations regarding these cases is stipulated in the Tribunal's Rules. According to Rule 31(1), a claim for damages must be made within a period of two years beginning with the 'relevant date'. The 'relevant date' is the later of the following: (a) the end of the period specified in sections 47A(7) and (8) 'in relation to the decision on the basis of which the claim is made', ie the period during which an appeal against the (infringement) decision can be made or is ongoing; and (b) the date on which the cause of action accrued.

In *Emerson I*, the claim for damages related to the alleged harm caused to the Emerson claimants as a result of their paying higher prices than would otherwise have been the case for carbon and graphite products due to the cartel. The most important legal question for the purposes of this work was whether, in respect of the time limit in Rule 31 of the Tribunal's Rules, the time for bringing a claim had begun to run. If the time had not begun to run, then the Emerson claimants required the CAT's permission to bring a claim for damages under section 47A. In other words, they could not pursue a damages claim as of right.

The Emerson claimants argued that the time had begun to run for bringing a claim and the permission of the CAT was not required to initiate a claim against Morgan Crucible.¹⁵ They based their claim on the argument that the decision was final and binding with respect to Morgan Crucible, and the fact that, in the present case, even if the GC were to annul the Commission decision, such annulment would have had no effect on Morgan Crucible, who was not a party to the EU proceedings.¹⁶ Morgan Crucible in turn argued that where there is a multi-party case and any one of the parties is taking an appeal against the decision that is to be used to establish liability, the only way a claim can be brought before a final decision on the Commission's decision (where there is an application to have that decision annulled) would be by the permission of the CAT.¹⁷ In other words, Morgan Crucible was arguing that the time for making a claim under section 47A had not yet begun to run since its co-cartelists had ongoing appeals challenging the Commission decision before the European Courts.

¹⁵ Oddly enough, if time had begun to run as the Emerson claimants claimed, their claim would have been out of time: they sought to rely on the Tolling Agreement between the parties extending the period of limitations (on whose effectiveness the CAT had to decide) and they also argued that the CAT had jurisdiction to extend the time by virtue of its power under Rule 19(2)(i) (on which the CAT also had to decide). The CAT found that the Tolling Agreement could not extend the prescribed limitation period; *Emerson I* (n 12) [107]. However, it also found that – if contrary to its findings, the limitation period had begun to run and, consequently, expired – the CAT itself had authority to extend it under Rule 19(2)(i) of the Tribunal's Rules; *ibid* [134].

¹⁶ *Emerson I* (n 12) [54] et seq. They also argued that it was not clear whether the reference in section 47A(8)(b) to 'any such proceedings' refers back to the EC 'proceedings' referred to in section 47A(8)(a) and whether the defendant to the UK proceedings before the CAT must also be a party to the EC proceedings; *ibid* [53].

¹⁷ *Emerson I* (n 12) [60].

The legal issue for the CAT in this case – as in the consequent line of similar cases – was the correct interpretation of section 47A(8). Essentially, the issue is whether appeal proceedings by *anyone* against the decision of the authority (ie the Commission) would prevent damages claims being made at the CAT (unless the CAT gives permission) or whether this is only the case where the defendant in the damages claim is a party to the appeal proceedings. The answer to this naturally also establishes whether the time for bringing a claim under section 47A has begun to run and, if it has, when it will expire. In other words, it directly determines the so-called ‘window’ during which a claim under section 47A can be brought *as of right* where the claimant is basing their case on an infringement decision of the Commission and there is an appeal to the European Courts.

A. The various ‘correct’ interpretations of section 47A(8)

i. Emerson I

In *Emerson I*, the CAT decided that the correct interpretation of section 47A(8) was that “‘any’ proceedings’ referred to proceedings that have been brought by *any* one or more of the addressees of the Commission decision in question or even by a third party with sufficient interest as per Article 263 TFEU (ex Article 230 EC). In other words, even if the defendant in the case at hand (ie Morgan Crucible) was not a party to the appeal proceedings, the appeal of its co-cartelists ensured that a damages claim under section 47A could not be brought before the CAT (without permission) since time will not have begun to run.¹⁸ In response to the Emerson claimants’ argument that any annulment of the Commission decision will have no effect regarding Morgan Crucible and that therefore the reference to ‘decision’ in section 47A(8) must be understood as reference to not the whole decision of the Commission but only to the part of the decision which is the subject of appeal, the CAT held that the word ‘decision’ cannot be given such a restrictive meaning.¹⁹

ii. Emerson III

The next case revolving around the same legal issue was *Emerson III* which involved a dispute between essentially the same companies as in *Emerson I*. Having received permission from the CAT to start a damages claim against Morgan Crucible in *Emerson II*,²⁰ the

¹⁸ *Emerson I* (n 12) [65]-[67].

¹⁹ *Emerson I* (n 12) [70]-[71].

²⁰ *Emerson Electric Co and others v Morgan Crucible (Emerson II)* [2007] CAT 30. Permission was justified on the grounds that if the CAT did not grant the requested permission, there was an enhanced risk to the Emerson claimants that the Morgan Crucible documents would not be available at trial as Morgan Crucible was not

claimants in *Emerson III* sought permission to make a damages claim against those co-cartelists of Morgan Crucible who had appealed the Commission decision before the GC, even though time had not yet begun to run for such a claim. The reasoning was that the claims against Morgan Crucible and the co-cartelists who had appealed the decision were so interrelated that it would be convenient and fair for the claims to proceed and be heard in a single set of proceedings.²¹ The CAT refused to grant this permission. The Emerson claimants' argument was mainly that a significant period of time (around 20 years) had already elapsed since the infringement began and any further delay would compound the prejudice they had already suffered.²² Their main concern was the impact of the delay on the state of the evidence.²³

According to the CAT, the principles to be applied in this case were that first, the overriding consideration was whether granting permission enabled a case to be dealt with justly and that second, it was legitimate to consider the nature and extent of particular prejudice that either party will suffer as a result of granting permission.²⁴ The 'real question' before the CAT was whether, if a monetary claim could not be brought before the CAT until the final determination of the EU proceedings, justice could not properly be done.²⁵ The Emerson claimants were unable to satisfy the CAT that this was the case.²⁶ More particularly, the CAT found that the nature and ambit of the appeal(s) may be significant: where the appeal seeks to set aside a decision or challenges findings which are germane to the nature and extent of a finding of infringement or the loss, granting permission carries a greater risk of injustice and inefficiency.²⁷ In the case at hand, all of the proposed defendants were seeking not only a reduction in the fine but also the annulment of the Commission decision either in its entirety or in so far as it applied to that defendant.²⁸ Importantly, the CAT also stated that there is no general rule that permission should be given to initiate a damages claim whenever an appeal against the decision is only as to the level of the fine: '[i]n some cases the issues raised by an appeal against the imposition and/or level of the fine may pertain to the nature and extent of

prepared to give an undertaking as to the preservation of the documents which satisfied the Emerson claimants; *ibid* [14].

²¹ *Emerson Electric Co and others v Morgan Crucible (Emerson III)* [2008] CAT 8, [4].

²² *Emerson III* (n 21) [51].

²³ *Emerson III* (n 21) [51].

²⁴ *Emerson III* (n 21) [79]-[80].

²⁵ *Emerson III* (n 21) [81].

²⁶ *Emerson III* (n 21) [83].

²⁷ *Emerson III* (n 21) [86].

²⁸ *Emerson III* (n 21) [87].

an infringement which might be central to the nature and extent of how (and by how much) the infringement adversely affects a proposed claimant'.²⁹

iii. *BCL I and BCL II*

This issue of whether an appeal against only the fine (similar to an appeal against the infringement findings of the decision) also has an impact in deciding what the 'relevant date' is for the purposes of section 47A is one that has to be resolved regarding its potential impact on the period of limitations. This was indeed the issue in *BCL I* and *BCL II*.³⁰ These cases arose from the Commission's decision in the *Vitamins* cartel, which had found BASF and other undertakings to have infringed Article 101 TFEU.³¹ Upon BASF's application to the GC for annulment or substantial reduction of the fine imposed upon it by the Commission decision, BASF received a reduction of the fines imposed on it and did not appeal further to the Court of Justice (CoJ).³² At the CAT, pursuant to section 47A, BCL claimed damages – as indirect purchasers of the cartel products - corresponding to the difference between the prices that they purchased at and the prices that they would have purchased at had there been no cartel. BASF argued that this claim was time-barred relying on the argument that they had only appealed against the fine (not the infringement) and the 'relevant date' was the date when the possibility of an appeal by BASF against the *infringement* aspect of the decision expired.³³ In other words, they argued that their appeal to the GC did not delay the start of the two-year period for bringing the claim since the appeal was only regarding the fine and not the infringement.³⁴ The claimants, in contrast, argued that any appeal against the decision was sufficient to delay the 'relevant date' (and therefore postpone the start of the two-year period) and that the fact that BASF challenged only the fine was irrelevant.³⁵

The CAT agreed with the claimants and found that the 'relevant date' fell on the expiry of the period during which an appeal against the judgment of the GC could have been instituted in the CoJ and that therefore, the claim was not time-barred.³⁶ Reiterating its findings in *Emerson III* the CAT held that the findings made by a competition authority in deciding to impose and in calculating the level of a fine may well be relevant to (and be determined by)

²⁹ *Emerson III* (n 21) [89].

³⁰ *BCL Old Co Ltd v BASF* [2008] CAT 24 (*BCL I*) and *BCL Old Co Ltd v BASF* [2009] CAT 29 (*BCL II*).

³¹ Commission Decision (COMP/E-1/37.512) *Vitamins* [2003] OJ L6/1.

³² Case T-15/02 *BASF AG v EC Commission* [2006] ECR II-497.

³³ *BCL I* (n 30) [11].

³⁴ *BCL I* (n 30) [11].

³⁵ *BCL I* (n 30) [12].

³⁶ *BCL I* (n 30) [30].

the nature and extent of the infringement being penalised.³⁷ According to the CAT, the gravity, duration and scope of the infringement (geographical and product-wise) may well be factors relevant, not only to the size of the penalty imposed, but also to liability in damages.³⁸ Similarly, according to the CAT, if – in deciding an appeal against a penalty – the European Courts were to find that the scope of the cartel was in fact substantially limited, this might not only be a mitigating circumstance as to the amount of the fine but could also be relevant to damages liability for the purposes of section 47A.³⁹ An example would be the Court’s finding the products purchased by a potential claimant not to be covered by the cartel in question.⁴⁰ The CAT further found that, particularly regarding the quantum of the damages suffered as a result of the infringement, an appeal against mere penalty could indeed have a material impact on matters relevant to claims under section 47A.⁴¹ Thus, according to the CAT, the ‘decision’ referred to in the relevant provisions, referred to the ‘infringement decision’ as a whole.⁴² Similarly, issues of legal certainty and transparency were also likely to arise if one were to adopt a different interpretation: it will be difficult for a claimant to form a clear view as to whether the points raised in the brief notice published in the Official Journal regarding the appeal are likely to have an impact on the issues that will arise in a damages claim under section 47A.⁴³ It is only when the final judgment of the GC or CoJ is available that a claimant will be in a position to determine the extent to which the finding of infringement appealed against is definitive (regardless of whether the action is for annulment of the decision or an aspect of the fine).⁴⁴ This judgment of the CAT is in line with its judgments in *Emerson I* and *Emerson III*, in which the CAT decided that the relevant appeal for the purposes of suspending the time for bringing a claim under section 47A was *any* appeal by any one and on any matter. Although, as will be explained in section III, it is highly problematic and incorrect particularly from an EU law perspective, to treat the appeal by one cartel member as suspending a claim against another who has not appealed, there is at least internal consistency in these decisions. This internal consistency has been distorted by, first, the Court of Appeal and the Supreme Court’s judgments in *BCL* and, second, the CAT’s own later decision in *Deutsche Bahn* and the Court of Appeal’s subsequent judgment in that case.

³⁷ *BCL I* (n 30) [34].

³⁸ *BCL I* (n 30) [34].

³⁹ *BCL I* (n 30) [34].

⁴⁰ *BCL I* (n 30) [34].

⁴¹ *BCL I* (n 30) [35].

⁴² *BCL I* (n 30) [35].

⁴³ *BCL I* (n 30) [37].

⁴⁴ *BCL I* (n 30) [37].

In the appeal of *BCL I*, the Court of Appeal reversed the finding of the CAT and found that the claim was time-barred.⁴⁵ On the basis of a rather artificial reading of the Competition Act, the Court of Appeal decided that there is a distinction in the legislation between decisions as to infringement and decisions as to penalty.⁴⁶ The Court of Appeal applied this interpretation to the Commission's practice as well by finding that, although '[i]t is the Commission's normal, if not universal, practice to deal with both [the infringement and the fines] in a single decision document', '[i]n substance, ... the decision that an undertaking has infringed the relevant prohibition is distinct from the decision imposing a penalty on that undertaking for the infringement'.⁴⁷ After the Court of Appeal's judgment, BCL applied to the CAT for an extension of time (which was of course established by the Court of Appeal to have expired) for lodging their claims in *BCL II*.⁴⁸ The CAT rejected this extension and its decision was appealed to the Court of Appeal. The Court dismissed the appeal upon finding that there is no power to extend the time and thus the CAT was correct in dismissing the claim.⁴⁹ On appeal to the Supreme Court, the Court of Appeal's decision was upheld.⁵⁰

iv. *Deutsche Bahn*

The legal situation became even more muddled with *Deutsche Bahn* which was – like the *Emerson* line of cases – pursued against Morgan Crucible on the basis of the Commission decision in *Electrical and mechanical carbon and graphite products*. Although the defendant and more or less all the facts except for the claimant were the same, the outcome in *Deutsche Bahn* was diametrically opposite to the outcome in *Emerson I*. The issue in *Deutsche Bahn* was once more whether 'decision' in section 47A(8) referred to a decision concerning a specific defendant to the section 47A claim (ie Morgan Crucible) or whether it referred to a decision concerning *all* the addressees of the decision. If 'decision' meant the decision against Morgan Crucible, then *Deutsche Bahn*'s claim for damages would be time-barred.⁵¹ If the decision meant the decision against any of the addressees, then *Deutsche Bahn*'s claim would be within the two-year limitation period (on the basis of the appeals of addressees other than Morgan Crucible).⁵² Stating that 'prior decisions of the Tribunal are not binding on

⁴⁵ *BCL Old Co Ltd v BASF* [2009] EWCA Civ 434 (*BCL I CA*).

⁴⁶ *BCL I CA* (n 45) [14] et seq.

⁴⁷ *BCL I CA* (n 45) [24].

⁴⁸ *BCL Old Co Ltd v BASF* [2009] CAT 29 (*BCL II*).

⁴⁹ *BCL Old Co Ltd v BASF* [2010] EWCA Civ 1258 (*BCL II CA*). The CAT in *BCL II* (n 48) had assumed that it had the power to extend the time but had refused to grant it.

⁵⁰ *BCL Old Co Ltd v BASF* [2012] UKSC 45 (*BCL II SC*).

⁵¹ *Deutsche Bahn AG v Morgan Crucible* [2011] CAT 16, [12].

⁵² *Deutsche Bahn* (n 51) [12].

the Tribunal'⁵³ and that '[t]here is a central ambiguity in the term "decision"', the CAT decided – seeking to comply with the Court of Appeal's interpretation of 'decision' in *BCL I* -⁵⁴ that 'decision' meant the specific part of the operative part of the Commission decision that makes a decision regarding a *particular addressee* (and thus was to be interpreted in the 'narrow' sense).⁵⁵ Thus, the CAT disagreed with the conclusion of the Tribunal in *Emerson I*.⁵⁶ The CAT agreed with the defendants that if an addressee had elected not to appeal, it was difficult to see why section 47A proceedings should be put off until all the *other* addressees of the decision have had their appeals determined.⁵⁷ Consequently, the claim against Morgan Crucible was held to be time-barred.⁵⁸

On appeal, the Court of Appeal stated that a 'disconcerting aspect of Morgan's argument is that, in other circumstances, Morgan would no doubt strenuously argue for a different construction' of section 47A.⁵⁹ According to the Court, it is difficult to believe that Morgan Crucible would maintain the stance that 'an appeal from the Commission's decision on what was found to be a single and continuous infringement' would be irrelevant to the claims against it if (a) the other undertakings had succeeded in their infringement appeals; and (b) the GC had set aside the Commission decision *in toto* on the ground that there had been no cartel and there had been no infringements of competition law in fact or in law.⁶⁰

At the Court of Appeal, Deutsche Bahn essentially argued that the natural and ordinary meaning of 'decision' in section 47A is a single decision on infringement concerning all the parties to whom the decision is addressed and who the Commission has found, on the basis of common evidence and interdependent facts, had jointly committed a single and continuous infringement.⁶¹ In contrast, Morgan Crucible argued that the relevant decision was the individual decision addressed by the Commission to Morgan Crucible as a particular party and that this was definitive and binding on it and on the CAT, whatever the result might be of appeals by other undertakings against the decision made against them.⁶² Morgan Crucible further argued that it was a fundamental principle of EU law that national courts were

⁵³ *Deutsche Bahn* (n 51) [17].

⁵⁴ *Deutsche Bahn* (n 51) [34], [37].

⁵⁵ *Deutsche Bahn* (n 51) [41]. The 'wide sense' of the term 'decision' would be understanding it to refer to the *instrument*, ie the document embodying the decision; *ibid* [19].

⁵⁶ *Deutsche Bahn* (n 51) [42].

⁵⁷ *Deutsche Bahn* (n 51) [46].

⁵⁸ *Deutsche Bahn* (n 51) [68].

⁵⁹ *Deutsche Bahn v Morgan Crucible* [2012] EWCA Civ 1055, [17] (*Deutsche Bahn CA*).

⁶⁰ *Deutsche Bahn CA* (n 59) [17].

⁶¹ *Deutsche Bahn CA* (n 59) [78].

⁶² *Deutsche Bahn CA* (n 59) [87].

precluded from taking any decision that would conflict with a binding Commission decision: it was not open to the CAT, in determining a follow-on claim against a non-appealing addressee, to disapply that decision simply on the ground that another addressee had successfully appealed against the decision addressed to it.⁶³ They also argued that it would be unfair to prevent the claimant from proceeding sooner rather than later, possibly kept waiting for years, while other undertakings exhausted appeals that had no relevance to the claim against the non-appealing addressee.⁶⁴

The Court of Appeal disagreed with the CAT's interpretation of 'decision' in *Deutsche Bahn* and found that 'decision' meant a decision of the Commission that the Treaty provision 'has been infringed'; namely, the decision that there is a single and continuous infringement based on common evidence and interdependent facts.⁶⁵ Thus, the claim against Morgan Crucible was *not* time-barred and the CAT in *Emerson I* was indeed correct. As noted before, this judgment of the Court of Appeal is currently on appeal at the Supreme Court.⁶⁶ Table 1 below summarises the rulings on the interpretation of 'decision' in various cases examined thus far.

	Does an appeal by <i>any</i> co-infringer prevent the time from running against the private claim defendant?			Does an appeal against fine only prevent the time from running against the private claim defendant?		
	CAT	CA	SC	CAT	CA	SC
<i>Emerson I</i>	Yes	-	-	-	-	-
<i>Emerson III</i>	-	-	-	Possibly	-	-
<i>BCL I</i>	-	-	-	Yes	No	-
<i>Deutsche Bahn</i>	No	Yes	Awaited	-	-	-

Table 1 Rulings on the interpretation of 'decision'

III Analysis and the correct approach

This author respectfully argues that the CAT in *Emerson I* and the Court of Appeal in *BCL I* and in *Deutsche Bahn* reached incorrect conclusions and outcomes. In general, the conclusions in these cases are without a sound legal base, in conflict with EU law principles and impractical, with serious negative implications for the private and public enforcement of competition law. The Supreme Court should, therefore, reverse the Court of Appeal's decision in *Deutsche Bahn* and find that the claim against Deutsche Bahn is time-barred.

⁶³ *Deutsche Bahn CA* (n 59) [91].

⁶⁴ *Deutsche Bahn CA* (n 59) [96].

⁶⁵ *Deutsche Bahn CA* (n 59) [113], [116].

⁶⁶ See n 2.

Starting with *Emerson I*, the CAT's reasoning in dismissing the Emerson claimants' EU-law-based arguments (such as that of an appeal being irrelevant to the position of a non-appealing party) was that, when the CoJ stated the principles relied on by the Emerson claimants, it was considering the scope of Article 263 TFEU and not the true construction of section 47A.⁶⁷ Therefore, according to the CAT, 'the principles expounded by the [CoJ] to meet different considerations' did not have any application or relevance to the true construction of section 47A.⁶⁸ The CAT's reasoning is artificial and it is not acceptable. It is artificial because the CoJ could never have decided on the true construction of section 47A since it *cannot* for lack of jurisdiction. As the CAT states, it is for the domestic legal systems to establish the detailed procedure for bringing private actions and in so doing the Member States must comply with the principle of equivalence and the principle of effectiveness.⁶⁹ This means that it is impossible for the CoJ to make findings relating particularly to section 47A unless a preliminary reference request was sent to it by, for example, the CAT. However, this does *not* mean that the general principles of EU law established by the CoJ are irrelevant to the case before the CAT.

The CAT's conclusion that the EU case law lacks application or relevance is also not acceptable since it disregards well-established principles of EU law. In cases like *TWD* and *AssiDöman* the CoJ clearly established that, as a matter of EU law: first, it is settled law that a decision which has not been challenged by the addressee within the time-limit laid down in the Treaty becomes definitive against her.⁷⁰ This safeguards legal certainty by preventing Union measures which involve legal effects from being called into question indefinitely.⁷¹ It is also justified on grounds of good administration of justice and procedural economy.⁷² This means that any proceedings at national level that do not treat the appeal of others as irrelevant to the legal situation of a party who has not appealed herself, overcomes this definitive nature which the decision assumes as against that person once the time-limit for bringing an action has expired.⁷³ Such national proceedings breach legal certainty and the principles of EU law set by the CoJ in the case law. Second, where an addressee of a decision brings an action for

⁶⁷ *Emerson I* (n 12) [71]. See text to n 19 above.

⁶⁸ *Emerson I* (n 12) [71].

⁶⁹ *Emerson I* (n 12) [69].

⁷⁰ Case C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833, [13]; Case 20/65 *Collotti v Court of Justice* [1965] ECR 847, 850; Case C-310/97 P *Commission v AssiDöman Kraft Products* [1999] ECR I-5363, [57].

⁷¹ *TWD* (n 70) [16].

⁷² *AssiDöman* (n 70) [61].

⁷³ See *TWD* (n 70) [18].

annulment, the matter to be tried by the EU courts relates only to those aspects of the decision which concern that addressee; the scope of the annulment may not go further than that sought by that applicant.⁷⁴ In the same vein, the authority *erga omnes* exerted by an annulling judgment cannot entail annulment of an act not challenged before the Courts but alleged to be vitiated by the same illegality.⁷⁵ The annulment has no effect on the validity of the decision vis-à-vis addressees who have not appealed.⁷⁶ Moreover, the European Courts treat the decision against various cartelists as ‘a number of similar individual decisions imposing fines ... adopted pursuant to a common procedure’⁷⁷ and as a ‘series of individual decisions making against each of the undertakings to which it was addressed a finding of infringement of the provisions of ... the Treaty under which it was charged and imposing a fine’ applying to each of the addressees.⁷⁸ Indeed, according to the GC in *PVC (No 2)*, ‘[h]ad the Commission so wished, it could have formally adopted a number of separate individual decisions confirming the infringements of ... the Treaty which it had found.’⁷⁹ Thus, each of those individual decisions forming part of a Commission decision is binding in its entirety on the undertaking to which it is addressed and where an addressee does not bring an action for annulment of the Commission decision in so far as that decision relates to her, the decision continues to be valid and binding on her.⁸⁰

These established principles of EU law mean that in *Emerson I* and the subsequent similar cases, the decision as against Morgan Crucible became final and definitive upon expiry of the appeal period pertaining to Morgan Crucible and that the decision against Morgan Crucible is a separate ‘decision’ from the decisions against Morgan Crucible’s co-cartelists. Therefore, the CAT’s interpretation of ‘decision’ in *Emerson I* and the Court of Appeal’s interpretation of ‘decision’ in *Deutsche Bahn* as the ‘entire decision against all of the cartelists’ is not correct given the EU context of the relevant decision(s). Such an interpretation not only conflicts with the above-mentioned EU law principles, but also leads to impractical results: what if all of the cartelists who appeal, appeal the decision separately (as in the case of Morgan Crucible’s co-cartelists) and at different times and the appeal court does not join the

⁷⁴ *AssiDöman* (n 70) [52]-[53].

⁷⁵ *AssiDöman* (n 70) [54].

⁷⁶ Case C-238/99 P et al *Limburgse Vinyl Maatschappij NV (LVM) and others v EC Commission* [2002] ECR I-8375, [100]; *AssiDöman* (n 70) [57]; *TWD* (n 70) [13].

⁷⁷ *AssiDöman* (n 70) [63].

⁷⁸ Joined Cases T-305/94 et al *Limburgse Vinyl Maatschappij NV (LVM) and others v EC Commission* [1999] ECR II-931, [167].

⁷⁹ *PVC (No 2)* (n 78) [167].

⁸⁰ *PVC (No 2)* (n 78) [168] referring to *TWD* (n 70) [13].

cases and sees them separately? How will the claimant for private damages calculate when the period of limitation expires (or starts to run, for that matter)? The CAT and the Court of Appeal assume that there will be one appeal application which might not be the case in practice. Such an interpretation can also breach the EU principle of effectiveness since it can be thought to make it extremely difficult to actually pursue a follow-on case based on a Commission decision by making it too complicated to establish when the time for bringing a damages claim begins to run and expires.⁸¹

In the same vein, the Court of Appeal's interpretation of a decision on infringement being distinct from a decision on penalty in *BCL I* has no basis in EU law or practice and is incorrect. The Court of Appeal uses the fact that the Commission made a finding of infringement without imposing a fine as illustration of the position that there are distinct decisions as to these aspects.⁸² However, there cannot be an imposition of a fine without there first being a finding of infringement, although there can be a finding of infringement without the imposition of penalties. In other words, there cannot be an independent decision imposing penalties; there must be an infringement for which penalties are being imposed and both the infringement and the penalties will be found in one and the same decision. The 'decision' is an instrument that contains various 'findings'. These 'findings' can relate to the infringement and/or the penalties. Yet, there would still be a single decision against one undertaking comprising the findings on infringement and penalty. As the Court of Appeal itself states, it is the Commission's universal practice to adopt a single decision containing the findings of infringement and penalty.⁸³ Just because the imposition of penalties can be appealed without appealing the finding of infringement does not mean that penalties were contained in a separate 'decision'. Essentially, the Court of Appeal treats the different 'Articles' in a decision as separate decisions in themselves by this holding.⁸⁴ This also ignores the fact that first, issues raised in a penalty appeal can have implications for the damages claim as noted

⁸¹ Although Member States are free to adopt their procedural rules under the principle of national procedural autonomy, they must obey by the principle of equivalence and the principle of effectiveness; see eg Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskamer für das Saarland* [1976] ECR 1989, 1997. The principle of equivalence requires that the national procedural rules governing the actions arising from the direct effect of EU law cannot be less favourable than those relating to similar actions of a domestic nature; *ibid.* The principle of effectiveness requires that national procedural rules should not render the application of EU law impossible or excessively difficult; see eg Case C-430&431/93 *Van Schijndel and Van Veen v Stichting Pensioenfondsvoor Fysiotherapeuten* [1995] ECR I-4705.

⁸² *BCL I* CA (n 45) [24].

⁸³ *BCL I* CA (n 45) [24].

⁸⁴ *BCL I* CA (n 45) [25].

by the CAT in *Emerson III* and *BCL I*⁸⁵ and second, that it is possible for the European Courts to raise points of their own motion in an appeal against a penalty provided that these points relate to ‘public interest’.⁸⁶ Similarly, even if the appeal is only against penalty the European Courts can consider issues of procedural anomaly (ie infringement of essential procedural requirements) of their own motion.⁸⁷ Moreover, a reassessment of penalties might involve the reassessment of the affected market/sales which would have an impact on damages, particularly regarding quantum. Consequently, the decision does not become definitive until after *any* appeals concerning it are resolved regardless of the content and subject matter of the appeals, provided that the appeal is by the relevant defendant.

The appeal must indeed be by the relevant defendant and this is why the CAT’s decision in *Emerson I* and the Court of Appeal’s decision in *Deutsche Bahn* are incorrect. What the Court of Appeal is missing in *Deutsche Bahn* when it states that Morgan Crucible would have argued differently if (a) the other undertakings had succeeded in their infringement appeals; and (b) the GC had set aside the Commission decision *in toto* on the ground that there had been no cartel and there had been no infringements of competition law in fact or in law⁸⁸ is that even if (a) and (b) were to occur, legally, this would not change Morgan Crucible’s position at all. Indeed, as the Court itself states, if Morgan Crucible’s construction is to be accepted, then even if there were no claims for damages against those co-cartelists which had successfully appealed, claimants could pursue claims against Morgan Crucible for full damages based on the Commission decision not appealed by it.⁸⁹ Moreover, Morgan Crucible would have no defence to liability for the single and continuous infringement by all the undertakings to which the Commission decision was addressed.⁹⁰ Although this can potentially lead to unfair and bizarre outcomes, as discussed below, this *is* the legal position under EU law and it is the legal position that should have been adopted by the Court of Appeal due to the EU context of the decision and the appeals.

In *Deutsche Bahn*, the Court of Appeal mainly focused on the ‘domestic’ law nature and context of section 47A and decided that there was no reason why the construction of section

⁸⁵ *Emerson III* (n 21) [89] and *BCL I* (n 30) [34].

⁸⁶ Case T-79/89 *BASF AG and others v EC Commission* [1992] ECR II-315, [30]-[31]. In this case points relating to public interest were lack of competence of the authority issuing the measure and the non-existence of the decision.

⁸⁷ Case C-367/95 P *EC Commission v Sytraval* [1998] ECR I-1719, [67]. Essential procedural requirements include absence of reasons or inadequacy of the reasons stated regarding a decision, etc.

⁸⁸ *Deutsche Bahn CA* (n 59) [17].

⁸⁹ *Deutsche Bahn CA* (n 59) [18].

⁹⁰ *Deutsche Bahn CA* (n 59) [18].

47A should be governed or concluded by particular reference to EU law on the nature of a Commission ‘decision’.⁹¹ This interpretation cannot be accepted: not only is the decision underlying the damages claim an EU measure, but also the appeal proceedings that the decision is subject to are EU proceedings. Therefore, it is impossible to interpret the facts and relevant procedures detached from the EU context. The UK procedures have to be reconciled with the EU principles which make up the context of the case.

On a reading of section 47A(6)(d) and (8), the Court of Appeal in *Deutsche Bahn* decided that the term ‘decision’ in these sections refers to a decision that a relevant prohibition *has been infringed*; thus, to a decision that there has been an infringement and that an infringement situation exists, not to a decision against, or as regards, a particular party or particular addressee of the Commission decision.⁹² The Court of Appeal found that ‘[i]t is not correct to describe an appeal against that infringement decision as an appeal against a decision addressed to a particular party’.⁹³ Yet, it *is* exactly an appeal against a decision addressed to a particular party under EU law. The Court further noted that the appeal is ‘directed to the decision that an infringement situation exists because a relevant prohibition has been infringed. The appeal is not simply against the decision against a particular party or a particular addressee’.⁹⁴ Again, under EU law, the appeal *is* indeed exactly an appeal against the decision against a particular addressee. According to the Court of Appeal, the addressing of the decision on infringement to a particular undertaking is a ‘secondary matter involving the allocation of responsibility consequential on a logically prior decision that the prohibition has been infringed and that an infringement situation exists’.⁹⁵ This is an incorrect interpretation: a decision that the prohibition has been infringed *cannot* exist in a vacuum; the infringement can only be deemed to exist when it is established to have been committed by a certain undertaking. Thus, it is not a secondary matter to address the infringement decision to a particular addressee; it is an essential part of adopting the decision.

In reaching the conclusion that it did in *Deutsche Bahn*, the Court of Appeal also stated that there is no binding authority on this point in either the national courts or in the CoJ.⁹⁶ However, as demonstrated in this article at length, there is indeed binding authority from the CoJ which clearly holds that an appeal by one party has no impact on the legal situation of

⁹¹ *Deutsche Bahn CA* (n 59) [100] et seq and [108].

⁹² *Deutsche Bahn CA* (n 59) [110].

⁹³ *Deutsche Bahn CA* (n 59) [112].

⁹⁴ *Deutsche Bahn CA* (n 59) [112].

⁹⁵ *Deutsche Bahn CA* (n 59) [112].

⁹⁶ *Deutsche Bahn CA* (n 59) [117].

another party who has not appealed.⁹⁷ As a practical consequence, the Court of Appeal asked the question what would be the point of bringing a claim for damages against an undertaking in the position of Morgan Crucible, while the prior question whether there has been an infringement of a prohibition was still being litigated on appeal by the other undertakings in the GC.⁹⁸ According to the Court, it would be more sensible and practical to postpone any proceedings until the final decision on that question was known, so that all questions of causation, quantum and contribution could be resolved at the same time, even if that involved delay.⁹⁹ With this question, the Court of Appeal demonstrates that it is either unwilling or unable to accept directly relevant and binding rules of EU law: it is absolutely clear from an EU law perspective that even if the appeal resulted in a finding of non-infringement, eg because there was no cartel, this would have no legal implications for Morgan Crucible's situation. There are currently no legal tools available to a party in the situation of Morgan Crucible to make such a finding applicable to itself. In fact, the case law explained above demonstrates the opposite: it is *not* possible for such a party to benefit from the outcome of another party's successful appeal.¹⁰⁰ Bizarre as it may be, in the damages claim, the CAT would still have to proceed on the basis that Morgan Crucible was party to an illegal cartel. The Court of Appeal in *Deutsche Bahn*, therefore, seems to have perhaps given precedence to what the law *should* be as opposed to what the law *is*.

A. The correct legal approach is unfair

As alluded to above, the correct application of the existing law may indeed lead to bizarre outcomes in the context of follow-on damages claims based on Commission decisions subject to appeal. First, there will be the problem of what to do in the damages claim when some of the addressees get the Commission decision annulled where the damages defendant has not appealed. The bizarre outcome is that such a defendant can be liable for the damages resulting from, for example, a cartel which legally did not exist and because the others had the decision annulled, the defendant would not even be able to get contribution from the others: the co-cartelists can ward off such a claim on the basis that they have not done anything illegal as determined by the appeal outcome. Subsequently, the damages claim defendant (eg Morgan Crucible) might have to pay everyone's share of damages for a cartel that as a matter of fact and/or law did not exist (provided causation and quantum can be

⁹⁷ See above text to n 70 et seq.

⁹⁸ *Deutsche Bahn CA* (n 59) [119].

⁹⁹ *Deutsche Bahn CA* (n 59) [119].

¹⁰⁰ See eg *AssiDöman* (n 70).

established). Similarly and perhaps worse, the appeal outcome might even be that the infringement decision did not exist as a matter of law or fact due to serious procedural anomaly.¹⁰¹ If the EU principle that an annulment can only produce legal outcomes for those parties who have appealed the decision is applicable also to the situation where the decision is found to be non-existent at appeal, this would produce a seriously unfair outcome.¹⁰² The CAT would have to award damages on the basis of a decision that legally does not exist. This is aggravated by the fact that, as noted above, in a follow-on case, there is no duty for the plaintiff to prove the ‘infringement’ and the CAT is bound by the Commission’s finding of ‘infringement’.¹⁰³ Thus, the CAT could be awarding damages on the basis of an ‘infringement’ decision which at appeal was found to be non-existent or unlawful because, for example, the agreement did not breach the competition rules. This is aggravated by the fact that in most cartel cases, the non-appealing addressee will be the leniency applicant who will have received immunity from fines in return for revealing a secret cartel to the authorities.

This issue of the leniency applicant being exposed to such claims was discussed by the CAT in *Deutsche Bahn*. In *Deutsche Bahn*, the CAT found that the possible exposure of the leniency applicant (and any other non-appealing addressee) should not be overstated because first, there is a discretion in the CAT to allow proceedings against appealing addressees to be commenced as well (section 47A(5)(b)).¹⁰⁴ Second, the CAT noted that even if the non-appealing addressee is the only defendant in section 47A proceedings, such a defendant would have a right to contribution.¹⁰⁵ However, as noted above, if the other addressees get an annulment from the European Courts, the (single) damages defendant who did not appeal would not be able to get any contribution. Third, according to the CAT, it could always stay the proceedings against the non-appealing addressee so as to enable to appealing addressees to catch up.¹⁰⁶ This – like the first proposition – assumes that the appealing addressees have also been/are also sued before the CAT; this might not be the case in practice. As noted above, the appeal decision legally has no consequences for the non-appealing addressee which

¹⁰¹ In *BASF AG* (n 86), the GC found the Commission measure to be ‘non-existent’. On appeal, the CoJ decided that the defects were not so serious as to make the act non-existent, but the decision was tainted by sufficient irregularity to be annulled; Case C-137/92 P *Commission v BASF AG and others* [1994] ECR I-2555.

¹⁰² See Craig and de Búrca noting that a judicial finding that an act is non-existent will have the same effect, in practice as if it had been annulled (although technically, there is no act to annul since it is non-existent); P Craig and G de Búrca *EU Law: Text, Cases, and Materials* (5th ed OUP 2011) 489.

¹⁰³ See above text to n 14.

¹⁰⁴ *Deutsche Bahn* (n 51) [52].

¹⁰⁵ *Deutsche Bahn* (n 51) [52].

¹⁰⁶ *Deutsche Bahn* (n 51) [52].

would make the stay of proceedings meaningless and there is currently no legal tool available to make that decision relevant to the non-appealing addressee. Moreover, the CAT stated in *Deutsche Bahn* that it would take full account of the appealing addressee's success at appeal when assessing the right of contribution of the non-appealing addressee.¹⁰⁷ Thus, the non-appealing addressee - the leniency recipient - can end up paying damages on everyone's behalf for a cartel that did not exist and/or pay damages without the possibility of actual contribution.

Another problem resulting from the correct legal approach is the calculation of the amount of damages. Assume A and B are the only cartelists in an infringement decision. B appeals to the European Courts and gets the decision annulled. A does not appeal. Private parties pursue a follow-on damages claim against A which will proceed on the basis that there is an infringement (although the European Courts might have decided that there was not in the appeal of B). In such a case, what is the *amount* of damages that A has to pay resulting from a cartel that legally did not exist? Does it have to pay the entire amount of damages calculated on the basis of the Commission decision without any possibility of contribution since it is jointly liable? In such a scenario, at least part of the damages relating to the alleged harm by B will have been annulled, but this would not be legally relevant to A's situation.

All in all, the clear message from the existing line of cases is that it is always better to appeal a Commission decision. The same goes for – in fact, particularly, for – leniency recipients. Exposing leniency recipients to undue damages claims and encouraging them to appeal decisions in which they were not fined disincentivises them from coming forward in the first place. Therefore, it is here that the private and public enforcement of competition law potentially conflict. Such a conflict hampers the development of both public and private enforcement. The message sent by the existing line of cases is also perverse in that it encourages litigation and the related expenditure on the part of parties who are rewarded by immunity from fines for revealing a secret cartel to the authorities. If the existing case law continues to be upheld by the Supreme Court in *Deutsch Bahn*, this will imply that the law takes with one hand what it gives with the other: the leniency recipient will have to incur the costs of a lengthy appeal to avoid having to pay damages on everyone's behalf on its own potentially with no contribution after being rewarded with a reduction in fines for revealing a secret infringement.

¹⁰⁷ *Deutsche Bahn* (n 51) [60].

B. How to fix the legally-correct-but-unfair approach

First and foremost, a mechanism must be put in place to protect the leniency recipients. As the Commission states in its Proposal for a Directive, as leniency recipients are less likely to appeal an infringement decision, ‘this decision often becomes final for them earlier than for other members of the same cartel’.¹⁰⁸ In line with this article’s arguments above, this statement demonstrates that the Commission also treats the ‘decision’ against the leniency recipient as a separate decision than the decision against the other cartelists and acknowledges that this decision will become *final* as a result of the leniency recipient not appealing. Moreover, the Commission recognises that the lack of appeal may make leniency recipients the primary targets of damages actions.¹⁰⁹ Seeking to strike a balance between public and private enforcement, the Commission proposes to limit the leniency recipient’s liability, as well as her contribution owed to co-cartelists under joint and several liability, to the harm she caused to her own direct or indirect purchasers.¹¹⁰ However, this limitation on the leniency recipient’s liability is not absolute: the immunity recipient remains fully liable as a last-resort debtor if the injured parties are unable to obtain full compensation from the other infringers.¹¹¹ This, alongside the fact that the other infringers might get an annulment on appeal, means that the leniency recipient is still at serious risk of having to pay the entire damages resulting from a cartel (which the appeal of others might establish not to have existed). Thus, although the Commission’s proposal alleviates the burden on the leniency recipients in some limited scenarios, the potential for perverse outcomes still exists. In fact, the possibility that the leniency recipient might end up footing the bill for a cartel that legally or factually did not exist is not even discussed in the Commission Proposal. Therefore, if the Proposal is accepted as it is, the leniency recipient would still be better off appealing the Commission decision.

A much better way of protecting the leniency recipient from such damages claims would be not disclosing the identity of the leniency recipient and/or unconditionally eliminating joint and several liability for the leniency recipient as in the US.¹¹² Similarly, immunity from the

¹⁰⁸ Commission Proposal for a Directive (n 1) 16.

¹⁰⁹ Commission Proposal for a Directive (n 1) 16.

¹¹⁰ Commission Proposal for a Directive (n 1) 16. In the case of a buying cartel, this would be to her direct or indirect providers. Where a cartel has caused harm only to others than the customers/providers of the infringers, the immunity recipient would be responsible only for her share of the harm caused by the cartel; *ibid*.

¹¹¹ Commission Proposal for a Directive (n 1) 16.

¹¹² For the US policy, see S Hammond and B Barnett ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’ 19 November 2008, <http://www.justice.gov/atr/public/criminal/239583.htm>, Question No. 32 regarding anonymity where it is stated

imposition of an infringement decision against the leniency recipient would also provide such protection.¹¹³ These are, however, unlikely to be accepted at the EU level where the Commission is trying to have its cake and eat it, too by seeking to encourage as much private and public enforcement as possible simultaneously. Such perfect harmony between public and private enforcement may not be possible in practice and the Commission might have to make a choice between these two types of enforcement and decide which one is to be prioritised. As it stands, the limited protection of leniency recipients implies that the preference is for private enforcement. This, however, presents a vicious circle: if the cartels on the basis of which the damages are being claimed are only discovered as a result of the leniency applications, then the discouragement of leniency applicants by undue exposure to damages claims will mean that there will be no damages claims at all since the cartels will not be discovered in the first place. Therefore, it appears more sensible in these scenarios to prioritise public enforcement over private enforcement and offer adequate protection to leniency recipients.

Second, even if the non-appealing addressee is not the leniency recipient and regardless of the type of infringement, the result of a successful appeal which establishes that the infringement did not occur as a matter of law or fact must somehow be taken into account in a follow-on case where damages are sought. Otherwise, one faces the unjustifiable possible outcome of a party paying damages for an infringement that did not occur to parties who were not harmed.¹¹⁴ This would be *factual* unjust enrichment on the part of the damages claimant but the damages defendant – under current EU law – has no means of avoiding or remedying this outcome since the appeal outcome is technically not applicable to her.¹¹⁵ Although in some cases, the appeal outcome might indeed only be relevant to the party who

that '[t]he [Antitrust] Division holds the identity of leniency applicants and the information they provide in strict confidence, Therefore, the Division does not publicly disclose the identity of a leniency applicant or information provided by the applicant, absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order in connection with litigation'. Regarding the removal of several and joint liability and limitation of the damages to harm caused by the leniency recipient only, see Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub L No 108-237, 118 Stat 661, Section 213. The OFT has also recommended the removal of joint and several liability for certain types of leniency recipients; see OFT Response (n 9) 19 et seq.

¹¹³ In the US, under the Corporate Leniency Policy 1993, 'leniency' is defined as 'not charging such a firm criminally for the activity being reported' (<http://www.justice.gov/atr/public/guidelines/0091.htm>). This could be adopted in the EU since there is no principle of mandatory prosecution.

¹¹⁴ They will, however, be *legally* harmed (provided that the infringement caused harm on the basis of the Commission decision) since the part of the infringement decision against the damages defendant will still be definitive and binding.

¹¹⁵ So long as the infringement decision against the damages defendant is considered to be still valid and binding, it would not be *legal* unjust enrichment since the damages would have been established on the basis of a legally valid decision.

has made the application, one can easily envisage situations where the appeal findings will be - as a matter of *fact*- relevant to non-appealing addressees as well. For example, if the outcome of the appeal is that the practice found to be an infringement of EU competition law is not prohibited by the rules (eg in case of a novel abuse or novel agreement) or that the Commission has committed serious procedural errors that taint the entire decision-making process and the subsequent decision, these will clearly be relevant to the non-appealing addressees' factual situation as well, albeit not legally relevant or applicable. Thus, one must find the means to make such findings legally relevant to the position of non-appealing addressees as well for the purposes of follow-on damages claims. The most appropriate way of achieving this is by legislation that would render the above-mentioned EU principles regarding the effect of appeals on non-appealing addressees inapplicable in follow-on damages claims.¹¹⁶ This could have been easily done by including a provision on this in the Commission Proposal but the Commission does not seem to have even spotted the problem. That the problem can only be fully resolved by legislation is demonstrated by an examination of the existing relevant legal tools with the most potential for applicability to the situation. These legal tools are *Masterfoods*, Article 16(1) Regulation 1/2003, the Co-Operation Notice and, more broadly, the duty of sincere co-operation.¹¹⁷

Applying *Masterfoods* to the issue at hand would imply that the period of limitations in follow-on cases before the CAT does not run during ongoing appeals not because the word 'decision' means the entire decision, but because the 'outcome of the dispute before the national court depends on the validity of the Commission decision' and 'it follows from the

¹¹⁶ An untested alternative would be to argue that the time for appeal for a non-appealing addressee starts to run again once the other addressees get the Commission decision annulled. The CoJ in some employment-related cases stipulated that '[t]he only persons concerned by the legal effects of a judgment of the court [sic] annulling a measure taken by an institution are parties to the action and those persons directly affected by the measure which is annulled. Such a judgment can only constitute a new factor and cause the periods for bringing appeals to run afresh as regards these parties and persons'; Case 52/64 *Pflöschner v Commission* [1965] ECR 981, 986; see also Case 43/64 *Müller v Councils of the EEC, EAED and ECSC* [1965] ECR 385, 397; Case 125/87 *Brown v Court of Justice* [1988] ECR 1619, [13]. This was repeated by the CoJ in *AssiDöman* (n 70) [62]. If indeed applicable, this alternative would obviously involve the follow-on damages defendant starting its own appeal after the other infringers have achieved annulment. This can result in a very complicated outcome: first, if the court seeing the damages case does not stay its proceedings during the appeal of the others (under the correct approach explained in this case, it should not have to), the non-appealing addressee can get an annulment applicable to itself after having paid out damages. Second, if the non-appealing addressee starts its own appeal proceedings while the damages claim is ongoing, it will imply that the damages claimant will have to wait for years before its claim can be decided on.

¹¹⁷ Duty of sincere co-operation is found in Article 4(3) TEU. Under Article 4(3) TEU, pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or *particular*, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the *acts* of the institutions of the Union.

obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment by the [Union] Courts...'.¹¹⁸ However, this approach can only be applicable where a damages action has been lodged and even then, without a mechanism to make the outcome of the appeal relevant to the non-appealing addressee, its application does not fully solve the problem. Moreover, the *Masterfoods* approach does not have any application to establishing whether the 'window' of making a claim has opened or not since this still requires an interpretation of 'decision' within the section 47A context.

Regarding the duty of sincere co-operation, Article 16(1) Regulation 1/2003 states that a national court cannot reach a conclusion different from that of the Commission.¹¹⁹ Oddly, it does not state anything about the Commission decision being subject to and perhaps annulled at appeal. Interpreted alongside the Co-operation Notice which states that '[t]he binding effect of the Commission's decision is of course without prejudice to the interpretation of [Union] law by the Court of Justice'¹²⁰; it is clear that if the national court thinks that the Commission decision is incorrect it will have to either make a preliminary reference request to the CoJ or stay its proceedings where the Commission decision is already being appealed before the European Courts.¹²¹ Unfortunately, neither of the solutions offered in the Cooperation Notice deals with the situation where there are multiple addressees and only some of them have appealed and the non-appealing addressees are sued for damages. Thus, so long as the EU principle that the outcome of an appeal will have no effects on the legal situation of a non-appealing addressee is not made inapplicable to follow-on cases, the problem cannot be resolved by these existing legal means.

Neither the recent UK Government decision found in the Government Response to the BIS Consultation nor the Draft Consumer Rights Bill (which will extend the period of limitations at the CAT from two to six years to harmonise it with the period of limitations at the High Court) alleviates the problem entirely either: it should be noted that the issue is not necessarily one of 'time' but of principle in deciding how the period of limitations is supposed to run in practice with multiple infringers where only some of them appeal the

¹¹⁸ Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, [57].

¹¹⁹ Council Regulation (EC) 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Article 16.

¹²⁰ Commission Notice on the Co-Operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC (2004/C 101/04) [2004] OJ C101/54 [13].

¹²¹ Cooperation Notice (n 120) [13].

authority decision.¹²² To remedy better some of the problems resulting from the existence of appealing and non-appealing addressees, in realising the reform of the rules, the UK government should eliminate the rule that an appeal prevents the time from running in follow-on cases under section 47A in the absence of permission from the CAT by repealing section 47A(5)(b) and harmonise this aspect of the period of limitations with the period of limitations at the High Court. This seems to have indeed been done by the Draft Consumer Rights Bill which seeks to reform private actions by amendments to the Competition Act.¹²³ The Draft Consumer Rights Bill does not contain a clause equivalent to section 47A(5). However, it still contains a section stipulating that the CAT is bound by the ‘infringement decision’ of the relevant authority in proceedings under section 47A ‘once it has become final’.¹²⁴ The wording of the draft amended version of section 58A is indeed very similar to the current wording of section 58A and no clarification is provided as to what precisely ‘decision’ refers to.¹²⁵ It is still ambiguous whether ‘decision’ refers to the decision against the defendant in the damages claim or whether it refers to the decision against any of the infringers in the presence of multiple addressees. How ‘decision’ is to be interpreted will directly establish whether the ‘decision’ has become final since it is only by interpreting ‘decision’ one can decide *whose* appeal prevents the finding of infringement from becoming ‘final’ for the purposes of section 58A and thereby, section 47A. Thus, it appears that although the Draft Consumer Rights Bill has resolved some of the problem by eliminating section 47A(5), the problem will now present itself in the interpretation of section 58A. Therefore, the Draft Consumer Rights Bill should be amended to include a precise definition of ‘decision’ to resolve this problem entirely. If ‘decision’ is defined as one against the defendant in the private claim, then this would provide consistency with EU law. However,

¹²² Government Response (n 1) [4.7]. At the High Court, the period of limitations is six years from the date on which the loss was suffered and it is postponed if material facts are deliberately concealed by the defendant; Limitation Act 1980 s.2 and s 32(1)(b). Thus, in the case of secret cartels, time starts to run from when the claimant knew or ought to have known of those facts, which will often be when a competition authority publishes an infringement decision; Whish and Bailey (n 14) 315. An appeal to the European Courts does not stop a claimant from pursuing a case before the High Court in case of a Commission decision. The Draft Consumer Rights Bill introduces a new section to the Competition Act stipulating that the period of limitations is the same as that which applies to an action in a court law under Limitation Act 1980 (section 47E).

¹²³ See Draft Consumer Rights Bill, Schedule 7, Private Actions in Competition Law.

¹²⁴ Section 58A as amended by the Draft Consumer Rights Bill Schedule 7, [14]. This will also mean that in follow-on cases, for claimants who would like to make use of the binding nature of the findings of infringement on the CAT, there will have to be a stay to await the outcome on appeal. This will, in practice, have the same effect as the current section 47A(5), albeit without any impact on the calculation of the period of limitations.

¹²⁵ An ‘infringement decision’ for these purposes is defined as ‘a decision of the Commission that the prohibition in Article 101(1) or the prohibition in Article 102 has been infringed’ (section 47A(5)(c) as amended by the Draft Consumer Rights Bill). Similar definitions are provided for Competition and Markets Authority (CMA) and CAT decisions; *ibid.*

this would then lead to the potential problems identified in section III.A. If ‘decision’ is defined as one against any of the addressees in the infringement decision, then these problems would be avoided but there would be a conflict between the UK statute and the EU case law explained in section III (provided that the EU-level legislation proposed in this article is not adopted).

Once the period of limitations for follow-on cases under section 47A is harmonised with that at the High Court both in terms of how it is calculated and also its length, the first step in a given case will be to stay the proceedings to wait for the outcome of appeal at the European Courts.¹²⁶ This can be done by interpreting *Masterfoods*, Article 16(1) Regulation 1/2003, the Co-Operation Notice and the duty of sincere co-operation. The final outcome, however, is still dependent on there being a mechanism which makes the outcome of the appeal relevant to the non-appealing addressee in the follow-on case. Thus, EU-level legislation is essential to fully resolve the problem.

Admittedly, such legislation would implicitly conflict with the reasons underlying the EU principle in the first place. The reasons underlying the settled EU principle are legal certainty, good administration of justice and procedural economy.¹²⁷ Avoiding free-riding on the expenses incurred by others is also a benefit of the principle.¹²⁸ Similarly, there is also a possibility that the appeal outcome increases the fines imposed on the infringers and thereby possibly increasing the scope for damages.

The adverse results of conflicting with these legitimate reasons underlying the principle can be avoided if the new rule is limited in scope. The rule can be stipulated such that it gives the *national court* the right or discretion to take into account any appeal outcome on the Commission decision relevant to the damages action at hand. In other words, no right need to

¹²⁶ Under the scheme of the Draft Consumer Rights Bill, whether a stay is necessary or not would depend on how one interprets ‘decision’ since it is the interpretation of ‘decision’ that will establish when the infringement decision becomes final and binding on the CAT. It should also be noted that the High Court has not always been willing to immediately stay all proceedings in such cases and has allowed proceedings to continue to some extent; see eg *National Grid Electricity Transmission plc v ABB Limited and others* [2009] EWHC 1326 (Ch); *WM Morrison Supermarkets plc and others v Mastercard* [2013] EWHC 1071 (Comm).

¹²⁷ See above text around n 70.

¹²⁸ *AssiDöman* (n 70) [41]. The Commission expresses this as the principle of equality in *AssiDöman* by stating that non-appealing addressees would receive an unfair advantage over the undertakings which, unlike them, had taken the risk, in particular financial risk, of bringing an action for annulment; *ibid*. The Commission also states that ‘if they had lost their case, the applicants would certainly not have offered to share their legal expenses; now that they have won their case, the applicants want to free-ride on the efforts of other undertakings’; *ibid*.

be created for the non-appealing addressee. For all senses and purposes, the decision would still be binding and definitive against the party who has not appealed it. The national court would have the possibility of assessing the appeal outcome on the Commission decision as per the requirements of each case and of taking into account any factors resulting from the appeal that are relevant for assessing causation and quantum. This would allow and oblige the national court to decide, for example, that there are no damages that can be awarded because the agreement did not breach competition law in the first place or because the decision was tainted by procedural anomaly leading to its annulment or non-existence. The decision as it stands against the non-appealing addressee is not re-litigated under this approach; thus, the harm to legal certainty is limited. All that is sought here is to avoid unjust enrichment in a different and new case (ie the follow-on case) that is implicitly based on the correctness of the underlying Commission decision. Any other position inevitably implies that some parties can and will be unjustly enriched with no possibility of restitution as a result of follow-on actions before national courts based on Commission decisions subject to appeal. Moreover, regarding cartel cases, this will also come at the expense of discouraging the revelation of the existence of these cartels in the first place. It should be accepted that the avoidance of such unfair outcomes and the revelation of secret cartels is to be preferred over absolute adherence to the reasons underlying the existing EU principle.

IV Conclusion

This article has demonstrated that certain procedural issues have to be resolved before private actions can develop as encouraged by the Commission and the UK Government. The period of limitations and how it is to work in practice in follow-on damages actions in the presence of multiple infringers some of whom have appealed and some of whom have not is an issue that has not been properly resolved. In fact, it has not even been picked up as a problem by the Commission or the UK Government both of whom are currently in the process of reforming private actions. Similarly, the issue is not a UK-specific one and is applicable to all Member State jurisdictions; follow-on actions based on Commission decisions with multiple infringers are possible in all Member States and will be even more encouraged with the Commission's forthcoming Directive.

This article has also demonstrated that the period of limitations in follow-on actions becomes particularly problematic in cartel cases with leniency recipients since the leniency recipients are the least likely addressees to appeal the Commission decision. Exposing these leniency

recipients to undue damages actions will automatically discourage leniency applicants from coming forward in the first place and thereby weaken the public enforcement of competition law.

Regarding the specific UK case law that has developed in all sorts of directions in different cases, it can only be hoped that the Supreme Court reverses the Court of Appeal judgment in *Deutsche Bahn* by adopting the correct approach identified in this article and finding that the claim against Morgan Crucible was time-barred. It can also only be hoped that in a future case the Supreme Court reverses the Court of Appeal judgment in *BCL I* to establish that an infringement decision is not distinct from a penalty decision; in fact, there is no such thing as a ‘penalty decision’ in the EU context. Similarly, it is for the UK legislator to amend the period of limitations in follow-on cases before the CAT by repealing the requirement of permission from CAT while there are ongoing appeals against the underlying decision (section 47A(5)(b)) and harmonise not just the length but also the calculation of the period with that at the High Court as proposed in the Draft Consumer Rights Bill. What the Draft Bill is missing and should be complemented with is a precise definition of ‘decision’ regarding cases where there are multiple infringers and addressees in the infringement decision to specify whether ‘decision’ refers to the decision against the defendant in the private action or whether it refers to the decision against any of the parties. The interpretation of ‘decision’ in this context will have immediate implications for establishing when the infringement decision has become final and therefore, when a private claimant can benefit from its binding nature on the CAT and the courts in a follow-on case. Finally, it is for the European authorities to legislate and allow national courts deciding follow-on cases to take into account factors arising from *any* appeal against the underlying Commission decision in so far as these factors are relevant for assessing causation and quantum.