

CPI's Cartel Column Presents:

Cartel Settlements: Facilitating Damages Claims But Hybrid Cases Remain Unsettling

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I. Introduction

Over ten years since the introduction of the European Commission Settlement Notice, cartel settlement decisions have become more common than standard decisions: in the period between January 1, 2017 and December 21, 2020, over 70 percent of cartel cases in which a decision was adopted by the European Commission (“the Commission”) were settlement decisions.² In this article we examine a number of developments and trends in settlement and hybrid cartel cases and their implications, including on damages claims which are now almost an inevitable consequence for infringers following the Commission administrative procedure.

Where the Commission believes that a case is appropriate for settlement, it is in the Commission’s interest for all parties to settle. However, if one or more parties opt out of the settlement procedure, the Commission may choose to settle with the remaining parties and follow the ‘normal’ (contentious) procedure for the parties that opted out (so-called “hybrid” cases). Following appeals in several hybrid cases, in this article we take stock of some of the ongoing issues hybrid cases, in particular arguments raised by non-settling parties regarding the Commission’s lack of impartiality and breach of the presumption of innocence through adopting (and publishing) the settlement and contested decisions on different dates and through referring to non-settling parties and/or their liability in settlement decisions. We also examine the increased use of redactions in contested infringement decisions in hybrid cases and how this feeds into damages claims.

Following the recent English Court of Appeal judgment on binding recitals in the *Trucks* decision, we also consider what this judgment means for follow-on damages claims in England and for the Commission settlement process.

Finally, we look at appeals of settlement decisions, which remain rare. Indeed, as explained below, the absence of substantive appeals of settlement decisions has been a boon for damages claims.

II. Hybrid Cases – Walking a Tightrope

“Hybrid” cases involve certain parties to a competition infringement engaging in the Commission’s settlement procedure whilst other parties choose not to engage in or opt out of settlement and choose to follow the (contentious) standard administrative procedure.

As at December 21, 2020 there have been seven³ hybrid cases out of a total of 34 cartel settlement cases. The number of hybrid cases has decreased in recent years with only two hybrid cases since the beginning of 2017: *Trucks* and *Canned Vegetables*. The relative decrease in hybrid cases may be partially explained by the numerous issues that such cases raise for all the parties involved as well as in follow-on damages claims. We discuss these issues in further detail below.

Lack of Impartiality and Breach of the Presumption of Innocence: Appeals of Standard Decisions in Hybrid Cases

In the six fully concluded hybrid cases to date (*Animal Feed Phosphates*; *Steel Abrasives*; *Yen Interest Rate Derivatives*; *Euro Interest Rate Derivatives*; *Mushrooms*; *Trucks*), all of the non-settling parties have appealed the standard Commission decisions to the General Court⁴, with breach of the presumption of innocence and a party’s rights of defence featuring as key aspects of the appeals. While there are various nuances to each appeal, we pick up on two

key themes below: (i) adopting (and publishing) the settlement and standard decisions on different dates; and (ii) references to non-settling parties and/or their liability in settlement decisions.

Publication of settlement and standard decisions on different dates

The Commission is in an inherently difficult and contradictory position in a hybrid case: the non-settling parties were (in the Commission's view) part of the cartel that is the basis for the settlement decision, yet the Commission needs to respect the non-settling parties' presumption of innocence and its rights of defence. This can be particularly difficult where the settlement decision and standard decision are adopted on different dates, months or years apart. In all hybrid cases to date, except *Animal Feed Phosphates* (the first hybrid case), the Commission has adopted and published the settlement decision and standard decision on different dates. The General Court addressed this issue in the *Icap* judgment (following an appeal by the non-settling party in Yen Interest Rate Derivatives), stating that "*in circumstances where the Commission considers that it is not in a position to determine the liability of the undertakings participating in the settlement without also taking a view on the participation in the infringement of the undertaking which has decided not to enter into a settlement, it is for the Commission to take the necessary measures – including possible adoption on the same date of the decisions relating to all the undertakings concerned by the cartel, as it did in [Animal Feed Phosphates] – enabling that presumption of innocence to be safeguarded*"⁵. By using the word "possible" in the above wording from the *Icap* judgment, the General Court refrained from stating that staggered decisions automatically infringe the presumption of innocence (a point picked up by the Commission in Scania's appeal in the *Trucks* decision, discussed below). The General Court's judgment in *Pometon* (the appeal of the contested infringement decision in *Steel Abrasives*) goes a step further, stating that "*none of the provisions of EU law that apply in this case require the Commission to adopt a settlement decision at the same time as the infringement and penalty decision against an undertaking which has withdrawn from the settlement procedure or has even refused to participate in such a procedure from the outset*"⁶.

Scania, the only non-settling party in *Trucks*, pursued this point in its appeal. Relying on the judgment in *Icap*, it argued that, in adopting the settlement decision before the contested decision, the Commission had failed to protect Scania's rights of defence⁷. Scania also argued that the Commission failed to fulfil its obligation to conduct a diligent and impartial examination. Scania argued that the Commission, having adopted the settlement decision prior to the adoption of the contested decision, was no longer in a position to demonstrate impartiality and to assess objectively the evidence and the arguments put forward by Scania in the procedure leading to the adoption of the contested infringement decision⁸. In response, the Commission argued that in *Icap*, the General Court held that procedures staggered over time in hybrid cases do not automatically infringe the presumption of innocence. The General Court's judgment on Scania's appeal in *Trucks* is awaited.

In principle, the idea of adopting (and publishing) settlement and contested infringement decisions on the same date is attractive and might go some way towards safeguarding the presumption of innocence for non-settling parties (or at the very least, make this a less likely ground of appeal). However, adopting this approach would also put at risk one of the key objectives and benefits of the settlement procedure – to ensure that cases are dealt with more quickly than under the standard procedure. Furthermore, the process of: (i) the

Commission launching an investigation; (ii) the Commission adopting a decision; and (iii) the Commission publishing a provisional or final non-confidential version of the decision in the public domain, invariably takes several years to complete. The lengthy wait for Commission decisions to be published would likely be exacerbated if the settlement and contested infringement decisions in hybrid cases needed to be adopted and published on the same date. For example, in *Trucks*, the Commission confirmed in January 2011 that it had conducted inspections in the trucks sector. It adopted the settlement decision in that case in July 2016 and published the provisional non-confidential version of the settlement decision in April 2017. The Commission adopted the contested infringement decision against Scania in September 2017 and the provisional non-confidential version of that decision was only published on June 30, 2020. If the Commission had adopted and published both decisions on the same later date, this would have been to the detriment of those parties who suffered losses as a result of the cartel and seek to rely on the settlement decision in advancing their damages claims.

Publication of the Commission's decision is important in allowing damages claims to progress because the decision provides claimants with key information regarding the cartel. Unless the Commission's administrative procedures can be expedited, adopting and publishing the settlement and standard decisions on the same date could cause more problems than it solves in the context of damages claims. Indeed, many claimants may only become aware of the competition infringement when the Commission decision has been published. The longer the period of time that elapses between the anticompetitive conduct taking place and the Commission's decision being published, the greater the risk that claimants lose access to documentary evidence (through routine document destruction policies) and witness evidence (through witnesses retiring or become uncontactable, or memories fading) to support their claims. Further, the greater the delay in the final Commission decision being published, the greater the opportunity for defendants to argue that claims are time barred as a result of sufficient evidence on the infringement coming into the public domain ahead of the Commission's decision being finalised and the infringement being established.⁹ Such detriment to claimants would be inconsistent with the Commission's stated support for parties seeking compensation through private damages actions against competition infringers.¹⁰

References to non-settling parties and their liability in the settlement decision

A number of non-settling parties have raised in their appeals arguments about being referenced in the relevant settlement decisions. The Commission is in a difficult position given that the non-settling party will have generally participated in many of the meetings/communications that form the basis for the settlement decision (regardless of how the conduct should be characterised). We set out details from a couple of example cases below.

- *Steel Abrasives*

Pometon was the only non-settling party in the *Steel Abrasives* cartel. In Pometon's appeal of the contested infringement decision, one ground of appeal was that, although the settlement decision was not addressed to Pometon, several references were made to Pometon in the "Description of the events" section of the settlement decision as an undertaking which actively participated in the cartel. Pometon referenced the following recitals of the settlement decision, in which the Commission expressly referred to Pometon's conduct:

“(26) Ervin, Winoia, Pometon, MTS and Würth engaged in frequent contacts on bilateral as well as multilateral bases, in which they discussed the key price components applicable to all their EEA steel abrasives sales ...

(28) In October 2003, Winoia, Ervin and Pometon met at the Lago di Garda (Italy) to agree on a uniform calculation model for a common scrap surcharge to be applied by all of them. ...

(29) ... MTS and Würth ... did not participate in the initial stages of the process when the agreement between Winoia, Ervin and Pometon was concluded. ...

(31) The contacts continued with Pometon until 16 May 2007 when it sold the steel abrasives business to Winoia and exited the business. ...

(38) The evidence demonstrates that contacts involving Winoia, Ervin and Pometon evolved into a pattern of behaviour as of October 2003 ... ”

In its appeal, Pometon argued that, in a settlement procedure, the final decision should be concerned only with the conduct of the undertakings party to the settlement and the penalties imposed on them. It argued that the references in the settlement decision to conduct ascribed to Pometon showed that, even before Pometon had the opportunity to defend itself, the Commission had already prejudged its guilt. Pometon therefore alleged that the contested infringement decision was vitiated by a breach of the principle of a fair trial, the principle of the presumption of innocence and its rights of the defence.

The Commission argued that the references to Pometon were intended only to establish the liability of the other four undertakings that participated in the cartel and did not affect the Commission’s duty to complete the adversarial procedure in relation to Pometon. Further the Commission stated that it had due regard, in its dealings with Pometon, for the principle of the presumption of innocence to be protected and that it had exercised caution and expressly stated, in footnote 4 of the settlement decision and recitals 27 and 28 of the contested infringement decision, that the description of events set out in the settlement decision did not draw any conclusions as to Pometon’s guilt regarding its participation in the cartel. The Commission also argued that Pometon’s name was inadvertently mentioned in the publication of the provisional text of the settlement decision and was replaced in the text of the settlement decision subsequently published on January 6, 2015 by the words “another undertaking.”¹¹ Pometon’s response was that irrespective of the manner in which the settlement decision was published, Pometon was the subject in that decision of specific allegations concerning its participation in the cartel and the infringement of the principle of the presumption of innocence arose from that. Replacing Pometon’s name in the text of the settlement decision subsequently published on January 6, 2015 did not cure the infringement of that principle¹²; rather, the settlement decision should only record the conduct of settling parties and should make no reference to the non-settling party (whether by name or by way of an anonymised reference).

Although Pometon was successful in reducing its fine on appeal, the aspects of its appeal dealing with the hybrid procedure were unsuccessful. The General Court noted that the Commission, especially in footnote 4 of the settlement decision, expressly ruled out Pometon’s guilt at that stage of the procedure.¹³ The General Court addressed the tightrope that the Commission must walk in hybrid cases, noting that the compliance with the duty of impartiality requires the Commission in a hybrid case to draw up and state the reasons for the

settlement decision, exercising all necessary drafting precautions to ensure that that decision, while not addressed to the non-settling party, does not undermine the procedural safeguards which the non-settling party must enjoy in the contested administrative procedure. It noted that while such drafting precautions should prompt the Commission to avoid as far as possible naming the non-settling undertaking in the settlement decision, this *“cannot lead to a prohibition on any direct or indirect reference to that undertaking.”*¹⁴ The General Court also made a number of strong statements that serve as a warning to non-settling parties that the principle of the presumption of innocence has its limits:

- *“ ... when an undertaking freely decides to opt for the hybrid procedure rather than provide the Commission with settlement submissions, it cannot claim, by relying on the principle of the presumption of innocence, that the Commission, as the authority responsible for ensuring compliance with the competition rules, is required to completely disregard in the settlement decision certain facts admitted by the other settling undertakings which are relevant for assessing the existence of that cartel as a whole, even though they relate to the conduct of the applicant who chose to take no further steps in the settlement procedure”*¹⁵;
- *“... the right of an undertaking to withdraw from a settlement procedure does not also confer on it the right to an irrebuttable presumption of innocence, that is to say, a presumption which cannot be disproved by evidence to the contrary, evidence that it is, in the instant case, for the Commission to adduce precisely in the course of an adversarial procedure with the undertaking concerned.”*¹⁶

Pometon has appealed the General Court judgment. Therefore the Court of Justice will, for the first time, give its view on certain aspects of the hybrid procedure. In October 2020, Advocate General Hogan delivered his opinion and recommended that Pometon’s fine be further reduced but that the other aspects of the appeal, including those related to the hybrid procedure, should be dismissed. However, the Advocate General was critical of how the General Court had interpreted the references to Pometon in the settlement decision, questioning whether the references to Pometon were necessary for the categorisation of the legal liability of the four settling parties. He concluded that, when the settlement decision is analysed as a whole, *“the General Court could not properly have concluded ... that the references to Pometon could not objectively lead to a suspicion that the Commission prejudged the guilt and liability of [Pometon] as early as the stage of the settlement decision addressed to the other four undertakings involved in the cartel ... Consequently, the General Court erred in law by stating ... that the Commission could not be accused of having breached its duty of impartiality towards Pometon and of having infringed the principle of the presumption of innocence in the contested decision.”*¹⁷ However, the Advocate General stated that the plea relating to this error of law was not necessarily effective as the *“violation of Pometon’s presumption of innocence at the time of the adoption of the settlement decision does not necessarily have a direct impact on the legality of the contested [standard] decision.”*¹⁸ He further explained that case law¹⁹ establishes that the irregularity relating to a possible lack of objective impartiality on the part of the Commission would entail the annulment of the contested decision only if it were established that, were it not for that irregularity, that decision would have been different in content. The Advocate General concluded that *“the lack of objective impartiality on the part of the Commission at the stage of the settlement decision did not affect the legality of the contested decision since the findings made in the latter decision are themselves duly supported by the evidence adduced*

by the Commission.”²⁰ The judgment of the Court of Justice will be eagerly awaited; if the Court of Justice agrees with the Advocate General, the Commission will need to consider very carefully its wording in future settlement decisions in hybrid cases. It is unclear whether the wording used in the *Trucks* settlement decision (see below) avoids the issues identified by the Advocate General.

- Trucks

Scania was the only non-settling party in *Trucks*. In the light of the issues encountered in previous hybrid cases, it appears that the Commission took additional care when drafting the *Trucks* settlement decision. Scania is not explicitly named in the settlement decision (the “Trucks Settlement Decision”) and recital 4 of that decision states: “On 20 November 2014, the Commission initiated proceedings ... against the addressees of this decision and a number of entities of an additional undertaking. This undertaking did not submit a request to settle the proceedings ... As at the date of this Decision, the administrative proceedings ... against this undertaking are pending. For the avoidance of doubt, this Decision does not make any findings concerning this undertaking with respect to an infringement of EU competition law.” In the Trucks Settlement Decision, the Commission frequently refers to the Addressees/settling parties “amongst others” thereby making it clear that the Addressees of the Settlement Decision were not the only parties involved in the infringing conduct; for example, recital 54 states “... during a meeting on 10 and 11 April 2003 ... which was attended by, amongst others, representatives of the Headquarters of all of the Addressees, discussions took place concerning, amongst other things, prices and the modalities of the introduction of Euro 4 standard compliant trucks ...”.

Scania has also pursued similar arguments in its appeal, arguing that the contested infringement decision (the “Scania Trucks Decision”) was adopted in breach of Scania’s rights of defence since the Commission had, in the Trucks Settlement Decision, legally characterised the facts and classified as an infringement the conduct in which Scania had participated before Scania had had the opportunity effectively to exercise its rights of defence²¹. Scania also argues that the Scania Trucks Decision infringes the presumption of innocence as the Trucks Settlement Decision determined the Commission’s final position with regard to the same facts as those set out in the statement of objections and found that those facts, in which Scania also participated, constitute an infringement²². The Commission strongly rejected Scania’s arguments, noting that the Trucks Settlement Decision contains no adverse findings against Scania, and in particular no reference or allusion to Scania’s involvement in, or liability for, the conduct described in that decision; it also referred to the fact that a procedure brought against Scania was still ongoing. The Commission also emphasised that the Trucks Settlement Decision was based not directly on the statement of objections but on the common understanding of the infringement between the settling parties and the Commission following the settlement meetings²³. The General Court’s judgment is awaited but the Commission has made a clear attempt to stay on the right side of the line in Trucks.

Redactions: protecting settling parties in contested infringement decisions

One of the advantages for settling parties is that a settlement decision generally contains far fewer details about the cartel arrangements than a contested infringement decision. In hybrid cases, this creates an inherent conflict, as the Commission issues both a settlement decision and a contested infringement decision. To address this conflict, in at least some hybrid cases,

the Commission has engaged with the settling parties to identify which information should be redacted in the contested infringement decisions.

EU law provides that decisions are taken as openly as possible within the EU and that the EU's institutions, such as the Commission, conduct their work as openly as possible.²⁴ In line with these general principles, the Commission states that it refrains from disclosing information only to the extent that this is covered by its duty of professional secrecy or other public policy exceptions. Guidance published by the Commission provides that, in public versions of decisions, it may redact information relating to undertakings participating in the infringement that are not mentioned in the operative part of the decision.²⁵ This information is covered by the presumption of innocence and the obligation of professional secrecy within the meaning of Article 339 TFEU as confirmed in the *Pergan* case.²⁶

One key question is whether, in a hybrid case where the settling parties have participated in the Commission's investigation and were fully able to exercise their rights of defence and admitted their participation in and liability for the relevant cartel, the *Pergan* principle applies to information about the settling parties in the standard decision? That is an issue on which there is no clear precedential authority at present, though it is likely to be an important issue in private damages actions arising out of hybrid cases.

More generally, the Commission's guidance on how it assesses confidentiality in preparing public versions of its decisions²⁷ provides that, as a general rule, it does not consider its own assessment, including its analysis of evidence and the results of its investigation, to be confidential (except to the extent that it explicitly refers to business secrets or other confidential information). It also considers that, in general, an undertaking cannot claim wholesale confidentiality over entire sections of documents, as it is normally possible to protect confidential information with more limited redactions. However, in the provisional non-confidential version of the Scania Trucks Decision, the approach taken seems to be closer to a wholesale redaction process.

The first hybrid case was *Animal Feed Phosphates*, in which the contested infringement decision issued to Timab contained detailed information about the settling parties and very limited redactions; the most recent hybrid case in which both decisions are published is Trucks in which the Scania Trucks Decision contains very extensive provisional redactions. As detailed further below, hybrid cases between *Animal Feed Phosphates* and *Trucks*, such as *Euro Interest Rate Derivatives* and *Mushrooms*, arguably involved an approach towards redactions which more evenly balanced the competing interests of: (i) of the Commission's duty to publish as much detail as possible in order to allow those interested to understand fully the reasoning behind its decisions; and (ii) the settling infringers in seeking fuller redactions to the contested infringement decision on the grounds of *Pergan*. This may reflect increasing caution from the Commission in its approach to accommodating redactions requested by settling infringers. Settling infringers are incentivised to request wholesale redactions in order to limit the information reaching the public domain concerning their role in the infringing conduct. Indeed, as noted above, one of the primary advantages for settling parties is that a settlement decision generally contains far fewer details about the cartel arrangements than a standard contested infringement decision; that is an advantage that settling infringers are motivated to protect by seeking redactions in any subsequent contested infringement decision.

Beginning ...

In the *Animal Feed Phosphates* case, Timab was the only non-settling party. The Commission found that the Animal Feed Phosphates cartel dated back to 1969 but could only establish Timab's participation in the cartel between September 1993 and February 2004. Nevertheless, the contested infringement decision addressed to Timab contained significantly more information than the settlement decision about the settling parties' cartel activities in relation to the period before Timab's participation, including detailed accounts of meetings which took place in the mid-to-late 1970s involving the settling parties. This information would have been extremely useful to a claimant seeking damages from the settling parties. More generally, it is notable that there are very limited redactions in the contested infringement decision despite it containing a detailed description of the cartel and the settling parties' participation in it.

Middle ...

In a number of subsequent hybrid cases, such as *Euro-Interest Rate Derivatives* and *Mushrooms*, the settling parties and the Commission took additional steps to redact information in contested infringement decisions regarding the settling parties' infringing conduct. This was generally limited to redacting the names of the settling parties and relevant employees as the examples below highlight:

(i) Contested infringement decision in AT.39914 – Euro Interest Rate Derivatives addressed to Crédit Agricole, HSBC, JPMorgan Chase:

(157) On 18 September 2006 [employee of JPMorgan Chase] and [employee of nonaddressee] have online discussions in which [employee of non-addressee] states that he wants the 3 months October to be high, to which [employee of JPMorgan Chase] responds that they have the same interest even though he has reduced his exposure for October. [employee of JPMorgan Chase] asks "HAPPY WITH SEP OUT AT 66?" and [employee of non-addressee] replies "VERY HAPPY NOW WE WANT 2EE 3MTH OCTOBER TO BE HIGH ...

(252) On 17 January 2007281 [employee of non-addressee] informs [employee of HSBC] that he has a large trading position on March/April ("j'ai du mar/apr pour taillasse" "ca va s'inverser"). [employee of HSBC] reciprocates and states that he sells May contracts to which [employee of non-addressee] agrees ("c'est cher hein? Oui may urs. Tas raison") and that he intends to sell September[...]. [employee of HSBC] indicates that he does it already and that his price for the September [...]is "4.045" shortly before leaving the chatroom."

(ii) Contested infringement decision in Case AT.39965 – Mushrooms addressed to Riberebro:

"(32) On 17 November 2010, a multilateral GETC meeting took place in Paris. Participants were [Riberebro], [...], [...] and [...]. The cartel members exchanged information on each participant's stock levels and agreed that they should respect each other's clients and markets and complained generally about the loss of clients. ...

(36) On 27 April 2011, a meeting took place at the premises of Riberebro in Alfaro, Spain between [...], [...], [Riberebro] and [...]. [...] stated that the market

was too divided, that prices were declining and everyone was going after volumes. The participants noted that prices for concluded contracts had fallen [...] and blamed [...] and [...] for that fall and [...] and Riberebro stated that tougher agreements had to be put in place.”

End ... ?

The provisional non-confidential version of the Scania Trucks Decision was published on June 30, 2020. Compared to the contested infringement decisions referenced above, the *Scania Trucks* Decision contains considerably more redactions; section 6.2 of the *Scania Trucks* Decision (“The collusive meetings and other anticompetitive contacts”) contains 93 recitals, of which 13 recitals are fully redacted and in 20 recitals at least half of the text is redacted (some examples of those recitals are set out below). A significant percentage of those redactions do not yet appear to be agreed as between the Commission, the settling parties and/or Scania as they are referred to as “[confidentiality claim pending]” in the *Scania Trucks* Decision.

Examples of partially redacted recitals in the provisional non-confidential Scania Trucks Decision:

“(98) On 17 January 1997 a competitor meeting was held in Brussels. [confidentiality claim pending] [...] [confidentiality claim pending] [...] to [...] and [...] (Scania HQ).¹⁴⁶ [...] has submitted [...]’s handwritten notes (dated 18 January 1997) with the heading “competitor meeting”.¹⁴⁷ In this meeting [...] was represented by [...] as the handwritten notes refer to his opening speech. [confidentiality claim pending] [...] [confidentiality claim pending] [...]. [confidentiality claim pending] “[...] [confidentiality claim pending] [...] [...] [confidentiality claim pending] - [confidentiality claim pending] [...] [confidentiality claim pending] [confidentiality claim pending] [...] [confidentiality claim pending] [confidentiality claim pending] [...] [confidentiality claim pending] [...] [confidentiality claim pending] [...] [confidentiality claim pending] [...] [confidentiality claim pending] [...]”

(124) On 1 July 2002 [...] [confidentiality claim pending] [...] [confidentiality claim pending]. [confidentiality claim pending] [...] [confidentiality claim pending] [...] [confidentiality claim pending] [...] [confidentiality claim pending] [...] [confidentiality claim pending] [...] [confidentiality claim pending].”

In the hearing report for the Scania appeal, the Commission appears to suggest that redactions can be made in standard decisions in hybrid cases on the basis of the *Pergan* principle: “the Commission maintains that, by consulting the settling parties concerning the non-confidential version of the contested decision, it gave effect to the case-law resulting from the [*Pergan*] judgment ... by giving the settling parties the opportunity to argue that certain data relating to them was confidential in view of the fact that, although they are not the addressees of the contested decision, they are nevertheless referred to in it.”²⁸

Even if the *Pergan* principle applies to information identifying the settling parties in a contested infringement decision, which has yet to be determined by the General Court or the Court of Justice, the redactions in the Scania Trucks Decision go far beyond what is necessary to avoid identifying the settling infringers. Further, the approach taken appears inconsistent with the Commission’s approach in previous hybrid cases and the approach adopted in the Commission’s guidance (referenced above). As the version of the *Scania Trucks* Decision

published on June 30, 2020 is the provisional non-confidential version of the decision, it is possible that the final non-confidential version of the decision will contain fewer redactions, once issues concerning the redactions have been fully and finally determined between the Commission, Scania and the settling infringers. If it does not contain significantly more limited redactions than the provisional non-confidential version of the decision, it risks setting a precedent that would appear to: (i) run counter to the Commission’s obligation to publish as much detail as possible in order to allow those interested to understand fully the reasoning behind its decisions; and (ii) create difficulties for claimants seeking to rely on contested infringement decisions to provide fuller details of infringing conduct perpetrated by settling infringers. Indeed, the Commission’s willingness to appease settling infringers’ redaction requests, at least at the outset, is likely to motivate settling infringers to make similar redaction demands in future hybrid cases.

III. Binding Recitals

A recent development at the intersection between settlement decisions and damages claims is the judgments of the Competition Appeal Tribunal (“CAT”) and the English Court of Appeal (“CoA”) which concerned the extent to which recitals in the Trucks Settlement Decision are binding on the settling parties in subsequent damages claims.²⁹ By way of brief summary of the key issue, recital 3 of the Trucks Settlement Decision states that the “*facts as outlined in this Decision have been accepted by MAN, Daimler, Iveco, Volvo and DAF (the “Addressees”) in the settlement procedure.*” Similar wording has been used in the settlement decisions in other hybrid cases³⁰, partially to make it very clear that one or more parties involved in the cartel (i.e. the non-settling parties) have not accepted the facts set out in the settlement decision.

In a series of damages claims brought in England against certain of the settling parties in the Trucks cartel (“the Defendants”), various claimants (“the Claimants”) have sought to rely on the facts set out in the *Trucks Settlement* Decision in support of their claims. To varying degrees, the Defendants sought to ‘not admit’ or deny a number of those facts in an attempt to force the Claimants to have to establish those facts at trial.

The CAT held a preliminary issues hearing in December 2019 to determine the extent to which the CAT and/or the Defendants were bound by the findings of fact set out in the *Trucks Settlement* Decision. In its judgment in March 2020, the CAT held that a number of the facts set out in the *Trucks Settlement* Decision were binding as a matter of EU law because they constitute the essential basis for the operative part of the Commission’s *Settlement* Decision (the “essential facts”).³¹ This meant that the CAT could not reach a decision which was inconsistent with ‘essential facts’ due to Article 16 Regulation 1/2003 (“Article 16”).

In respect of facts that were found not to be binding as a matter of EU law (the ‘non-essential facts’), the CAT held that it would be an abuse of process under English law for the Defendants to seek to deny or not admit those facts unless the defendants could show a legitimate reason for them to do so by reference to the following principles:

1. the Claimant does not object to a positive challenge to a particular fact by a Defendant;
2. the finding in the Settlement Decision does not accurately reflect the underlying document referred to, with the CAT deciding in any such case whether an inconsistency exists between the Settlement Decision and the relevant document;

3. the Defendant relies on new evidence, which the Defendants could not have reasonably had access to at the time of the Commission's investigation;
4. where a Claimant pleads facts which are more detailed than or additional to the findings in a recital of the Settlement Decision, it will not be an abuse of process for a Defendant to plead in response to those detailed or additional facts provided that it does not amount to a denial of a finding in a recital (unless justified by one of the principles at 1-3 above); or
5. if not covered by principles 1-4 above, the Defendant must set out the reasons for advancing a positive case contrary to a finding in a recital and the CAT will determine whether it is an abuse of process for that case to be advanced.³²

The key reason for the CAT's finding on abuse of process was recital 3 of the Trucks Settlement Decision referenced above. The CAT concluded that it would both bring the administration of justice into disrepute and be unfair to the Claimants if the Defendants were permitted to 'not admit' or deny the facts in the Settlement Decision unless they fell within one of the five principles above.

The Defendants appealed the abuse of process aspect of the CAT's judgment to the CoA. The CoA rejected the Defendants' appeal. It noted that the settlement procedure provided the Defendants an opportunity to challenge the non-essential facts in the Trucks Settlement Decision; the Commission had issued a statement of objections, provided access to the Commission's administrative file and the Defendants could have brought a procedural appeal in the European Courts if the Trucks Settlement Decision did not reflect the admissions made in their settlement submissions.³³

Following the CAT and CoA judgments, competition infringers now have a clearer understanding of what the consequences are of settling with the Commission, in the context of subsequent damages claims (at least those pursued in the English courts). Given the prevalence of follow on damages actions, it is likely that well advised competition infringers will factor in these consequences in determining whether to enter into a settlement with the Commission.

IV. Appeals

The right to appeal an infringement decision is a fundamental right. However, an appeal or appeals of an infringement decision inevitably have an impact on the pace at which damages claims can proceed. In *MasterFoods*³⁴ it was established that national civil proceedings must be stayed or suspended until the decision of the Commission to impose a fine has become irrevocable or all appeal avenues have been exhausted. In the English courts, steps towards trial can still be taken although a final trial cannot be heard until after the European appeals process has been exhausted.³⁵

To date, there have only been three appeals out of 34 settlement decisions³⁶, highlighting that the settlement procedure has been very effective in minimising appeals of Commission decisions. This is a positive development for damages claimants who sue settling parties and whose claims can proceed more quickly towards trial as compared with contested infringement decisions that are under appeal before the European Courts. In hybrid cases, this dynamic may influence which parties claimants choose to sue. As contested decisions in

hybrid cases are often appealed by non-settling parties (see above), claimants may elect not to sue non-settling parties as this could complicate and delay their claims.

Furthermore, there have not been any appeals by settling parties in relation to the substance or scope of a decision, or in relation to the liability of a settling party. This is consistent with how the settlement procedure operates, as the settling parties are required to voluntarily acknowledge their participation in, and liability for, the relevant infringement in their settlement submissions.

Appeals in relation to settlement decisions have, to date, related to the level of fines imposed and, in particular, the level of fines imposed on one settling party as compared to the fines imposed on other settling parties. While each appeal turns on its own facts, in two of the appeals (*Société Générale* and *Printeos/Tompla*), this issue arose partially because of the manner in which settlement discussions were (and are) conducted: once the wording of the case overview has been agreed by all of the relevant parties and the Commission, the parties will be informed *separately* of the range of fines being considered. As the settlement meetings are bilateral, the parties do not receive any information on the range of the other parties' fines and will not have an opportunity to assess their fine, as compared to fines imposed on the other settling parties, until the final decision has been published. Since the settling parties are not informed of the maximum fines to be adopted against other settling parties during settlement discussions, this information does not form part of what the settling parties agree to in their settlement submissions. The third appeal of a settlement decision is more recent and relates to Clariant's appeal of the settlement decision adopted in July 2020 in relation to the ethylene purchasing cartel. One of the grounds of appeal requests that the fine imposed on Clariant be reduced to a proportionate level, suggesting that Clariant may be trying to adopt similar arguments as in the *Société Générale* and *Printeos/Tompla* appeals.

Such appeals (of fines) have limited impact on follow-on damages claims since the appellants are not contesting their involvement in, or liability for, the infringement. The settlement procedure therefore often allows damages claims to progress more quickly than in the case of contested decisions. Furthermore, as more cases are settled (as noted above, in the period from January 1, 2017, over 70 percent of cartel cases in which a decision was adopted by the Commission were settlement decisions), the number of appeals related to cartel conduct should decrease over time. It is hoped that this will allow for speedier judgments in the decisions that are appealed, as the strain on the General Court and the Court of Justice's capacities will be reduced through hearing fewer cases.

V. Conclusion

Settlement decisions are here to stay, as are follow-on damages claims. However, to settle or not to settle remains a finely balanced question for alleged cartelists and also has knock-on effects on the damages claims that follow the administrative procedure.

On the whole, settlement decisions facilitate damages claims, not least because settlement decisions are generally published more quickly than contested decisions and there have, to date, not been any substantive appeals of settlement decisions.

The General Court judgments in hybrid cases such as *Icap* and *Pometon* and the CAT and CoA judgments in the *Trucks* cases in the English courts have provided parties with a clearer understanding (as compared to when the settlement procedure was first introduced) of what

settling or not settling may mean in the Commission administrative procedure and in subsequent damages claims. The advantages and disadvantages of each option are now clearer for alleged competition infringers. While issues remain to be resolved in relation to hybrid cases, including in relation to the protection of non-settling infringers' presumption of innocence, the upcoming Court of Justice judgment in *Pometon* may provide additional clarity on how such cases should be handled and if the Commission is taking sufficient steps to protect the rights of non-settling parties. We may, however, need to wait longer to obtain clarity on the extent of redactions that can be made in contested decisions to protect the rights of settling parties.

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- ¹ Bryan Cave Leighton Paisner, The authors would like to thank Ben Bosmans for his research assistance.
- ² 2017: 7 decisions of which 4 were settlement decisions; 2018: 4 decisions of which 3 were settlement decisions; 2019: 5 decisions of which 4 were settlement decisions; 2020: 2 decisions as at November 17, 2020, both of which were settlement decisions
- ³ Includes *Canned Vegetables* in which the standard decision is awaited (the SO was issued to Conserve Italia in October 2020); the settlement decision was adopted in September 2019 against Bonduelle, Coroos and Groupe CECAB; we are aware that some sources have suggested that Bioethanol Benchmarks will be a hybrid case but as this has not been confirmed, we have not included it in our analysis.
- ⁴ Although Riberebro withdrew its appeal in relation to the standard decision in *Mushrooms*.
- ⁵ *Icap and Others v. Commission* (T-180/15, EU:T:2017:795).
- ⁶ Case T-433/16, *Pometon SpA, v. European Commission* (100).
- ⁷ Report for the Hearing in Case T-799/17, *Scania AB, Scania CV AB, Scania Deutschland GmbH v. European Commission* (54).
- ⁸ Report for the Hearing in Case T-799/17, *Scania AB, Scania CV AB, Scania Deutschland GmbH v. European Commission* (55).
- ⁹ In [Granville Technology Group Limited \(In Liquidation\) and Others v Elpida Memory \(Europe\) GmbH and Others \[2020\] EWHC 415 \(Comm\)](#) it was held that limitation under English law can commence prior to the Commission's decision being published.
- ¹⁰ See for example, Commission Press Release dated November 10, 2014: Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions.
- ¹¹ In the version of the *Steel Abrasives* settlement decision that is currently publicly available, the reference to Pometon selling its business to Winoa in May 2007 in recital 31 has also been removed.
- ¹² Case T-433/16, *Pometon SpA, v. European Commission* (45).
- ¹³ Case T-433/16, *Pometon SpA, v. European Commission* (65).
- ¹⁴ Case T-433/16, *Pometon SpA, v. European Commission* (72).
- ¹⁵ Case T-433/16, *Pometon SpA, v. European Commission* (93).
- ¹⁶ Case T-433/16, *Pometon SpA, v. European Commission* (96).
- ¹⁷ Opinion of Advocate General Hogan, Case C-440/19 P, *Pometon SpA, v. European Commission* (81).
- ¹⁸ Opinion of Advocate General Hogan, Case C-440/19 P, *Pometon SpA v. European Commission* (82).
- ¹⁹ In particular, the General Court judgment in *Icap and Others v. Commission* (T-180/15).
- ²⁰ Opinion of Advocate General Hogan, Case C-440/19 P, *Pometon SpA v. European Commission* (101).
- ²¹ Report for the Hearing in Case T-799/17, *Scania AB, Scania CV AB, Scania Deutschland GmbH v. European Commission* (54).
- ²² Report for the Hearing in Case T-799/17, *Scania AB, Scania CV AB, Scania Deutschland GmbH v. European Commission* (61).
- ²³ Report for the Hearing in Case T-799/17, *Scania AB, Scania CV AB, Scania Deutschland GmbH v. European Commission* (69 -70).
- ²⁴ This is based on second subparagraph of Article 1 of the Treaty on European Union (TFEU) and is reflected in Article 15 TFEU.
- ²⁵ Guidance on the preparation of public versions of Commission Decisions adopted under Articles 7 to 10, 23 and 24 of Regulation 1/2003.
- ²⁶ *Pergan Hilfsstoffe für industrielle Prozesse v. Commission*, T-474/04.
- ²⁷ Guidance on the preparation of public versions of Commission Decisions adopted under Articles 7 to 10, 23 and 24 of Regulation 1/2003.
- ²⁸ Report for the Hearing in Case T-799/17, *Scania AB, Scania CV AB, Scania Deutschland GmbH v. European Commission* (85).
- ²⁹ *Royal Mail Group Ltd v DAF Trucks Ltd and others* [2020] CAT 7; *AB Volvo (PUBL) v. Ryder Ltd* [2020] EWCA Civ 1475 Our colleagues discuss the Court of Appeal judgment further in this blog: <https://www.bclplaw.com/en-GB/insights/bound-by-prior-admissions-court-of-appeal-upholds-the-cats-abuse-of-process-judgment-against-truck-cartelists.html>.
- ³⁰ E.g. recital 3 of the Settlement Decision in AT.39965, *Mushrooms*: "The facts as outlined in this Decision have been accepted by Bonduelle, Lutèce and Prochamp (the "Settling Parties") in the settlement procedure. ...";

recital 5 of the Settlement Decision in AT.39861, *Yen Interest Rate Derivatives*: “... *This Decision is based on matters of fact as accepted only by the addressees of this Decision. ...* “

³¹ *Royal Mail Group Ltd v. DAF Trucks Ltd and others* [2020] CAT 7 (148).

³² *Royal Mail Group Ltd v. DAF Trucks Ltd and others* [2020] CAT 7 (141).

³³ *AB Volvo (PUBL) v. Ryder Ltd* [2020] EWCA Civ (129, 130).

³⁴ *Masterfoods Ltd v. HB Icecream Ltd* [2000] ECR I-11369.

³⁵ *National Grid Electricity Transmission Plc v. ABB Limited and others* [2009] EWHC 1326 (Ch).

³⁶ The appeals are those by *Société Générale* (Euro Interest Rate Derivatives), *Printeos/Tompla* (Paper Envelopes) and *Clariant* (Ethylene).