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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Cases No: 1284/5/7/18  
and 1290-1295/5/7/18 (T)

Salisbury Square House  
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London EC4Y 8AP

4 March 2020

Before:

THE HONOURABLE MR JUSTICE ROTH  
(President)  
THE HONOURABLE MR JUSTICE FANCOURT  
HODGE MALEK QC

Sitting as a Tribunal in England and Wales

BETWEEN:

**ROYAL MAIL GROUP LIMITED v DAF TRUCKS LIMITED & OTHERS**

**BT GROUP PLC & OTHERS v DAF TRUCKS LIMITED & OTHERS**

**RYDER LIMITED & ANOTHER v MAN SE & OTHERS**

**SUEZ GROUPE SAS AND OTHERS v FIAT CHRYSLER AUTOMOBILES  
N.V. & OTHERS**

**VEOLIA ENVIRONNEMENT S.A. & OTHERS v FIAT CHRYSLER  
AUTOMOBILES N.V. & OTHERS**

**WOLSELEY UK LIMITED & OTHERS v FIAT CHRYSLER  
AUTOMOBILES N.V. & OTHERS**

**DAWSONGROUP PLC & OTHERS v DAF TRUCKS N.V. & OTHERS**

Heard at the Rolls Building on 3, 5 and 6 December 2019

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**JUDGMENT: PRELIMINARY ISSUE**

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## APPEARANCES

Mr Tim Ward QC, Mr Ben Lask and Ms Anneliese Blackwood (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Claimants in the Royal Mail Group Limited, BT Group PLC and Dawsongroup Plc actions.

Mr Mark Brealey QC and Mr Derek Spitz (instructed by Ashurst LLP) appeared on behalf of the Claimants in the Ryder Limited action.

Ms Marie Demetriou QC and Mr Christopher Brown (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants in the Suez Groupe SAS, Veolia Environnement S.A. and Wolseley UK Limited actions.

Mr Daniel Beard QC and Mr David Gregory (instructed by Travers Smith LLP) appeared on behalf of the DAF Defendants.

Mr Paul Harris QC and Mr Ben Rayment (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Daimler Defendants.

Ms Kelyn Bacon QC and Mr Matthew Kennedy (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Iveco Defendants.

Mr Daniel Jowell QC and Mr Tom Pascoe (instructed by Slaughter and May) appeared on behalf of the MAN Defendants.

Ms Sarah Ford QC and Mr Daniel Piccinin (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Volvo/ Renault Defendants.

## A. INTRODUCTION

1. By its decision in Case 39824 *Trucks*, adopted on 19 July 2016 (“the Decision”), the European Commission (“the Commission”) determined that five major European truck manufacturing groups had carried out a single continuous infringement of Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) and Article 53 of the EEA Agreement (“EEA”) over a period of some 14 years between 1997 and 2011 (the “Infringement”). For the purpose of this Judgment, the addressees of the Decision are referred to simply by the corporate name of the group to which they belong: DAF, Daimler, Iveco, Volvo/Renault and MAN; and together (as in the Decision) they are referred to as the “Addressees”.
2. The Decision was a settlement decision adopted pursuant to the procedure set out in Article 10a of Regulation 773/2004/EC and the Addressees all admitted their involvement. The Commission imposed fines on the Addressees in aggregate of a little over €2.9 billion (after a discount of 10% for settlement). That figure excludes MAN, which was granted immunity from fines under the Commission’s 2006 Leniency Notice: the Commission’s press release on the day of the Decision stated that MAN received immunity for “revealing the existence of the cartel” and thereby avoided a fine of around €1.2 billion.
3. A significant number of actions claiming damages against some or all of the Addressees and related companies have been commenced in the UK. We understand that these are among well over a thousand claims for damages following on from the Decision that have been brought in various EU Member States. Before the Tribunal, seven such actions are being case managed together. Some of them involve only one or two claimants; others involve over a hundred claimants. However, the question of the extent to which the Decision is binding for the purpose of the domestic damages claim arises as an important issue in all these seven actions. Accordingly, the Tribunal directed that this should be determined as a preliminary issue.
4. Another major truck manufacturing group, Scania, did not participate in the settlement and was the subject of a separate Commission decision on 27 September 2017 (the “Scania Decision”). Scania’s appeal against that decision is pending before the General Court: Case T-799/17. Scania is not a defendant (other than by way of contribution

proceedings) to any of these seven actions and this judgment does not concern the Scania Decision.

5. The preliminary issue was heard over three days and involved a large number of parties. We are grateful to all counsel for the efficient way in which they divided up the oral argument and for their clear and helpful submissions.

## **B. THE DECISION**

6. As is usual for decisions of the Commission, the Decision comprises a relatively short, operative part declaring what the Commission has decided (sometimes referred to by the French term, the *dispositif*), and a large number of antecedent recital paragraphs explaining the background and reasoning.
7. However, as noted above, the Decision was adopted pursuant to the Commission's settlement procedure. It will be necessary to describe that procedure in more detail below. But in consequence, the description and details of the infringement in the recitals are very significantly shorter than they would be in a decision following contested proceedings.
8. The operative part comprises four articles. Article 1 states :

“By colluding on pricing and gross price increases in the EEA for medium and heavy trucks; and the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards, the following undertakings infringed Article 101 TFEU and Article 53 of the EEA Agreement during the periods indicated:”

There follow five sub-paragraphs specifying, for each individual addressee of the Decision, the period over which it has been found to commit the infringement.

9. Article 2 states:

“For the infringement referred to in Article 1, the following fines are imposed:”

There follow the financial amounts of the fines imposed on each Addressee, in most cases jointly and severally within the different manufacturing groups, and details of the time and method for payment, interest for late payment, etc.

10. Article 3 requires the Addressees to bring the infringement immediately to an end insofar as they had not already done so, and Article 4 sets out the full details (corporate name and address) of each individual Addressee.

11. The Decision prior to the operative part is divided into eight sections (of which the first two are both numbered “1” so the rest are numbered 2-7) as follows:

- “1. Introduction
- 1. The industry subject to the proceedings
- 2. Procedure
- 3. Description of the Conduct
- 4. Legal assessment
- 5. Duration of the infringement
- 6. Liability
- 7. Remedies”

12. The Introduction Section gives a brief summary and states, in recital (3):

“(3) The facts as outlined in this Decision have been accepted by MAN, Daimler, Iveco, Volvo and DAF (the “Addressees”) in the settlement procedure.”

13. The following Section 1 starts by defining the subject-matter of the Decision, at recital (5):

“(5) The products concerned by the infringement are trucks weighing between 6 and 16 tonnes (“medium trucks”) and trucks weighing more than 16 tonnes (“heavy trucks”) both as rigid trucks as well as tractor trucks (hereinafter, medium and heavy trucks are referred to collectively as “Trucks”).<sup>[5]</sup> The case does not concern aftersales, other services and warranties for trucks, the sale of used trucks or any other goods or services sold by the addressees of this Decision.

[5] Excluding trucks for military use»

14. Section 1 proceeds to describe the various Addressees and their relevant subsidiaries or associated companies, and then provides a general description of the nature of the trucks market, noting the way that prices are generally set and stating, at recital (29), that the market “is characterised by a high degree of transparency” with data on order intake, delivery periods and prices being available in various (legitimate) ways. That section concludes:

“(30) As a result, one of the remaining uncertainties for the Addressees on the trucks market was the future market behaviour of competing truck producers and in particular their respective intentions with regard to changes to their gross prices and gross price lists.”

15. Section 2 summarises the various stages of the Commission’s investigation following the application for immunity received from MAN in September 2010. This includes reference to the Addressees’ involvement in the settlement procedure which is discussed below.
16. Section 3 is a substantive section comprising 18 recital paragraphs describing the nature and scope of the infringement. Section 4 addresses the legal principles for infringement of Article 101 TFEU (and Article 53 EEA) and how they are satisfied on the facts of this case. Section 5 comprises just two recital paragraphs setting out the duration of the infringement and effectively repeating what is in recitals (62)-(63) in Section 3.
17. Section 6 considers the liability of the various individual companies within each manufacturing group on the basis of the concept of “undertaking” in EU law.
18. Finally, Section 7 is the longest section, comprising 36 recital paragraphs, explaining the legal basis on which fines are imposed in this case and the approach adopted in the various steps taken pursuant to the Commission’s 2006 Guidelines on fines<sup>1</sup>, by reference to the facts of this case.

### **C. THE PRELIMINARY ISSUE**

19. It was common ground that Article 1 in the operative part is binding on the parties and, indeed, on the Tribunal. The dispute between the parties concerned the recitals in sections 3, 4 and 7 of the Decision, and also, as it emerged in the hearing, Article 2 in the operative part.
20. Accordingly, the claimants were directed by the Tribunal to state which of those recitals they contend are binding. The defendants who are Addressees (the “Addressee Defendants”) were directed by way of response to state to what extent (if at all) they accepted that those recitals were binding. Since it appeared that some of the matters set

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<sup>1</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ 2006 C210/2.

out in the recitals are admitted in any event as a matter of fact for the purpose of these actions, the Addressee Defendants were directed also to specify to what extent any relevant recital is admitted, such that it is unnecessary to determine whether it is binding as a matter of law. On that basis, the Tribunal ordered that the preliminary issue to be determined would be as follows:

"Which, if any of the recitals, or parts of recitals, in sections 3, 4 and 7 of the [Decision], which are

- a. said by the Addressee Defendants in their Joint Response to the Claimants' Recital Schedules dated 5 February 2019 not to be binding; and
- b. have otherwise not been admitted by all of the Addressee Defendants; and
- c. are set out by the Claimants in their joint schedule to be served on 19 July 2019;

are binding in these proceedings in respect of the Addressee Defendants such that they cannot be contested by (a) the Addressee Defendants or (b) any of the Defendants, and for what purposes are they or the operative part of the Decision binding?"

21. In their submissions, the defendants all accepted that insofar as the Tribunal should find that the Addressee Defendants cannot contest a recital, their related companies joined as defendants in some of the actions who are not Addressees would not seek to contest that recital. The distinction made in that regard in the wording of the preliminary issue therefore falls away.
22. The claimants' position is that all the recitals in these sections of the Decision are binding as a matter of EU law.<sup>2</sup> However, some recitals only state the relevant principles of EU law in the abstract, which are not in issue and so the claimants do not need to rely on those recitals.<sup>3</sup> In the alternative, insofar as the recitals are not binding under EU law, the claimants submitted that since this was a settlement decision, recording at recital (3) that the Addressees had accepted the facts set out, it would be an abuse of process as a matter of English common law for the defendants not to admit them in these proceedings. Of the defendants, DAF took the position that nothing in the Decision was binding in these proceedings outside Article 1, save that the recitals could be used to clarify or interpret what was stated in Article 1. The other defendants advanced the alternative submission that the recitals were binding insofar as they

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<sup>2</sup> In Section 7, the recitals invoked are (102), (104) and by some of the claimants, (115)-(116) and (119). However, of these, (119) is not in dispute as it concerns only Volvo/Renault, who have admitted it.

<sup>3</sup> E.g. recitals (65)-(67), (79)-(80) and (103), (106), (114).

constituted the essential basis of what is stated in the operative part, and that on this basis only a few of the findings in the recitals were binding. All the defendants submitted that insofar as a recital was not binding as a matter of EU law, it could not be an abuse of process for the defendants to contest it, whether by a bare denial, or not admitting what is there stated so that the burden was on the claimants to prove it, or by positively disputing it by contrary evidence.

23. We consider first the position under EU law and then the English common law of abuse of process.

#### **D. EU LAW**

##### **(1) The legislative provisions**

24. Article 16(1) of Council Regulation (EC) 1/2003 ("Article 16") states:

"When national courts rule on agreements, decisions or practices under Article [101] or Article [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission..."

25. Article 16 codifies the prior jurisprudence of the Court of Justice as regards the obligation on national courts not to take decisions that may conflict with decisions of the Commission: see recital (22) to Regulation 1/2003 and Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* (EU:C:2000:689) at para 52, and Case C-199/11 *Europese Gemeenschap v Otis NV* (EU:C:2012:684) at para 50.

26. Section 58A of the Competition Act 1998 (the "CA") provides:

"(1) This section applies to a claim in respect of an infringement decision which is brought in proceedings—

- (a) before the court, or
- (b) before the Tribunal under section 47A or 47B.

(2) The court or the Tribunal is bound by the infringement decision once it has become final.

...

(5) This section applies to the extent that the court or the Tribunal would not otherwise be bound by the infringement decision in question."



An "infringement decision" is defined by section 47A(6) CA as including a decision of the Commission or of the Competition and Markets Authority (the "CMA") that the prohibition in Article 101(1) or the prohibition in Article 102 TFEU has been infringed or a decision of the CMA that the Chapter I or the Chapter II prohibition (the domestic equivalents of Articles 101(1) and 102) has been infringed. Sections 58A(3)-(4) provide that such a decision becomes "final" once it is no longer susceptible to appeal.

27. The argument before the Tribunal was based on Article 16. It is common ground that, as a provision of an EU Regulation, Article 16 is of direct effect in the national courts. DAF submitted that since the Decision has a binding effect pursuant to Article 16, by reason of section 58A(5) there is no scope for application of section 58A. It is unnecessary for us to decide that point since the claimants did not suggest that if section 58A(2) did apply, it would give rise to any wider effect than results from Article 16. Indeed, as we explain below, in some respects we consider that Article 16 has a broader effect than section 58A(2).

28. Before us, Mr Beard QC on behalf of DAF placed reliance on Article 288 TFEU which prescribes the various "legal acts" which the EU institutions are entitled to adopt:

"To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force."

Mr Beard argued that the binding force thereby given to a decision refers to the legal act, which must be the operative part of the decision and not the antecedent recitals.

29. However, we consider that "binding" in Article 288 of the Treaty means being subject to the obligations or prohibitions which the instrument sets out, or put another way, the extent to which the instrument has the force of law. It is in that sense that a directive is "binding" only as to its objectives and only on the Member State, which is obliged to

transpose it into national law, and is not of direct and general application, by contrast with a regulation, which has direct legal force on everyone. By contrast, when the issue before the Tribunal asks whether a recital in the Decision is “binding” that is in effect a shorthand for asking whether it would run counter to the Decision if the Tribunal were to make a finding inconsistent with that recital or did not accept as correct what is stated in that recital. That is the obligation on national courts, and thus the Tribunal, that flows from Article 16. As the Court of Justice explained in *Otis*, in the judgment of the Grand Chamber at para 54:

“The rule that national courts may not take decisions running counter to a Commission decision relating to a proceeding under Article 101 TFEU is thus a specific expression of the division of powers, within the EU, between, on the one hand, national courts and, on the other, the Commission and the EU Courts.”

30. Accordingly, we do not think that Article 288 TFEU provides much assistance. Moreover, as is clear from some of the case-law discussed below, the EU Courts have in fact recognised in some instances that legal effects for an addressee of a decision can result from recitals independently of the operative part. We therefore consider that the question before us has to be addressed on the basis of, first, the interpretation and then, the application of the obligation arising from Article 16.
31. Mr Beard further submitted that Article 16 is not engaged in the present cases since Article 1 of the Decision merely stated that the various Addressees had committed the infringement there described for the periods set out, which none of the defendants sought to dispute. But as the claimants pointed out, that only begs the question which the Tribunal has to decide, i.e. whether any and if so which aspects or parts of the Decision, other than the operative part, are binding on the national court.
32. A large number of judgments were referred to in argument and some of those cases were relied on by both sides. We think it is convenient to summarise what we regard as the relevant authorities before setting out our analysis.

**(2) The case law**

33. In *Secretary of State for Health v Servier Laboratories Ltd* [2019] EWCA Civ 1096, the Court of Appeal recently considered the question of what findings in a judgment of the EU General Court are binding for the purpose of a damages claim in the English court. That question was addressed under the principle of *res judicata* as developed in

EU law. Since the question before the Tribunal concerns a decision of the Commission, the principle of *res judicata* is not engaged. Indeed, as Rose LJ observed in her judgment in *Servier* (with which Longmore LJ and Sir Stephen Richards agreed) at [28], in the light of Article 16 the determination of what findings in a Commission decision are binding involves different considerations. Accordingly, none of the parties relied on *Servier* as a foundation for their arguments.

34. However, the issue facing the Tribunal was recently considered by the High Court in *BritNed Development Ltd v ABB AB* [2018] EWHC 2616 (Ch).<sup>4</sup> In his judgment, Marcus Smith J addressed at [67] the law regarding the ‘bindingness’ of Commission decisions. After noting that the operative part of such a decision is binding on the court, the judge addressed the question of recitals at [67(6)(b)-(c)]:

“(b) *A recital constituting part of the essential basis for a decision.* As Case C-164/02, *Kingdom of the Netherlands v. EC Commission* makes clear, whilst generally speaking recitals are not acts capable of review by the courts, an exception is made in the case of those recitals constituting the essential basis for the operative part of that act. Here, the relevant act is a decision and to the extent that a recital constitutes part of the essential basis for a decision then – where the decision is binding on this court – so too is such a recital. This, as it seems to me, is an inevitable consequence of section 58A of the Competition Act 1998 and Article 16(1) of Regulation 1/2003. Clearly, what constitutes a recital constituting a part of the essential basis for a decision depends largely on the nature of the decision itself.

(c) *A recital not constituting part of the essential basis for a decision.* Such recitals are not binding on this court. I do not consider that such a conclusion is inconsistent with the duty of sincere cooperation arising out of Article 4(3) of the Treaty on European Union, and I can identify no other rule – whether of European Union law or English law – that compels such a conclusion....”

35. The Tribunal is not bound by that view although it is clearly entitled to considerable respect. However, in that case there was no dispute between the parties as to this issue so what Marcus Smith J said was strictly *obiter*. For DAF, Mr Beard submitted that it was wrong. Against that background, we turn to the EU authorities, which we discuss in chronological order.
36. In Case T-138/89 *NBV and NVB v Commission* (EU:T:1992:95) (“*Dutch Banks*”), the Commission had granted “negative clearance” to two Dutch banking associations, holding that what was then Article 85(1) EEC (now Article 101(1) TFEU) did not apply

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<sup>4</sup> The judgment was largely upheld on appeal and the Court of Appeal did not address this point: [2019] EWCA Civ 1840.

to their interbank transfer agreement because it had no effect on trade between Member States. However, in its statement of reasons, the Commission noted that the agreement restricted competition to an appreciable extent and the banking associations applied to annul the decision insofar as it made that finding. The Court of First Instance (“CFI”; now, the General Court) dismissed the application as inadmissible. In its judgment, the Court noted, at para 30, that the applicants were not calling into question the operative part of the decision which had granted the negative clearance, and continued:

“31. In this regard, it should be pointed out that, as the Court of Justice has consistently held, the proceedings provided for in Article 173 of the Treaty can be instituted only against an act adversely affecting a person’s interests, in other words against an act capable of affecting a given legal position (see for example the judgment in Case 60/81 *IBM v Commission* [1981] ECR 2639); whatever the grounds on which such an act is based, only its operative part is capable of producing legal effects and, as a consequence, of adversely affecting such interests. As regards the assessments made by the Commission in the recitals to the decision at issue, whilst it is acknowledged that they do not correspond completely to the applicants’ opinion, they are not in themselves capable of forming the subject of an application for annulment. Their legality might be open to review by the Community judicature only to the extent to which, as grounds of an act adversely affecting a person’s interests, they constituted the necessary support for its operative part. The Court of First Instance notes that in this case not only does the act not adversely affect the applicants’ interests but also that the contested recital does not constitute the necessary support for the operative part of the act. Indeed, once it has found that the agreement notified is not capable of affecting intra-Community trade, the Commission can only conclude that there are no grounds for it to intervene, whatever its assessment of the purpose or effect of the agreement on competition.”

37. Case T-251/00 *Lagardère and Canal+* (EU:T:2002:278), on which both Mr Ward QC and Ms Bacon QC, from their different perspectives, sought to rely, was a challenge to a decision of the Commission (of 10 July 2000) which amended some of the recitals in a previous decision (of 22 June 2000) under the EU Merger Regulation (Regulation 4064/89 as amended) but did not alter the operative part of the earlier decision. On that basis, the Commission argued that the appeal was inadmissible. The CFI stated (omitting citations):

“67 It must be observed, first, that the mere fact that the decision of 10 July 2000 did not amend the operative part of the earlier decision is not sufficient for the action to be ruled inadmissible. Although the courts have consistently held that only the operative part of an act is capable of producing binding legal effects and, thereby, of having adverse effects, nevertheless the statement of the reasons for an act is indispensable for determining the exact meaning of what is stated in the operative part (...).

68 It follows that the decision of 10 July 2000 can be the subject of an action for annulment only if, even without altering the terms of the operative part of the decision of 22 June 2000, the amendment of some of the grounds of the latter changed the

substance of what was decided in the operative part, thus affecting the applicants' interests within the meaning of the case-law cited in paragraph 63 above.”

And at para 72, the Court summarised the legal position by reference to the parties' competing arguments as follows (omitting citations):

“... If, according to the [Commission]'s submissions, its reasoning in the grounds of the decisions of 22 June and 10 July 2000 has only the force of an opinion, without any binding legal effect, the action for annulment must be dismissed as inadmissible in the absence of an act open to challenge (...). On the other hand, if, as the applicants argue, the alteration made by the decision of 10 July 2000 in the reasoning of the grounds of the decision of 22 June 2000 altered the substance of what was decided in the operative part of the earlier decision, the later decision will have produced binding legal effects such as to affect the applicants' interests by bringing about a distinct change in their legal position.”

However, the conclusion in that case that the action was admissible rested heavily on a particular provision of the Merger Regulation which indicated what was encompassed by a decision taken under that legislative regime.

38. Case T-61/99 *Adriatica di Navigazione SpA v Commission* (EU:T:2003:335) was an appeal by one of the addressees of the Commission's decision in *Greek Ferries* concerning a cartel between Greek ferry operators on certain routes out of Piraeus. The Court noted that there was a contradiction between the statement in the recitals finding that *Adriatica* was involved in a single infringement covering both northern and southerly routes and the wording of Article 1 of the operative part that referred expressly to two infringements, a pricing agreement concerning the northerly route, to which *Adriatica* was not a party, and a pricing agreement concerning southerly routes to which *Adriatica* was a party. In that regard, the Court stated, at para 43:

“It should be borne in mind that it is in the operative part of a decision that the Commission must indicate the nature and extent of the infringements which it sanctions. It should be noted that, in principle, as regards in particular the scope and nature of the infringements sanctioned, it is the operative part, rather than the statement of reasons, that is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in a decision. As the Court of Justice has already held, for the purpose of determining the persons to whom a decision, which finds that there has been an infringement, applies, only the operative part of the decision must be considered, provided that it is not open to more than one interpretation.”

39. On that basis, *Adriatica's* argument that the decision against it should be annulled because it had wrongly been found to be liable for a single overall cartel covering all routes was dismissed: whatever was said in the recitals, the operative part clearly

confined its liability to the southerly routes. However, the Court proceeded to reduce the fine imposed on Adriatica (by Article 2 of the operative part) because the recitals showed that this had been calculated on the basis of a finding that Adriatica was involved in a single overall infringement whereas the operative part held that there were two cartels and that the applicant participated in only one of them: see at paras 186-192.

40. Case C-164/02 *Netherlands v Commission* (EU:C:2004:54), to which Marcus Smith J referred in *BritNed*, was a decision of the European Court of Justice (“ECJ”)<sup>5</sup> holding that a challenge to a Commission State aid decision was inadmissible. The Commission decision had found that Dutch measures granting incentive subsidies for the processing of silt dredged from various river estuaries mostly did not constitute ‘aid’ within the meaning of the State aid provisions of the Treaty, and that insofar as they were aid the measures satisfied the conditions for compatibility with the common market. The Dutch government sought to challenge the decision insofar as it found that the contributions paid to port authorities constituted aid. The Court held that this did not amount to a challenge to the operative part of the decision which could produce legal effects on the applicant. The Court proceeded to state:

“21. As for the argument of the Netherlands Government that part of the statement of reasons for the contested decision, namely where it states that certain port authorities fall within the definition of ‘undertakings’ under Article 87(1) EC, has adverse legal consequences for the Kingdom of the Netherlands irrespective of the outcome of the case, it need merely be stated that, regardless of the grounds on which such a decision is based, only the operative part thereof is capable of producing legal effects and, as a consequence, of adversely affecting its interests. By contrast, the assessments made in the recitals to a decision are not in themselves capable of forming the subject of an application for annulment. They can be subject to judicial review by the Community judicature only to the extent that, as grounds of an act adversely affecting a person’s interests, they constitute the essential basis for the operative part of that act.

22. In the present case, the statement of reasons in issue does not constitute the essential basis for the operative part of a decision adversely affecting the Kingdom of the Netherlands. Since the Commission found in the operative part of the contested decision that, regardless of the fact that some of the contributions concerned might constitute aid within the meaning of Article 87(1) EC, the scheme is, in any event, justified on the basis of the reasons set out in Article 87(3)(c) EC, that operative part does not in the least constitute the adoption of a position as to whether all port authorities are undertakings or whether all of the activities of such authorities are economic in nature.”

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<sup>5</sup> The European Court of Justice is now called the Court of Justice of the European Union, but for convenience the abbreviation “ECJ” will be used throughout.

41. Case T-210/08 *Coppens v Commission* (EU:T:2011:288) concerned a Commission decision finding that a number of companies participated in a cartel on the international removal services market in Belgium. The applicant was one of the addressees of the decision: by Article 1 it was stated that the applicant infringed Article [101(1)] over a period of almost 11 years by fixing prices, market sharing and the manipulation of the procedure for the submission of tenders; and by Article 2 the applicant was subject to a fine. In its appeal, the applicant pointed out that the recitals made clear that it was the only company not to have participated in the agreement on commissions: its participation in the cartel was limited to issuing ‘cover quotes’. On that basis, and having regard to the evidence in the recitals, the General Court concluded that the Commission had not been entitled to find that the applicant was a participant in a single and continuous infringement with the other addressees – a finding which is set out in one of the recitals and, as shown by other recitals, formed the basis for calculation of the fine. The Court then stated (citations omitted):

“33. As regards the inferences which must be drawn from that conclusion, the fact that the operative part of the Decision does not refer to the single and continuous nature of the infringement is irrelevant. It must be observed, first, that the decisional practice of the Commission is not uniform in that regard. While the Commission has made express reference to the single and continuous nature of an infringement in the operative parts of some of its decisions (...), it has not done so in other decisions, such as the Decision. The scope of the annulment cannot depend on whether or not the Commission includes a reference to a single and continuous infringement in the operative part of the Decision.

34. Second, it should be pointed out that the enacting terms of an act are inextricably linked to the statement of reasons for them, so that, if that act has to be interpreted, account must be taken of the reasons which led to its adoption (...). Although only the operative part of a decision is capable of producing legal effects, the fact remains that the assessments made in the grounds of a decision can be subject to judicial review by the judicature of the European Union to the extent that, as grounds of a measure adversely affecting the interests of those concerned, they constitute the essential basis for the operative part of that measure or if those grounds are likely to alter the substance of what was decided in the operative part (...).

35. It is clear from the grounds of the Decision, and in particular from recitals 307 and 345, that the Commission regards the applicant as liable for participation in a single and continuous infringement. In addition, the fact that, notwithstanding the applicant’s limited participation, the Commission applied a rate of 17% of the value of sales – that is, the single percentage applied to all the companies in question – in order to take into account the gravity of the applicant’s infringement, can be explained only by the fact that it considers the applicant to have participated in a single and continuous infringement. Lastly, the single and continuous nature of the infringement seems also to have influenced the assessment of the duration of its participation in the infringement (...).”

The Court held that in consequence the finding against the applicant in Article 1 and its fine under Article 2 should be annulled in their entirety. On further appeal by the Commission against the scope of that annulment, the ECJ held that since Coppens' participation in the agreement on cover quotes was an infringement of Article [101(1)] and the decision was severable in that regard, the correct resolution was to annul Article 1 only in part and to substitute a reduced fine: Case C-441/11P *Commission v Coppens* (EU:C:2012:778). But this did not call into question the reasoning of the General Court in the passage quoted.

42. Cases T-15 & 16/12 *Provincie Groningen and ors v Commission* (EU:T:2013:74) were a judgment of the General Court concerning State aid. By a decision of 13 July 2011, the Commission held that a measure notified by the Netherlands concerning the provision of subsidies for the acquisition of land for environmental protection was “compatible with the internal market pursuant to Article 106(2) TFEU.” That was the entire content of the operative part of the decision. (Although State aid decisions of the Commission are typically set out in a different format to competition decisions, the same distinction between the operative part and the antecedent recitals setting out the facts and reasoning applies.) The recital paragraphs in the decision analysed the measure in question, its funding and effect, first to determine whether it constituted State aid according to the criteria in Article 107(1) TFEU, and having concluded that it was, to decide whether it met the conditions of the Framework for State aid in the form of public service compensation, in which case it would be compatible with the internal market pursuant to Article 106(2) TFEU.
43. The applicants in Case T-15/12 were bodies responsible for managing the subsidies scheme and the applicants in Case T-16/12 were a number of land management organisations which were among the beneficiaries of the scheme. The applicants sought an order annulling the decision, at least in part, on the basis that the scheme did not amount to State aid and/or that they were not ‘undertakings’ subject to State aid control. Noting that the operative part of the decision simply determined that the measure in question was “compatible with the internal market”, the General Court first considered whether the applications were admissible:<sup>6</sup>

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<sup>6</sup> The judgment is published only in French and Dutch. The quotation is from an unofficial translation provided by the defendants.



“36. On the basis that, in their arguments, the applicants aim to challenge the contested decision insofar as, on the one hand, it qualifies the subsidies scheme as State aid, and on the other, it qualifies the environmental managers as undertakings, it should be recalled that the sole fact that the contested qualifications appear in the grounds of the contested decision does not render the action inadmissible. According to case law, whereas it is established that only the operative part of a legal act is capable of having binding legal effects and, thereby, of having adverse effects, it remains the case that the content of the grounds of an act should be taken into account to determine what has been decided in the operative part of the act [citing *Lagardère*].

37. In this case, as noted by the Commission in recital 16 of the contested decision, the characterisation of the beneficiaries of the aid scheme as undertakings, within the meaning of Article 107(1) TFEU, as stated in recital 17 of the decision, is part of the preliminary analysis necessary to the conclusion that the scheme falls within the scope of this provision. Similarly, Article 106(2) TFEU mentioned in the operative part of the contested decision refers to undertakings whether private or public responsible for the management of services in the general economic interest. This provision makes it possible to derogate from the prohibition in Article 107(1) TFEU by declaring aid compatible with the internal market under certain conditions and thus presupposes that the Commission has first considered that the notified measure constituted aid within the meaning of Article 107(1) TFEU. Therefore, it must be stated that the conclusion that the scheme constitutes State aid forms the necessary support for the operative part, which concludes that the scheme is compatible with the internal market pursuant to Article 106(2) TFEU.

38. However, without a legally binding finding in the operative part of the contested decision regarding the status as undertakings of the environmental managers, of which the applicants in case T-16/12 are part and, a fortiori, of the organisations for the protection of nature and land management and regarding the economic nature of the latter’s activities, the grounds in the contested decision relating to that status do not constitute the necessary support for the operative part of the decision and are therefore not subject to the control of the EU court in the present case, so that they cannot form the basis for any interest in bringing proceedings on the part of the applicants [citing Case C-164/02 *Netherlands v Commission*]

The Court proceeded to dismiss the applications as inadmissible on the basis that the applicants did not have sufficient interest in bringing the proceedings.

44. Ms Bacon, who sought to rely on this judgment, frankly described paragraph 38 as “elliptical”, a description with which we agree. We find the conclusion there set out difficult to follow, since if those eligible for the grant of the subsidies were not undertakings, the measure would not constitute State aid. It is unclear whether the Court held that there was no finding in the decision regarding the applicants’ status as undertakings because on that question the decision simply referred back to an earlier State aid decision concerning a Dutch subsidy scheme for nature management and that earlier decision was not here under challenge (see para 17 of the Commission decision); or, as Ms Bacon suggested, because the decision merely stated generally that beneficiaries of the scheme were undertakings without any specific finding that any

particular beneficiaries, or beneficiaries having the specific character of the applicants, were undertakings. Indeed, Ms Bacon acknowledged that if there was a decision that individual aid to a single company was State aid, a finding that the company was an undertaking for the purpose of the State aid rules would be a necessary and constituent element of the decision. But in the end this does not matter. The relevant point that we take from the judgment is that a finding in the recitals which is the necessary support for the operative part of a decision is susceptible to challenge in an appeal even though that finding is not expressed in the operative part.

45. Case T-9/11 *Air Canada v Commission* (EU:T:2015:994) was an application by the airline to annul the Commission's decision against it in the air freight cartel case. Among the grounds relied on was a failure to state reasons, since the applicant argued that the grounds (in the recitals) and the operative part of the decision were contradictory. On a careful examination of the reasoning in the decision, the General Court found that the decision was vitiated both by contradictions between the grounds and the operative part and within the grounds themselves (para 74). The defective statement of reasons therefore led to the annulment of the decision. In the course of the judgment, the General Court emphasised the importance of the operative part of a decision finding infringement of the competition rules, in the context of ensuring effective judicial protection, and effectively repeated the statement in the *Adriatica* judgment set out at para 38 above: *Air Canada*, para 36.
46. The Court proceeded to observe that an infringement of Article 101(1) TFEU can found a damages claim before a national court, and that Article 16 prevents national courts taking decisions running counter to a decision of the Commission concerning such an infringement. The Court continued:
  - “39. In that respect, it must be considered, contrary to what the Commission asserted in essence at the hearing, that a national court would take a decision contrary to that adopted by the Commission not only if it gave a different legal classification to the anti-competitive conduct examined, but also if its decision differed from that of the Commission as regards the temporal or geographic scope of the conduct examined or as regards the liability or non-liability of persons investigated in relation to the conduct at issue and whose liability was examined in the Commission's decision.
  40. The national courts are therefore bound by the decision adopted by the Commission, provided that it has not been annulled or invalidated, and consequently the meaning of the operative part of that decision must be unambiguous.

41. In particular, clear wording of the operative part of a decision finding an infringement of the competition rules must allow the national courts to understand the scope of that infringement and to identify the persons liable, in order to be able to draw the necessary inferences as regards claims for damages brought by persons harmed by that infringement.”

47. As a recent example of where it was held that recitals were the necessary support for the operative part of a Commission decision and could in themselves found an action for annulment, Mr Ward referred to the proceedings brought by ABB AB and ABB Ltd (together “ABB”) following the Commission’s cartel decision in *Power Cables*. This was the decision which formed the basis of the follow-on damages claim in *BritNed* (para 34 above). Article 1 of the operative part of the decision simply stated that:

“The following undertakings infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, for the periods indicated, in a single and continuous infringement in the (extra) high voltage underground and/or submarine power cables sector:”

and proceeded to list the names of the companies involved and, for each, the dates of the infringement. ABB was identified accordingly in the list.

48. ABB had been granted full immunity and by its application it challenged the starting date for its infringement set out in Article 1. But it also contested other aspects of the decision that did not involve a challenge to the wording of the operative part but were directed at findings in the recitals. As recorded at para 22 of the judgment of the General Court, ABB claimed that the Court should:

“– annul in part Article 1 of the contested decision in so far as it finds that the applicants had participated in a single and continuous infringement in the (extra) high voltage underground and/or submarine power cable sector in so far as that finding extends to all projects involving underground power cables with voltages of 110 kV and above (and not only projects involving underground power cables with voltages of 220 kV and above);

– annul in part Article 1 of the decision in so far as it finds that the applicants had participated in a single and continuous infringement in the (extra) high voltage underground and/or submarine power cable sector insofar as the finding extends to all accessories relating to projects involving underground power cables with voltages of 110 kV and above (and not only accessories relating to projects involving underground power cables with voltages of 220 kV and above);

– annul in part Article 1 of the decision insofar as it finds that the applicants’ participation in the infringement started on 1 April 2000;...”

And the Court observed:

“28. As a preliminary point, on the scope of the action, it should be noted that the applicants do not dispute the existence of an infringement, or the calculation of the fine, or call into question the information and materials which they submitted to the Commission in the course of the administrative procedure in the context of their application for immunity. However, they do submit that the contested decision contains certain errors which extend the scope of the Commission’s findings relating to the infringement, in terms of both the products covered and the duration of the infringement.

29. At the hearing, the applicants essentially observed that a lack of precision in the determination of the products or the duration of participation could have significant consequences in the context of actions for damages brought before national courts, which they claim are connected to the Commission’s decision.”

49. It appears that the Commission as respondent did not seek to argue that ABB’s action was inadmissible and the Court (which will take a point on admissibility of its own motion) clearly did not consider that this was the case. The General Court dismissed the application: Case T-445/14 *ABB Ltd v Commission* (EU:T:2018:449). But on further appeal, the ECJ set aside part of the General Court’s judgment and held that the decision of the Commission must be annulled:

“in so far as it finds ABB Ltd and ABB AB liable for an infringement .... in respect of a collective refusal to supply accessories for underground power cables with voltages from 110 kV and below 220 kV.”

That finding was set out in one of the recitals of the decision not the operative part, and this conclusion was reached after a careful examination of the evidential basis for that finding in the other recitals: Case C-593/18P *ABB v Commission* (EU:C:2019:1027).

50. Finally, reference was made to the recent judgment of the General Court in Case T-105/17 *HSBC Holdings plc v Commission* (EU:T:2019:675). The Commission had imposed a very substantial fine on three companies in the HSBC group (“HSBC”) for participation in a single and continuous infringement of Article 101(1) on the market for Euro Interest Rate Derivatives committed over a period of five weeks. HSBC sought to have the decision annulled, at least so far as it found a single and continuous infringement, and challenged the fine. In a long and detailed judgment, the General Court examined the evidence relied on in the decision and concluded that several of the factual findings against HSBC in the recitals were incorrect. However, when it came to address the consequences of these errors for the appeal, the Court stated:

“295. It should be noted that the errors made by the Commission in its finding relating to the discussions of 9 and 14 March 2007, referred to in paragraphs 166 to 195 above, have no effect on the lawfulness of Article 1 of the contested decision and, in particular,

on Article 1(b) of the contested decision, since the conclusion it contains remains substantiated even if those discussions are discounted.

296. The same applies to the errors made by the Commission relating to the precise determination of the conduct for which HSBC could be held liable by virtue of its participation in a single and continuous infringement, as referred to in paragraphs 263 to 274 above. HSBC's participation, along with other banks, in the manipulation of 19 March 2007 and the fact that HSBC considered repeating that manipulation in themselves substantiate Article 1(b) of the contested decision to the sufficient legal standard.

297. However, to the extent that the factors capable of affecting the assessment of the gravity of an infringement include the number and intensity of the incidents of anticompetitive conduct and for the reasons set out in paragraph 123 above,<sup>7</sup> it is in its assessment of whether the amount of the fine is proportionate that the Court may give due effect to the fact that those assessments were vitiated by error.”

The Court accordingly dismissed the application to annul or vary the finding of infringement.<sup>8</sup> The fine on HSBC was annulled but for other reasons that are not relevant to the present issue.

### **(3) Analysis**

#### ***(a) The position of the parties***

51. As stated above, all the parties agreed that the finding of infringement in the operative part of a decision is binding on a national court.
52. Mr Brealey QC, for all the claimants, submitted that a recital is binding insofar as it is the essential basis for the operative part. He contended that this covered “any factual finding or assessment that is directly related to” “or constitutes the necessary support for” a finding in the operative part. Counsel for the claimants in three of the cases (“VSW”) expressed it slightly differently in their skeleton argument, saying:

“... recitals which are an essential basis for the operative part of the Decision, including because they could change the substance of what was provided for in the operative part or because [they] are necessary to have regard to in order to understand the operative part”

are binding on the Tribunal.

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<sup>7</sup> Para 123 stated: “... The existence of other anticompetitive conduct attributable to HSBC is relevant for the purposes of assessing the gravity of the infringement of Article 101(1) TFEU committed by HSBC and, consequently, the proportionality of the fine imposed on it. The factors capable of affecting the assessment of the gravity of an infringement include the number and intensity of the incidents of anticompetitive conduct.

<sup>8</sup> However HSBC has appealed to the ECJ contending that the approach of the General Court is incorrect: Case C-883/19P.

53. As already mentioned, Mr Beard for DAF submitted that none of the recitals is binding on a national court.
54. For all the other defendants, Ms Bacon submitted that if DAF was wrong, then recitals which provided the essential basis or necessary support (using those expressions interchangeably), or part of the essential basis, for the operative part were binding. Although this is effectively the same expression as put forward by the claimants, Ms Bacon argued that this comprised only those recitals which had what she described as “a decisional quality” (i.e. “something that is essential ... to understanding what the decision is”) or, as she put it when referring to one of the cases, set out “a legal assessment that determines the substance of the operative part.”

**(b) Discussion: principles**

55. It should be appreciated that the cases set out above arose in different contexts and as regards different kinds of decisions. That helps to explain the different emphasis and approach in some of the judgments. However, having regard to the arguments made by the various parties, we consider that the authorities reviewed above support the following principles.
56. First, the recitals can be relied on as an aid to interpretation of the operative part insofar as the operative part is unclear or ambiguous: *Adriatica* and *Air Canada*. To give a non-controversial example, in the present case, where Article 1 of the Decision refers to “medium and heavy trucks”, recital (5) may be referred to in order to determine what specifically these two categories comprise. Mr Beard indeed accepted this, while arguing that this did not affect his fundamental proposition that only the operative part was binding. Whether this principle means that the operative part is binding as interpreted in accordance with those recitals or that those recitals are binding alongside the operative part seems to us a formalistic distinction of no practical effect. Either way, it raises the question of what in the operative part here is unclear and requires resort to the recitals for interpretation, a matter we address below.
57. Secondly, we consider it is clear from the European jurisprudence that the legal effect of the recitals is not limited to cases where the operative part is ambiguous or unclear. As the General Court noted in *Coppens*, the practice of the Commission as to what is included in the operative part of a decision is not uniform. Accordingly, it would

produce arbitrary results if the extent to which a decision was binding was determined exclusively by reference to the operative part.

58. Although an application for annulment must formally be directed at the operative part, such an application may be made where the substantive challenge is to an assessment in recitals which affects the substance of what is decided in the operative part: *Lagardère*; or which constitutes the “essential basis” or provides the “necessary support” for the operative part: *Netherlands v Commission*, *Dutch Banks*, *Coppens* and *Provincie Groningen*. We agree with both Mr Brealey and Ms Bacon that the expressions “essential basis” and “necessary support”, as used in the EU jurisprudence, amount to the same thing.
59. Hence such challenges may be brought although the applicant does not dispute the determination in the operative part: e.g. *Netherlands v Commission* (decision that a measure was not State aid); *Dutch Banks* (negative clearance of agreements as outside Article 101(1)); *ABB* (infringement of Article 101(1) which was not disputed).
60. The finding in a recital of a competition infringement decision will not constitute an “essential basis” or “necessary support” for the operative part if without that recital the conclusions as to the nature, scope and extent of the infringement are substantiated by other recitals: *HSBC*. Therefore, we do not accept the formulation put forward by Mr Brealey that “any factual finding or assessment that is *directly related to* the finding of infringement constitutes the necessary support for that finding of infringement”, which could suggest a rather broader test.
61. Thirdly, for the purpose of the essential basis/necessary support test in a competition infringement case, the relevant determinations in the operative part comprise not only the finding of infringement but also the imposition of the fines: *Coppens*; *HSBC*.
62. We should add that we did not find Case C-162/97 *Nilsson and others* (EU:C:1998:554), relied on by Mr Beard, of assistance. That concerned not a Commission decision but a Council directive, where the ECJ ruled, unsurprisingly, that the Swedish authorities were not entitled in their national measures to derogate from the express prohibitions in the directive on the basis of the fourth recital in the preamble to the directive. Directives have a very different structure from Commission decisions in individual cases and that ruling is far removed from the issue before us.

63. All the European cases we have discussed and from which we derive the principles set out above concern applications for annulment and many address questions of admissibility. None of them addresses the interpretation of Article 16. As Advocate General Cruz Villalón observed in his Opinion in *Otis*, at para 47, the question of how far the binding nature of Commission competition decisions under Article 16 extends has not been determined by the EU courts. That was said in 2012 and remains the position today. However, in our judgment, the principles derived from the EU jurisprudence discussed above are significant in two respects in establishing the answer to the question before us.
64. First, we emphasise again that the obligation resulting from Article 16 is that a national court must not make a decision that would be inconsistent with (“run counter to”) a decision of the Commission. If a judgment of the Tribunal were to be inconsistent with recitals in the Decision that were the “essential basis” or “necessary support” for the operative part, as those terms are explained above, in our view that would, on any sensible interpretation of Article 16, be inconsistent with the Decision.
65. That conclusion is strongly supported by the reasoning of the Court of Appeal in *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* (“*Enron No 2*”) [2011] EWCA Civ 2. That case concerned domestic competition law and the earlier version of the provision in section 58 CA that “[u]nless the court directs otherwise”, a “finding of fact” by the Office of Fair Trading is “binding on the parties” in a private action (once that finding is no longer susceptible to appeal).<sup>9</sup> In his judgment (with which Jacob and Patten LJJ agreed), Lloyd LJ contrasted this provision with what were then sections 47A(9) and 58A CA, which made a decision that there has been an infringement absolutely binding. He explained, at [50]:

“...Section 58 is of wider scope, because it relates to findings of fact made by the regulator in the course of the investigation. However it is less rigid, because of the court's power to direct that a particular finding shall not be binding. That is a comprehensible regime because the regulator may make findings which are directly relevant to a decision as to infringement, but it may also make findings of much less direct relevance. Findings in the former category should be regarded as binding, *because to challenge them would be tantamount to challenging the finding of infringement*. However, if the finding is peripheral or incidental, on the one hand to question it may not involve subverting the infringement finding and on the other it may be fair and sensible because the undertaking may not have been concerned, for the

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<sup>9</sup> The current version is in almost identical language but refers to a finding by the CMA.



purposes of the regulatory proceedings, to contest such a point, whereas if the finding is relied on in proceedings for damages it may have a much greater importance." [emphasis added]

66. For the defendants, both Mr Beard and Ms Bacon submitted that this had no application in the present cases since Lloyd LJ was addressing UK competition law and not EU law, UK competition decisions are differently structured to EU decisions (they do not have an equivalent distinction between recitals and an operative part), and section 58 CA is not analogous to Article 16. For the claimants, Mr Brealey submitted that in *Deutsche Bahn AG v Morgan Advanced Materials Plc* [2014] UKSC 24, in the judgment of Lord Mance at [25], the Supreme Court approved the application of Lloyd LJ's observations to a Commission decision under Article 101(1). In our view, it is not clear that Lord Mance was there adopting the whole of para [50] of Lloyd LJ's judgment and, more particularly, he was not there concerned with findings of fact that were not contained in the operative part of the decision. But in our view, this does not matter: even if *Enron No 2* is not binding as regards Article 16 and EU law, the force of Lloyd LJ's observations clearly applies to EU decisions as much as to domestic decisions. We should add that we recognise that Mr Brealey adopted his formulation "directly related to", which we have rejected above, from the judgment in *Enron No 2*. But the language of Lloyd LJ is not to be read as if it were a statute and we consider that in the EU context it is appropriate to adhere to the language derived from the EU cases.
67. Secondly, if a finding in a decision cannot be challenged in proceedings before the EU Courts, then it would ordinarily be a denial of justice for that finding to be binding in national proceedings. By contrast, to the extent that it can be challenged on an application in Luxembourg, it falls within the jurisdiction of the EU regime and thus outside the realm of the national court. We think that useful guidance in that regard can be derived from the judgment in *Otis*, which was a reference from the Belgian court in a damages action following the Commission decision condemning a cartel between elevator manufacturers. The case was unusual in that the claimant before the Belgian court was the EU, represented by the Commission, as a purchaser of the cartelised products seeking damages from addressees of the decision. On the basis that the Commission was seeking to achieve binding effect for its own decision pursuant to Article 16 in its claim for damages, the defendants argued that this made the Commission a judge in its own cause and infringed their right to a fair hearing.

Rejecting that contention, the Grand Chamber of the ECJ stated that insofar as the defendants had wished to challenge the Commission decision, the exclusive jurisdiction to review that decision lay with the EU Courts. The Court further rejected the objection that this review was of only limited scope, stating:

“63. The review provided for by the Treaties thus involves review by the EU Courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for in Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for in Article 31 of Regulation No 1/2003, therefore meets the requirements of the principle of effective judicial protection in Article 47 of the Charter ....”

On that basis, the Court continued:

65. ..., a civil action for damages, such as the action before the referring court, requires, as can be seen from the order for reference, not only that a harmful event be found to have occurred, but also that loss and a direct link between the loss and that harmful event be established. Whilst it is true that, because of its obligation not to take decisions running counter to a Commission decision finding an infringement of Article 101 TFEU, the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court.

66. Indeed, even when the Commission has in its decision determined the precise effects of the infringement, it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages. Such an assessment is not contrary to Article 16 of Regulation No 1/2003.

67. In view of all the foregoing considerations, the Commission cannot be regarded as judge and party in its own cause in the context of a dispute such as that in the main proceedings.”

68. Accordingly, we consider that the principles which determine whether a finding in a recital to a decision is susceptible to challenge before the EU courts are appropriately applicable to determine whether a finding is binding for the purpose of Article 16: the criterion is that the finding in the recital is an essential basis or the necessary support for a determination in the operative part, or necessary to understand the scope of the operative part. This is in accordance with the view expressed *obiter* by Marcus Smith J in *BritNed*. We therefore reject DAF’s primary case that only the operative part of the Decision is binding. Further, from the authorities discussed above, and from *Otis*, we consider that the criteria of “essential basis” or “necessary support” are not necessarily confined, as the other defendants contended, to “legal assessments” or a very narrow category of findings of fact. However, we accept Ms Bacon’s submission

that it is a fact specific exercise in each case to identify what has actually been decided either in the operative part (which is to be interpreted with the aid of the recitals) or in a recital which is an essential basis or provides the necessary support for the operative part, such that the national court would be acting inconsistently with the decision if it made a different finding.

69. In the course of argument, Mr Beard submitted that Article 16 is concerned only with the operative part of the decision that concerns the infringement and has no application to the operative part that concerns the fine. On that basis, in the present case any inconsistency with the essential basis of Article 2 of the Decision is irrelevant. By letter subsequent to the hearing, the solicitors of Iveco said that the judgments in *BCL Old Co Ltd v BASF plc* [2012] UKSC 45 and [2009] EWCA Civ 434, supported that submission.
70. We do not agree. Article 16 is expressed in general terms: see at para 24 above. The national court in ruling on the same “agreements, decisions or practices” which are already “the subject of a Commission decision” must not act inconsistently with “the decision adopted by the Commission.”
71. Even if it is accepted that the Decision here can be regarded as comprising two decisions, i.e. a decision in Article 1 finding an infringement and a decision in Article 2 imposing fines, or indeed on that basis three decisions since Article 3 imposes a requirement not only that the infringement be brought to an end but that the Addressees refrain from any conduct having the same or similar object or effect, the subject of all those “decisions” is the same: the agreement or concerted practices of the Addressees. The obligation under Article 16 on the national court not to take a decision “running counter to the decision adopted by the Commission”, in our judgment therefore applies to all the “decisions” of which those agreements or concerted practices (i.e. the arrangements which constitute the infringement) are the subject. For example, if, in the section of the recitals explaining its calculation of the fines for an anti-competitive agreement, the Commission in its assessment of the gravity of the infringement found that the agreement covered all the Benelux countries and that the executives who made the agreement took steps to ensure that it was implemented by notifying all their sales executives, we consider that it would plainly run counter to that decision if a national

court in a subsequent damages claim were to find that the agreement did not cover the Netherlands and that no steps were taken to implement it.

72. We do not see that the *BCL Old* judgments lead to any different conclusion. The judgments in the Court of Appeal and the Supreme Court (which was not on an appeal from that Court of Appeal judgment but on a subsequent appeal in the same proceedings and which approved the Court of Appeal’s conclusion) were concerned exclusively with the CA, and the meaning in the domestic statute of the words “a decision of the European Commission *that the prohibition in Article 81(1) or Article 82 of the Treaty [now Article 101(1) or Article 102 TFEU] has been infringed*” [our emphasis]. The issue arose in the context of the limitation provisions in the statute, and thus the time by which a damages claim before the Tribunal had to be commenced under the legislative regime then in force. We of course accept as a result that section 58A(2) CA in its reference to “infringement decision”, and thus to such a decision as defined in section 47A(6), has the restricted meaning urged by Mr Beard: see the judgment of Stephen Richards LJ in *BCL Old* at [23]. However, that cannot affect the proper interpretation of Article 16, which was not considered at all by either the Court of Appeal or the Supreme Court. Not only is the language in the CA which we have emphasised absent from Article 16 but, as is well-known, EU legislation is to be given a purposive interpretation, employing a less literal approach than that which applies to domestic legislation: see e.g. the authorities cited in *Bennion on Statutory Interpretation* (7<sup>th</sup> edn) at pp 748-750.

73. On that basis, we turn to consider whether any and if so which findings in the recitals satisfy this test.

**(c) *Application to the Decision***

74. Article 1 of the operative part is set out at para 8 above. For the purpose of analysis, what it decides can be broken down to eight elements, as follows:

- (1) collusion
- (2) on pricing and gross price increases
- (3) in the EEA

- (4) and on the timing and passing on of costs for the introduction of emission technologies required by EURO 3 to 6 standards
- (5) for medium and heavy trucks
- (6) by the undertakings thereafter identified
- (7) infringed Article 101 TFEU and Article 53 EEA
- (8) during the periods set out for each undertaking.

75. We observed at the outset that this is a settlement decision. The antecedent recitals are not anything like as full or as detailed as would be the case for a contested decision. Moreover, the recitals are not drafted like a statute and their language is sometimes imprecise or very general. In their schedules prepared for the hearing, the parties have analysed each recital in the relevant sections of the Decision, in support of submissions as to which sentences, and sometimes which phrases within sentences, are or are not binding. However, we think that it is important to keep in mind throughout that the question being addressed is what in the recitals is necessary to interpret the above determinations in the operative part or provides an essential basis or necessary support for these elements, such that a contradictory finding by the Tribunal would be inconsistent with those determinations as so interpreted. In some respects, that question falls to be answered by reading several recitals together and they do not always have to be read literally.

76. As already observed, it is necessary to rely on recital (5) to determine what is meant by “medium and heavy trucks”: i.e. element (5) above. A national court would clearly be acting inconsistently with the Decision if it were to hold that the infringement concerned a narrower definition of medium and heavy trucks.

77. In our judgment, the term “collusion” (i.e. element (1) above) is also unclear. Further, while the collusion covered gross price increases it also covered “pricing”, which expression is also very vague: i.e. element (2) above. Moreover, this was collusion which infringed the competition rules: element (7) above; i.e. it had the object or effect of preventing, restricting or distorting competition to an appreciable extent.

78. The defendants (other than DAF) accept that the following aspects of recitals (68)-(69) and (81) are binding:

“(68) The conduct described in Section [3] above can be characterised as a complex infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement, consisting of various actions which can either be classified as agreements or concerted practices, within which the Addressees ... substituted practical cooperation between them for the risks of competition.”

“(69) This conduct therefore presents all of the characteristics of an agreement and/or concerted practice in the sense of Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement, which had as its object the prevention, restriction and/or distortion of competition with respect to Trucks within the EEA.”

“(81) The anti-competitive behaviour described in paragraphs (49) to (60) above has the object of restricting competition in the EEA-wide market.”

79. We do not think that the reference back at the start of (68) incorporates the whole of Section 3 as essential basis/necessary support: there are a host of details in Section 3 which could not form a basis of challenge in an action before the EU Courts: cp *HSBC*. But the statements quoted above show only that this was an “object” not an “effects” infringement and that the Addressees substituted practical cooperation for the risk of competition. To understand what form and scope the price collusion took and to discern the essential basis of a determination that there was practical cooperation which restricted or distorted competition, it is necessary to look further. We consider that the following is established by recitals (46)-(49), (51), (57)-(58), (75) and (81) as the essential basis for, or clarification of, elements (1) and (2) of Article 1, as set out at para 74 above:

The Addressees exchanged gross price lists and information on gross prices, including planned future gross price increases, and most of them exchanged truck configurators containing detailed gross prices as those came to replace gross price lists. This included information which was not publicly available and was commercially sensitive. The exchange of gross price information placed the Addressees in a better position to understand each other’s European price strategy than on the basis of market intelligence alone. The exchange of configurators helped them to compare their own offers with those of their competitors, which further increased the transparency of the market. Some configurators only granted access to technical information, such as bodybuilder

portals, and did not include any price information. In addition, between 1997 and 2004:

(a) the Addressees at their meetings in some cases also agreed their respective gross price increases; and

(b) occasionally they also discussed net prices for some countries.

80. We appreciate that what is said in (a) and (b) is imprecise, and it is unspecified how often or for what countries those agreements or discussions occurred. However, in our view, if the Tribunal were to give a judgment that was inconsistent with what is set out above, that would be inconsistent with the Decision. If the Tribunal were to find that most of the information exchanged was otherwise available, and that the exchanges did not in this way materially reduce the risks for the Addressees of competition, that would strike at the essential basis of the infringement. Since the finding of “collusion” on “pricing” is so vague, it could stand in the absence of (a) and (b). Nonetheless, we consider that these additional findings are necessary in order to understand the scope of the infringement referred to in Article 1.

81. As regards element (3) above, in our view that also is imprecise. That description could refer to collusion across any number of the (then) 30 Member States of the EEA. Accordingly, we consider that the specification of the geographic scope of the infringement in recital (61) is binding as an essential basis or necessary clarification:

“The geographic scope of the infringement covered the entire EEA throughout the entire duration of the infringement.”

We note that the first part of that sentence has been admitted by the defendants<sup>10</sup>, but without the second part. However, if the infringement for the first seven years of the 14-year period had covered only, say, Germany and France, then we consider the Addressees would have been able to challenge this finding by way of qualification of Article 1. Further, we note that this recital is also consistent with recital (2) at the very outset of the Decision that seeks to give a summary of the infringement (although formally outside the terms of the preliminary issue before us), and recital (116) on which the penalty calculations were based: see para 98 below. See also *Air Canada*,

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<sup>10</sup> As regards the scope of the pricing information, not the location of the communications or meetings.

para 39, as regards the temporal and geographic scope of an infringement, quoted at para 46 above.

82. There are very few findings in the recitals relevant to element (4) of Article 1: i.e. the emission technologies and EURO 3 to 6 standards. Other than a statement in recital (50) stating that the infringement in this respect “included agreements and/or concerted practices” covering effectively what is stated in Article 1, the supportive material in the recitals is only:

(a) The finding in recital (51) that the participants *agreed* on the timing and the additional charge to be applied to emissions technology complying with EURO emissions standards. This agreement was within the period 1997 to 2004 but it is unclear whether this was an agreement only with regard to EURO 3 or extended to the later variants.

(b) The finding in recital (52) that at a meeting on 6 April 1998 attended by representatives of the Headquarters of all of the Addressees:

“...the participants coordinated on the introduction of EURO 3 standard compliant trucks. They agreed not to offer EURO 3 standard compliant trucks before it was compulsory to do so and agreed on a range for the price additional charge for EURO 3 standard compliant trucks.”

(c) The finding in recital (54):

“After the introduction of the Euro currency and with the introduction of pan-European (EEA) price lists for almost all manufacturers (see (28)), the Addressees started systematically to exchange their respective planned gross price increases through their German subsidiaries (see for example (59)), while the collusive contacts at the level of senior managers of the Headquarters continued in parallel between 2002 and 2004. For example during a meeting on 10 and 11 April 2003, in the context of an industry association meeting, 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, similar to the discussions that had previously been held concerning the Euro 3 standard (see (52)).”

(d) the findings in recital (59) that at a meeting between 4 and 5 July 2004 in Munich representatives of the German subsidiaries of all the Addressees exchanged information about the cost of complying with the EURO 4 emissions standards and further meetings including on 12 April 2006 and 12-13 March



2008 “continued the discussions on ... the price increases for Euro 4 and Euro 5 standards.”

83. In those circumstances, we consider that the findings referred to in recitals (51) and (52) are an essential basis and also necessary to interpret elements (1) and (4) of Article 1: i.e. what is meant by “collusion” “on the timing and passing on of costs” for compliance with the EURO emissions standards. Otherwise, we do not consider that the findings referred to in recitals (54) and (59) clarify the nature of the collusion with regard to EURO emissions as found summarily in recital (50) which in that respect mirrors Article 1. In our view, they are simply examples of occasions when such collusion took place; and indeed no illustration is given of collusion on EURO 6. All that we think can be said is that beyond the findings in recitals (51) and (52) there is no finding that the collusion on the introduction of emission technologies to comply with EURO emissions standards went beyond exchange of information (on timing and the passing on of costs), and if a national court so held that would not be inconsistent with the Decision. Otherwise, we think that this element of Article 1 rests on the summary finding in recital (50):

“These collusive arrangements included agreements and/or concerted practices on ... the timing and the passing on of costs for the introduction of emission technologies required by EURO 3 to 6 standards.”

While the defendants do not accept that recital (50) is binding as a matter of law, they unsurprisingly admit those findings in recital (50) which are reproduced in Article 1. It is therefore unnecessary to decide whether this wording in recital (50) in itself is formally binding.

84. We do not think that the findings in recitals (51), (55), (57) and (81) that there were exchanges on commercially sensitive non-price information, such as truck delivery periods, order intake and country specific market forecasts are binding pursuant to Article 16: they go beyond the scope of the operative part of the Decision: cp *Adriatica*. Nor is there any basis in the Decision to suggest that this was taken into account in calculation of the fines: cp recital (115).
85. Further, we do not consider that all the other details and examples of occasions when and how the collusion took place that are set out in recitals (49)-(60), which go beyond what is set out above, are covered by the obligation in Article 16. Once the general

position as set out above is established, these details are essentially evidence, and indeed merely illustrative evidence, in support. Other than in an evidential sense, no individual instance is an essential basis of elements (1) and (2) above. Mr Ward submitted for the claimants that if a cartel was based on a single meeting, then a finding concerning that meeting would be the essential basis of an infringement, and that it would be unjust if this much more extensive cartel, involving many meetings over many years, meant that no individual meeting constituted an essential basis of the Decision because there were always other meetings. We see some force in that complaint, but the reality is that here the Tribunal is bound by the findings as set out above which apply to the entire period of the infringement. Illustrative examples are not necessary. By contrast, for a single meeting cartel, the finding as to that meeting is not an illustration: it comprises the foundation of the infringement and for a national court to find that that meeting had a different character or did not involve all addressees of the decision would entirely run counter to the decision. We therefore regard this result as an inevitable consequence of the test we have to apply.

86. The defendants, other than DAF, accept that the first sentence of recital (71) is binding, which states:

“In the present case, the conduct described in Section [3] constitutes a single and continuous infringement of Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement from 17 January 1997 until 18 January 2011.”

87. The defendants make the same admission as regards the equivalent statement in recital (78). We consider that they are clearly right to do so. It is on that basis that the Commission found that all the Addressee groups were liable for their conduct viewed as a whole over the entire period, 1997-2011. Moreover, if this were not a single and continuous infringement, the Commission would have been unable to impose fines regarding the conduct for the early years of that period in view of the five year limitation period under Article 25 of Regulation 1/2003. Indeed, in other cases, such a finding is included in the operative part (e.g. the *Power Cables* decision, para 47 above, and the Euro Interest Rate Derivatives decision, para 50 above). Accordingly, this finding was an essential basis of Articles 1 and 2 of the Decision.
88. However, as set out in the legal summary at recital (70), a single and continuous infringement as a matter of EU law requires that the various actions (a) can properly be

viewed as an ongoing process and not isolated or sporadic instances, and (b) formed part of an ‘overall plan’ because they had the same object of distorting competition.

89. The finding as regards (b) is set out in the final two sentences of recital (71) as follows:

“The single anti-competitive economic aim of the collusion between the Addressees was to coordinate each other's gross pricing behaviour and the introduction of certain emission standards in order to remove uncertainty regarding the behaviour of the respective Addressees and ultimately the reaction of customers on the market. The collusive practices followed a single economic aim, namely the distortion of independent price setting and the normal movement of prices for Trucks in the EEA.”

The finding as regards (a) is set out in recital (73) (of which the third sentence refers back to the finding as regards (b)):

“The evidence available shows that the conduct described above constituted an ongoing process and did not consist of isolated or sporadic occurrences. The contacts between the Addressees were of a continuous nature, with numerous regular contacts (face-to-face meetings, phone calls and email exchanges). The different elements of the infringement were in pursuit of a common anti-competitive object as described above, which remained the same throughout the entire period of the infringement. The existence of a single and continuous infringement is also supported by the fact that the anticompetitive conduct followed a similar pattern throughout the entire period of the infringement.”

We consider that these passages therefore constitute an essential basis of the Decision.

90. Recital (77) states simply:

“The overall scheme was implemented over a period of several years employing the same mechanisms and pursuing the same common purpose of eliminating competition.”

In our view, this is to be read as an abbreviated summary of the position previously set out and takes the matter no further. Indeed, insofar as it may be said that a purpose of “eliminating” competition goes further than a purpose of “distorting” competition, we think it is clear from the Decision as a whole that the finding as to the common purpose is set out in the fuller statement in recital (71). See also the finding in recital (81) that the object was of “restricting” competition.

91. We do not regard the other findings in recitals (71)-(77) as forming part of the essential basis, giving that expression the meaning discussed above. They by contrast set out evidence relied on to support the essential basis.

92. For there to be an infringement of Article 101(1), the actual or potential effect on trade between Member States must be appreciable. The first sentence of recital (85) states:

“In this case, taking into account the market share and turnover of the Addressees within the EEA, it can be presumed that the effects on trade are appreciable.”

Accordingly, we agree with the defendants (apart from DAF) who accept that this finding is binding.

93. Similarly, the finding in recital (88) that the conditions provided for in Article 101(3) TFEU and Article 53(3) EEA are not met is binding. Were it otherwise, the conduct would be exempted from the prohibition in Article 101(1) (and Article 53(1) EEA) and the operative part could not stand.

94. As mentioned at the outset, the Decision imposed substantial fines on the Addressees, apart from MAN which benefited from immunity. The Decision makes clear that MAN would similarly have been fined if it had not been granted immunity: e.g., recital (123).

95. Under Article 23(2) of Regulation 1/2003, the jurisdiction to impose fines is engaged only if the infringement is committed intentionally or negligently: see recital (103). In this case, recital (104) sets out the Commission’s finding that the infringement was committed intentionally. Accordingly, we consider that finding is an essential basis of the operative part of the Decision. Indeed, if that finding were set aside on appeal, Article 2 would be annulled.

96. Since the finding in recital (104) that the infringement was committed “intentionally” is binding, so also is the finding in recital (68) that the infringement there described was committed “knowingly”. We regard those statements as effectively the same, since it is well established that “intentionally” for the purpose of Article 23(2) means that the undertaking could not have been unaware that its conduct had the object of restricting competition: *Bellamy & Child, European Union Law of Competition* (8<sup>th</sup> edn), para 14.007.

97. Finally, as stated in recital (106), pursuant to Article 23(3) of Regulation 1/2003, in fixing the amount of the fine the Commission must have regard to the gravity of the infringement. The Decision accordingly addresses the issue of gravity in section 7.2.3, and the Commission explains in recital (114) that for this purpose it has regard to a

number of factors, including “the geographic scope of the infringement”, reflecting its Guidelines on fines, point 22. The Court of Justice has held that the Commission must apply those Guidelines unless it provides a good reason for departing from them: Cases C-189/02P etc *Dansk Rørindustri v Commission* (EU:CL2005:408), paras 209-211.

98. Applying this criterion, the Decision finds in recital (116) that the infringement covered the entire EEA. We have already held that the parallel statement in recital (61) is binding: para 81 above. While it is therefore superfluous for present purposes, we should state that we also regard that finding in recital (116) as binding since it was an essential basis for determining the calculation of the fine. Put another way, it would be possible to challenge the Decision on the basis that the infringement covered only 30% of the EEA for half the period, and if that were established the fines imposed by the operative part would have to be reassessed.

## **E. ABUSE OF PROCESS**

99. Before examining the law and potential application of this doctrine, we make two preliminary observations. First, the claimants advance their case on abuse, as a matter of English law, on the basis that this is a settlement decision, and only insofar as the recitals in the Decision are not binding as a matter of EU law. The significance of the issue of abuse of process is therefore dependent on the extent to which (if at all) the recitals are binding pursuant to Article 16. Secondly, the defendants accept that as the Decision is clearly admissible in these proceedings, the admission by the Addressees of the facts outlined in the Decision, as recorded in recital (3), is itself admissible. As Mr Jowell QC, who conducted this part of the argument for the defendants, put it: “One could say that it is an admission of the main facts. That is something that we say can be taken into account.” It would then be a question of what weight the Tribunal should give to that admission. We return to that point below.

### **(1) The law on abuse of process**

100. In its skeleton argument, MAN states the governing principle as follows, in terms which the claimants accept:

“14. Where the parties to later proceedings are not the same parties (or their privies) as the earlier proceedings, it will only be an abuse of process to seek to litigate issues which arose in the prior proceedings where one of two threshold conditions is met:

“... if the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of [the] process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated; or (ii) to permit such relitigation would bring the administration of justice into disrepute.”

15. Thus, Buxton LJ held in *Laing v Taylor Walton* [2008] PNLR 11 that:

“The court ... has to consider, by an intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration [of justice] into disrepute.”

101. The first quotation is from the judgment of Sir Andrew Morritt V-C (with whom Potter and Hale LJJ agreed) in *Secretary of State for Trade and Industry v Birstow* [2003] EWCA Civ 321 at [38]. These principles consciously reflect what was said by Lord Diplock, with the concurrence of the other members of the Appellate Committee of the House of Lords, in *Hunter v Chief Constable* [1982] AC 529. That case concerned one of the ‘Birmingham Six’ who had been convicted of murder at a criminal trial. He then brought civil proceedings claiming damages for physical injuries he alleged were inflicted on him by a number of police officers while he was in custody. The judge in the criminal trial had considered and determined whether the claimant had been assaulted by the police as part of his determination of whether the claimant’s confession was voluntary, and held that it was voluntary and so admissible. The allegations were repeated before the jury in the trial at which the claimant was convicted. The House of Lords, upholding the Court of Appeal, held that the civil damages claim against the police should be struck out as an abuse of process. At the start of his seminal speech in *Hunter*, Lord Diplock said this (at 536):

“...this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.”

And in the course of his analysis, Lord Diplock stated (at 541):

“The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision

against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.”

102. The House of Lords and now the Supreme Court have returned to consider the doctrine of abuse of process on a number of occasions. Of particular significance, in our view, are the observations of Lord Bingham on this doctrine in his speech in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31 (with which Lords Goff, Cooke and Hutton agreed). The question arose in circumstances where there had been prior proceedings between a company which Mr Johnson controlled and the same defendants arising out of the same transaction. The issue involved the so-called rule in *Henderson v Henderson* directed against raising in a later case arguments, claims or defences which could have been raised in the earlier case. After discussion of the authorities, Lord Bingham considered the application of abuse of process in such circumstances and stated:

“It is ... wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.”

Following close examination of the particular facts, the House of Lords allowed Mr Johnson’s appeal, holding that the Court of Appeal in its decision striking out his claim as an abuse:

“... adopted too mechanical an approach, giving little or no weight to the considerations which led Mr Johnson to act as he did and failing to weigh the overall balance of justice...” (per Lord Bingham at 34).

103. More recently, in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, Lord Sumption (with whose judgment the other members of the Supreme Court agreed) considered the relationship between res judicata and abuse of process, and concluded (at [25]):

“Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court’s procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation...”

104. The principle of abuse of process has been considered and applied in countless and very varied cases. However, the closest to the present actions is undoubtedly *Iberian* [1996] 2 CMLR 601, [1997] ICR 164. The defendants had been the addressees of a Commission decision holding that they had abused their dominant position in the supply of British plasterboard in violation of Article [102] TFEU. Their appeals against that decision to the CFI and then the ECJ were dismissed. In the action for damages brought by Iberian, who had been the complainant before the Commission, there was the trial of a preliminary issue to determine whether the “findings of fact” and “conclusions as to the interpretation and/or application of Article [102]” as set out in the Commission’s decision and the judgments of the EU Courts were conclusive in the domestic civil proceedings. The claimant argued that these matters were *res judicata*, on the basis that it had been the complainant before the Commission and subsequently made submissions by its lawyers as intervener in the proceedings before the EU Courts, where it had been awarded its costs, or in the alternative that for the defendants to dispute these matters would be an abuse of process.
105. In his judgment, Laddie J first considered the issue of *res judicata* and noted that the form of *res judicata* relied on was issue estoppel. He held that issue estoppel as that doctrine had developed in English law would not apply since the proceedings before the Commission were administrative not civil court proceedings; and the claimant could not be considered to be a “party” to the annulment proceedings before the EU Courts: see at [36]-[39]. However, under the heading “A broader approach”, Laddie J considered the general public policy principles, and then expressed the issue as follows, at [44]:

“Approaching the matter as one of principle, it appears that the question to be decided can be put as follows: In all the circumstances of this case should the complainant and investigatee be allowed to open up and dispute in these proceedings the final conclusions of fact or law reached in competition proceedings in Brussels and Luxembourg? If the answer to that is in the negative, it does not matter whether it is categorised as a part of the law of *res judicata* – *i.e.* that the complainant and investigatee are bound by those conclusions – or as part of the law of abuse of process – *i.e.* that any attempt by either of them to challenge the conclusions is improper. In either case the same public policy considerations are at work.”

The judge further remarked, at [50]:

“The defendants’ argument makes it clear that what they want to do is to litigate again all the major issues which have been considered in detail in the European proceedings. Those proceedings were initiated nine years ago and relate to trading more than 10



years ago. Even the English proceedings are now seven years old. I confess that against that background, I do not find the prospect of a full English High Court action with discovery, experts' reports and cross examination at all attractive. Furthermore, if the defendants are right, for reasons which I will touch upon later, it is likely to mean that any party to English proceedings who pleads a breach of statutory duty on the back of allegations of breaches of Articles [101] and [102] will also be faced with a decade of litigation. That may well have the effect of deterring parties from raising such cases. But on the assumption that a party has a good claim for breach of statutory duty, a course which will persuade all but the rich or reckless to abandon their rights to compensation does not commend itself."

Laddie J observed that competition proceedings before the Commission were *sui generis* [an observation that would now apply similarly to UK competition proceedings before the CMA], with close involvement of the complainant. After examining the characteristics of Commission proceedings and various authorities on the relationship between Commission proceedings and national courts, he concluded (at [72]):

"These cases suggest that the courts should not interpret our rules of procedure in a way which will give rise to an appreciable and unnecessary risk that courts here and the Commission will come to inconsistent results in relation to competition issues. Of course due regard has to be paid to the interests of justice to the parties. But where, as here, the parties have disputed the same issues before the Commission and have had real and reasonable opportunities to appeal from an adverse decision, there is no injustice in obliging them to accept the result obtained in Europe. The position is *a fortiori* when, as here, the opportunities of appeal have been used to the full. Therefore, whether expressed in terms of *res judicata* or abuse of process, it would be contrary to public policy to allow persons who have been involved in competition proceedings in Europe to deny here the correctness of the conclusions reached there. The parties are bound. It follows that preliminary issues (b) and (d) should be answered in the affirmative...."<sup>11</sup>

106. Laddie J then turned (at [75]) to the alternative way the claimant put its case. This was:

"...To use English legal terminology, for the defendants to deny the correctness of the plaintiff's allegations of abuse of a dominant position amounts to an abuse of process since it would involve a collateral attack on binding decisions of the Commission, the CFI and ECJ."

As the judge noted, this argument did not depend at all on the status of Iberian as complainant in the European proceedings. Before starting his analysis of the case law, Laddie J stated (at [78]):

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<sup>11</sup> Those issues were: "(b) Whether the Decision, the Judgment of the CFI in *Case T-65/89* and/or the Opinion of the Advocate General and Judgment in *Case C-310/93P* are conclusive as to those facts in the present proceedings"; and "(d) Whether the conclusions as to the interpretation and/or applicability of Article [102] set out in the Decision, the Judgment of the CFI in *Case T-65/89* and/or the Opinion of the Advocate General and Judgment in *Case C-310/93P* are conclusive of such issues in the present proceedings". However, in argument the claimant disavowed reliance on the opinion of the Advocate General.

“ ... I should make it clear that all the arguments of public policy which have led me to conclude that neither the plaintiff nor the defendants can challenge the European decisions in this case on the basis of *res judicata* apply with particular force to the defendants. Whatever the position of the plaintiff, the defendants were directly and fully involved in the European proceedings. They were the addressees of the Commission, CFI and ECJ decisions. The public policy considerations therefore have particular force where the defendants are concerned.”

Finally, after consideration of *Hunter*, Laddie J concluded (at [89]):<sup>12</sup>

“The *Hunter* case was concerned with whether a litigant could relitigate an issue determined in previous proceedings before a competent court to which he was a party. In this case it can be said that the decision of the Commission was not a decision of a competent court, although that argument would not apply to the decisions of the CFI and ECJ. However, in view of the special position held by the Commission in relation to competition issues and the public policy considerations set out earlier in this judgment, I think that the underlying rationale in *Hunter* applies here as well. To adopt the sentiments of Jeremy Bentham, to allow the defendants to argue afresh here all those points which they argued and lost in the course of eight or nine years of detailed proceedings before the competition authorities in Europe would be absurd. I can see no compelling reason why they should be allowed a second bite at the cherry for the purpose of persuading the English courts to come to a conclusion inconsistent with that already arrived at in Europe. It follows that in my view it would be an abuse of process to allow the defendants to mount a collateral attack on the Commission decision in proceedings against *any* party before any national court. On this basis as well, preliminary issues (b) and (d) are answered in the affirmative.”

107. In *Re Barings (No 3)* [1999] 1 BCLC 226 at 242, this passage from para [89] of Laddie J’s judgment was adopted and applied by Jonathan Parker J in his judgment, which was effectively approved by the Court of Appeal when refusing permission to appeal.

## (2) The Commission’s settlement procedure

108. Fundamental to the claimants’ argument is the Commission’s settlement procedure in competition cases, which it is therefore necessary to describe in some detail.

109. The Commission’s conduct of proceedings concerning Articles 101 and 102 TFEU is governed by Regulation 773/804 (the “Implementing Regulation”). In July 2008, the Implementing Regulation was amended by Regulation 622/2008 which inserted provisions concerning the settlement procedure in cartel cases. The preambular recitals to Regulation 622/2008 explained the purpose of the procedure, including:

“(4) A settlement procedure should therefore be established in order to enable the Commission to handle faster and more efficiently cartel cases. The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the

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<sup>12</sup> There is an error in the paragraph numbering inserted in the CMLR report: the paragraph quoted should be [89].

parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. Therefore, the Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts....”

110. On that basis, Article 10a was introduced into Regulation 773/804, including the following:

“1. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions. The Commission shall not be obliged to take into account replies received after the expiry of that time limit.

...

2. Parties taking part in settlement discussions may be informed by the Commission of:

(a) the objections it envisages to raise against them;

(b) the evidence used to determine the envisaged objections;

(c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and

(d) the range of potential fines.

...

Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 101 of the Treaty as well as their liability. [These settlement submissions shall be specifically drawn up by the undertakings concerned as a formal request to the Commission to adopt any decision in their case following the settlement procedure.]<sup>13</sup> Before the Commission sets a time limit for the introduction of settlement submissions, the parties concerned shall be entitled to have the information specified in the first subparagraph, disclosed to them, upon request, in a timely manner. The Commission shall not be obliged to take into account settlement submissions received after the expiry of that time limit.

3. When the statement of objections notified to the parties reflects the contents of their settlement submissions, the written reply to the statement of objections by the parties concerned shall, within a time limit set by the Commission, confirm that the statement of objections addressed to them reflects the contents of their settlement submissions.

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<sup>13</sup> This sentence was introduced by a further amendment in 2015: Regulation 2015/1348.

The Commission may then proceed to the adoption of a decision pursuant to Article 7 and Article 23 of Regulation (EC) No 1/2003...”

111. The Commission sets out the way it operates the settlement procedure in its Settlement Notice.<sup>14</sup> The Notice explains, at point 16, that the early disclosure of information by the Commission, including the evidence on which the Commission intends to rely:

“...will allow the parties to be informed of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections. This will enable the parties effectively to assert their views on the potential objections against them and will allow them to make an informed decision on whether or not to settle.”

112. If a party then wishes to proceed to a formal request for settlement, the Settlement Notice states (footnotes omitted):

### **“2.3 Settlement submissions**

20. Parties opting for a settlement procedure must introduce a formal request to settle in the form of a settlement submission. The settlement submission provided for in Article 10a(2) of Regulation (EC) No 773/2004 should contain:

(a) an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions;

(b) an indication of the maximum amount of the fine the parties foresee to be imposed by the Commission and which the parties would accept in the framework of a settlement procedure;

(c) the parties' confirmation that, they have been sufficiently informed of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission;

(d) the parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision;

(e) the parties' agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in an agreed official language of the European Community.

21. The acknowledgements and confirmations provided by the parties in view of settlement constitute the expression of their commitment to cooperate in the

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<sup>14</sup> Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008 C167/1.

expeditious handling of the case following the settlement procedure. However, those acknowledgments and confirmations are conditional upon the Commission meeting their settlement request, including the anticipated maximum amount of the fine.

22. Settlement requests cannot be revoked unilaterally by the parties which have provided them unless the Commission does not meet the settlement requests by reflecting the settlement submissions first in a statement of objections and ultimately, in a final decision (see in this regard points 27 and 29). The statement of objections would be deemed to have endorsed the settlement submissions if it reflects their contents on the issues mentioned in point 20(a). Additionally, for a final decision to be deemed to have reflected the settlement submissions, it should also impose a fine which does not exceed the maximum amount indicated therein.

## **2.4 Statement of objections and reply**

23. Pursuant to Article 10(1) of Regulation (EC) No 773/2004, the notification of a written statement of objections to each of the parties against whom objections are raised is a mandatory preparatory step before adopting any final decision. Therefore, the Commission will issue a statement of objections also in a settlement procedure.

24. For the parties' rights of defence to be exercised effectively, the Commission should hear their views on the objections against them and supporting evidence before adopting a final decision and take them into account by amending its preliminary analysis, where appropriate. The Commission must be able not only to accept or reject the parties' relevant arguments expressed during the administrative procedure, but also to make its own analysis of the matters put forward by them in order to either abandon such objections because they have been shown to be unfounded or to supplement and reassess its arguments both in fact and in law, in support of the objections which it maintains.

25. By introducing a formal settlement request in the form of a settlement submission prior to the notification of the statement of objections, the parties concerned enable the Commission to effectively take their views into account already when drafting the statement of objections, rather than only before the consultation of the Advisory Committee on Restrictive Practices and Dominant Positions (hereinafter the 'Advisory Committee') or before the adoption of the final decision.

26. Should the statement of objections reflect the parties' settlement submissions, the parties concerned should within a time-limit of at least two weeks set by the Commission in accordance with Articles 10a(3) and 17(3) of Regulation (EC) No 773/2004, reply to it by simply confirming (in unequivocal terms) that the statement of objections corresponds to the contents of their settlement submissions and that they therefore remain committed to follow the settlement procedure. In the absence of such a reply, the Commission will take note of the party's breach of its commitment and may also disregard the party's request to follow the settlement procedure.

...

29. The Commission retains the right to adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' settlement submissions, either in view of the opinion provided by the Advisory Committee or for other appropriate considerations in view of the ultimate decisional autonomy of the Commission to this effect. However, should the Commission opt to follow that course, it will inform the parties and notify to them a new statement of

objections in order to allow for the exercise of their rights of defence in accordance with the applicable general rules of procedure. It follows that the parties would then be entitled to have access to the file, to request an oral hearing and to reply to the statement of objections. The acknowledgments provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.”

113. Then at point 32 the Commission states that the reward which it offers a party for settlement is a reduction by 10% of the amount, as finally calculated after adjustments, of the fine.

**(3) Is the doctrine of abuse of process precluded by Article 16?**

114. The defendants accepted that *Iberian* was correct in holding that the doctrine of abuse of process can apply as a result of a decision of the Commission although it is not a court. That follows also from the decision in *Barings*, where the judge and Court of Appeal so held in respect of a disciplinary decision of the Securities and Futures Authority (although in that case they held that there was no abuse). See also *Kamoka v Security Services* [2017] EWCA Civ 1665, where Flaux LJ, giving the only reasoned judgment in the Court of Appeal, made reference to *Iberian* and stated, at [75]:

“... the application of the principle of abuse of process ... extends, in appropriate cases, to decisions of industrial tribunals or administrative bodies such as the European Commission or the FSA.”

However, the defendants submitted that *Iberian* has now been superseded by the statutory provision in Article 16 which was exhaustive in determining what in a Commission competition decision is binding. Accordingly, the defendants argued that there is no potential for abuse of process to apply.

115. We do not accept that submission, which we think ignores the distinction made by the Supreme Court in *Virgin Atlantic*. Article 16 is a rule of substantive law governing the relative roles of the Commission and national courts. It applies in all circumstances to determine what in a decision is binding on national courts. Abuse of process, as Lord Sumption emphasised, is a rule of procedural law: it enables the court to protect against manifest unfairness in the particular circumstances of the case before it, and ensure that the administration of justice is not brought into disrepute. We have set out above the two distinct grounds of Laddie J’s judgment. We fully accept that his “broader approach”, whereby after considering a number of decisions of the European Courts (including the judgment of the ECJ in *Delimitis*) and some English authorities, he held

that the English court cannot come to an inconsistent result with that of the Commission, is now subsumed by Article 16. That provision is indeed a codification of the principle set out by the ECJ in *Delimitis* and subsequent authorities. But the second ground of *Iberian*, based on the English law of abuse of process<sup>15</sup> and directly relying on *Hunter*, is not, in our judgment, displaced by Article 16. As submitted by Ms Demetriou QC, who conducted the abuse argument on behalf of all the claimants, EU law does not preclude the application of national procedural law, so long as it does not offend against the EU principles of non-discrimination (or equivalence) and effectiveness.

116. Ms Demetriou further pointed out that in *Hunter* itself, the claimant argued that the statutory scheme in section 11 of the Civil Evidence Act 1968 (which made a criminal conviction admissible in civil proceedings as proof that the offence had been committed unless the contrary was proved) meant that mounting a collateral attack on the conviction could not be an abuse: see the summary of counsel’s argument at 534-535. The House of Lords firmly rejected this argument, holding that section 11 could apply in a wide variety of circumstances; it had no bearing on the potential application of abuse of process on the facts of the instant case (at 544).
117. We recognise that in its judgment in *2 Travel Group* [2012] CAT 19, concerning an OFT decision, the Tribunal stated at [70]:

“... we ... consider that the decision of Laddie J in *Iberian* has now been overtaken by legislation, in the case of Commission decisions by Article 16 of Regulation 1/2003, and in the case of decisions of the OFT by sections 47A and 58. We do not consider there to be a role for *Iberian* in this case given the existence of section 58.”

However, that was in response to an argument from the claimant, abandoned by the time of its closing submissions, that to the extent that a finding of fact in the OFT decision was not binding under section 58 CA, it was nonetheless binding pursuant to *Iberian*. Section 58 made any finding of fact by the OFT binding on the parties to a civil action in respect of the infringement “unless the court directs otherwise”: see para 65 above. Since the claimant had abandoned any distinct argument based on *Iberian*, the judgment deals with this matter only briefly, without distinguishing between the

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<sup>15</sup> Although Laddie J in his discussion of this ground refers to two ECJ judgments which were relied on before him, he found that they did not add much and were not directly relevant to the issue of abuse.

two grounds of Laddie J's judgment or discussing any of the authorities on abuse of process. Indeed, it is not clear from the succinct statement at [67] that the claimant had put forward a distinct abuse of process argument at all: see the summary of *Iberian* at [69] which makes no mention of abuse. The OFT decision in respect of which *2 Travel* brought follow-on proceedings was not a settlement decision and the conclusion that there was no scope for application of *Iberian* in the circumstances of that case was clearly correct. If, which we very much doubt, the general statement at [70] quoted above was intended to mean that abuse of process could *never* now apply because of Article 16, we respectfully disagree.

118. All the defendants sought to rely on the statement by Marcus Smith J in *BritNed* that there was no rule of English law which compelled the court to conclude that it was bound by a recital which was not the essential basis for a Commission decision: see at para 34 above. However, we do not see that this takes the matter further. As a general statement, it accords with our conclusion above. We do not read it as intended to exclude the potential application of the doctrine of abuse of process in any circumstances, and the Commission's decision in *Power Cables* which was under consideration in that case was not a settlement decision. Moreover, like the judge's observations in the immediately preceding sub-paragraph, this was *obiter*.
119. We should add that we do not consider that the decision in *Crehan v Inntrepreneur Pub Co* [2006] UKHL 38 is relevant to the question before us. There, the House of Lords held that a Commission decision on the degree of foreclosure of the UK beer market is not binding in litigation before the English court in which none of the parties had been a party to the proceedings in which the Commission had taken its decision. That distinction was indeed fundamental: Lord Hoffmann observed that if the Commission had taken a decision against Inntrepreneur, then (subject only to any application for annulment) Inntrepreneur would have been bound in the English litigation, on the basis of the *Iberian* judgment: see at [68].
120. We emphasise that we are not suggesting that *Iberian* indicates that it is an abuse of process for the defendants to contest any of the findings in the recitals. As Mr Jowell pointed out, Laddie J did not consider specifically which part of the decision there at issue was binding and, more particularly, did not have regard to the distinction between findings which formed the essential basis of the decision and the rest. Moreover, the



Commission decision in that case was not a settlement decision. The question of abuse falls to be decided in the particular circumstances of the present case.

**(4) Will abuse of process apply where the parties are not the same?**

121. The defendants submitted that it is wholly exceptional for it to be an abuse to advance a case that was inconsistent with a previous decision where the parties in the two sets of proceedings were not the same. In that regard, Mr Jowell relied on the statement of Flaux LJ in *Kamoka* at [119]:

“As is clear from the authorities (specifically Lord Hobhouse in *In re Norris* at [26]) cases where subsequent proceedings are an abuse of process, notwithstanding that the claimant or his privy was not a party to the earlier proceedings, are entirely exceptional.”

122. The relevant passage from Lord Hobhouse’s speech (with which the other members of the Appellate Committee agreed) in *In re Norris* [2001] UKHL 34, is quoted in Flaux LJ’s judgment at [71]:

“Attempts to relitigate issues which have already been the subject of judicial decision may or may not amount to an abuse of process. Ordinarily such situations fall to be governed by the principle of *estoppel per rem judicatem* or of issue estoppel (admitted not to be applicable in the present case). It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse.”

123. However, in *Michael Wilson & Partners Ltd v Sinclair* [2017] EWCA Civ 3, Simon LJ (with whose judgment Patten and Ryder LJJ agreed), in summarising at [48] the “themes” that emerge from the authorities, expressly recognised the point made by Lord Hobhouse in *Norris* but added as two distinct themes:

“(3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in *Johnson v. Gore Wood* and Buxton LJ in *Taylor Walton v. Laing*.

(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the *Arthur Hall* case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the *Bairstow* case; or, as Lord Hobhouse put it in the *Arthur Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.”

124. Moreover, in *Virgin Atlantic*, Lord Sumption pointed out, at [25], that the focus on abuse of process may arise, as in *Johnson v Gore-Wood*, precisely because the parties to the two actions are not the same and the principles of issue estoppel and cause of action estoppel are therefore not available. Indeed, in *Hunter*, the defendants were the police and the Home Office, neither of which had of course been parties to the earlier criminal prosecution. We do not accept, on the authorities, that there is a presumption against there being an abuse when the parties are not the same, and indeed we did not understand the submissions of Mr Jowell as going that far. The present case is manifestly very different from the situation of two contested commercial actions where one party seeks in the second action to run a case decided against it in the previous action in which the other party was not the same (cp *Bragg v Oceanus Mutual* [1982] 2 Lloyd's Law Rep 132). To say that cases of abuse will be rare when the parties to the two actions are not the same therefore does not advance the matter. As Ms Demetriou pointed out in her reply, the question for the Tribunal to decide is, is this such a case?

**(5) Is the defendants' position an abuse here?**

125. The claimants emphasised that the basis of their argument on abuse is that the facts in the Decision were admitted by the defendants in a formal settlement procedure. Ms Demetriou expressly disavowed any suggestion that it would otherwise be an abuse of process for addressees of a decision to contest findings in recitals which were not binding pursuant to Article 16. As she expressly recognised, that could not be the position since those are findings which the addressees could not challenge before the EU Courts.

126. By the time of the Decision in July 2016, the Commission's settlement procedure for cartel cases was well established. As explained in the Settlement Notice, the usual process is for the parties to embark on the settlement procedure *before* the Commission takes the formal step of issuing a statement of objections ("SO"). The Commission then issues a SO reflecting the parties' formal settlement submissions, which the parties then confirm corresponds to their settlement submissions. In this way, the Commission achieves the full benefit of expediting the proceedings and achieving efficiency in the use of its resources.

127. The present case was unusual in that the Addressees invoked the settlement procedure only *after* receipt of the SO. As noted in Whish, *Competition Law* (9<sup>th</sup> edn, 2018) at p. 273, that was the only time this had happened, and we believe that remains the position for a cartel settlement decision. Section 2 of the Decision summarises the steps taken in this case. The Commission carried out inspections (dawn raids) at the premises of the Addressees in January 2011. Following extensive investigations, the Commission then issued a SO on 20 November 2014. As noted at recital (39) of the Decision, thereafter the Addressees were granted access to the full file of the Commission. Several months later, no doubt after considering carefully the evidence assembled by the Commission, the Addressees informally asked to continue the case under the settlement procedure: recital (40). Following various meetings and discussions with the Commission over a period of some nine months, the Addressees made their formal settlement submissions pursuant to Article 10a of the Implementing Regulation. As recorded in recital (43), and in accordance with point 20 of the Settlement Notice, the submission of each Addressee contained:

“ – an acknowledgement in clear and unequivocal terms of the Addressee’s liability for the infringement summarily described as regards its object, the main facts, their legal qualification, including its role and the duration of its participation in the infringement in accordance with the results of the settlement discussions;

- an indication of the maximum amount of the fine the Addressee expected to be imposed by the Commission and which it would accept in the framework of a settlement procedure;

- the Addressee’s confirmation that it has been sufficiently informed of the objections the Commission raised against it and that it has been given sufficient opportunity to make its views known to the Commission;

- the Addressee’s confirmation that it has been provided by the Commission with all the information necessary for allowing it to make an informed decision on whether or not to settle;

- the Addressee’s confirmation that it did not request to be heard again in an oral hearing before the Commission adopts the final settlement decision; ...”

128. The Addressees, as corporate groups, are very large, well-resourced companies. In their dealings with the Commission, as in the present proceedings, they would have had access to highly experienced legal advice. As at 2015-2016, for an infringement of this nature, they would inevitably have been well aware of the potential for private damages claims following the Commission’s decision. We of course have not seen the exchanges which passed between the Addressees and the Commission in the settlement

discussions, but we have no doubt that the findings which the Addressees agreed to accept would have received careful and thorough consideration. Moreover, none of the defendants suggested that the statement in recital (3) of the Decision that they had accepted the facts outlined in the Decision in the course of the settlement procedure was incorrect.

129. In return for the settlement on that basis, the Addressees received a 10% reduction in the penalty. Given the very high level of fines in this case, that amounts to a saving of about €330 million, which even for large companies is a significant sum. The EU proceedings were brought to an earlier conclusion. In addition, the Addressees have become subject to an infringement decision which is very substantially shorter and more general than a decision made after contested proceedings that would set out all the evidence against them (the Scania Decision concerning just one manufacturing group comprises over 400 recitals compared to 136 recitals in the Decision). Their actual settlement submissions are protected from disclosure under Article 6(6) of Directive 2014/104 (the Damages Directive), transposed into UK law by Schedule 8A, para 28 CA. Given the asymmetry of information between the participants in a cartel and claimants alleging that they suffered loss as a result of the cartel, those claimants inevitably look to the infringement decision for details as to how the cartel took effect. As the present actions demonstrate, the lack of detail in a settlement decision therefore presents a handicap to claimants seeking to recover, and a corresponding benefit to the addressees of the decision.
130. DAF submitted in its skeleton argument that the Tribunal cannot know the terms on which the “acceptance” by the Addressees recorded in recital (3) was given as that was part of the confidential settlement process. As we acknowledge above, that is of course correct. But if that is intended to mean that the acceptance somehow does not mean what it says, we reject that submission. Of course, the admission was for the purpose of settlement and obtaining the benefits we have referred to. But the defendants’ contention that they can admit a fact to the Commission for the purpose of obtaining those benefits in the Decision but then not admit the same fact for the purpose of resisting a consequent damages claim based on the Decision, simply begs the question whether the latter conduct constitutes an abuse.

131. In that context, on the basis of the English authorities on abuse of process discussed above, we apply a broad, merits-based approach in asking whether it would bring the administration of justice into disrepute and/or be unfair to the claimants if the defendants are able simply to deny the facts which the Decision records them as having admitted, or to “not admit” those facts in their defences to these claims and thus require the claimants to prove them. In our judgment, it would be an abuse of process here on both accounts. That encompasses the position adopted by several of the defendants regarding many of the meetings referred to in the Decision: the defendants admit that a meeting took place on the specified date in the specified place and/or with the specified attendees, but make no admission as to what occurred at the meeting. The defendants would be placing on the claimants the very significant burden of proving all these facts, in circumstances where the relevant information is largely held by the defendants, some of it may be undocumented and insofar as it is documented the claimants would have to obtain it by an extensive disclosure exercise involving very expensive inspection.
132. We emphasise that the factual findings in the Decision were formally admitted by the Addressees in a structured process, where their rights were fully protected, in quasi-criminal proceedings. We do not regard this as remotely comparable to admissions made in correspondence or a press statement, which would be simply admissible but which the admitting party could explain or controvert in civil proceedings.
133. Mr Jowell argued that to hold that disputing the findings is an abuse would be unfair to the Addressees since they do not have a basis in the settlement process to contest a finding outside their own knowledge. However, in the first place, each Addressee had access to the Commission’s file and could ask to see the evidence against it. And in the second place, insofar as the finding concerns the conduct or knowledge of another Addressee (X), if X is bound by that finding we think it is fanciful to suggest that another Addressee would otherwise have sought to advance an argument that X did not do what X admits it did, or did not know information which it admits it knew.
134. However, we consider that the position is more complex for a defendant that seeks to put forward a positive case challenging a particular finding in the Decision. Ms Demetriou accepted that there might be instances where it would not be an abuse for a defendant to put forward a positive case that was contrary to a finding in a settlement decision of which it was an addressee but, she submitted, there would have to be a

particularly good reason for the court to permit it to resile from such a finding. She gave the example of subsequently discovered evidence which was not before the Commission.

135. In the present cases, it is notable that the claimants have not simply pleaded the Decision, or various recitals in the Decision, as the factual basis of the infringement which they then contend caused them loss. In their extensive pleadings, the claimants have in many instances gone significantly beyond the recitals in terms of detail, drawing on material obtained, in particular, from disclosure of documents provided by the defendants to the Commission. By their defences, the defendants have had to respond to these allegations and while sometimes they have done so by denials or non-admissions, in other instances they have pleaded positively in contesting what has been asserted.

136. Altogether, we consider that guidance can be gained from the provisions on formal admissions in CPR Part 14. CPR rule 14.1(5) provides that an admission made after commencement of proceedings may be withdrawn only with the permission of the court and rule 14.1A(3) provides that a formal pre-action admission (although only in actions governed by three pre-action protocols) may be withdrawn after the start of proceedings only with the consent of all the parties or the permission of the court. Practice Direction 14 then sets out the approach the court should adopt when permission is sought:

“7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including-

- (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
- (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
- (c) the prejudice that may be caused to any person if the admission is withdrawn.
- (d) the prejudice that may be caused to any person if the application is refused;
- (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
- (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
- (g) the interests of the administration of justice.”

137. It should be obvious that CPR Part 14 and the attendant Practice Direction provide only an analogy: the present circumstances do not concern an admission made with regard to the same actual or potential claims, or indeed between the same parties. Nonetheless, the policy considerations which evidently underlie the various factors to which the court should have regard under the Practice Direction appear to us very relevant to the question before us.
138. In the present case, DAF has stated that recital (48) is erroneous in stating that “[a]ll of the Addressees, with the exception of DAF” had access to the configurators of at least one other Addressee. DAF has pleaded that it too had such access and so was not in an exceptional position. The claimants naturally do not object to DAF contesting recital (48) in that way and we think it should clearly be able to do so. Similarly, all the parties agreed that recital (62) is incorrect in stating that “all of the Addressees” started their participation in the infringement on 17 January 1997. That is inconsistent with the dates in Article 1 of the operative part, which state that the German subsidiaries in particular became participants only in 2004. We think that recital (62) should probably be referring to “the undertakings”, i.e. the corporate groups of each Addressee as a whole.
139. Further, MAN has admitted recital (60) in its defences subject to two corrections. The recital refers to collection of “information on gross price increases ... as of November 2010 and as of January 2011” and states that the content of such a list “has been reproduced in a handwritten note by an employee of MAN”. MAN states that the date should be simply “as of December 2010” and, secondly, that the note referred to did not completely replicate the list. The claimants do not object to that correction.
140. Recital (116) sets out a figure for the combined market share in the EEA of all the Addressees, and by its defences Iveco seeks to challenge that calculation as inaccurate. As we understood it, the claimants do not suggest that it is an abuse for a defendant to contest that figure on the basis that it will put forward evidence for a different calculation. Moreover, since those claimants who have sued Iveco do not appear to have pleaded reliance on the figure in recital (116) in their Particulars of Claim, Iveco has not pleaded a positive case in its defences, and this issue has not yet come to the fore.

141. In our judgment, having regard to the considerations discussed above, the following principles should apply in the particular circumstances of the present proceedings:

- (1) It is an abuse of process for a defendant simply to deny or not admit facts set out in a recital relied on by a claimant.
- (2) Where the claimants do not object, it is not an abuse for a defendant to put forward a case or evidence inconsistent with a recital.
- (3) Where a defendant seeks to put forward a contrary position to a finding in the Decision on the basis that it does not accurately reflect the underlying document referred to, whether that be a contemporaneous document or a statement in a settlement submission, it will not be an abuse for a defendant to do so. If necessary, the Tribunal would have to decide whether there is indeed an inconsistency.<sup>16</sup>
- (4) Where a defendant relies on new evidence which it could not reasonably have had access to at the time of the proceedings before the Commission, it is not an abuse if it seeks to advance facts inconsistent with a recital.
- (5) Where a claimant pleads facts or allegations that are more detailed than, additional to or different from the facts set out in a recital, it will not be an abuse for a defendant to plead a response in appropriate terms and detail to such facts and allegations, provided that in substance its response does not amount to a denial of a recital that is not otherwise justified by (2), (3) or (4) above.
- (6) In circumstances not covered by (2)-(5), it is for the defendant seeking to put forward a positive case contrary to a finding in a recital to set out the reasons why it should be able to do so in that particular instance, and then for the Tribunal to decide.

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<sup>16</sup> How that would be done procedurally with regard to a settlement submission can be considered should the situation arise. We do not as a matter of principle see a difficulty in the Tribunal being shown part of a settlement submission without disclosure to the claimant for this purpose: cp the procedure where an issue arises as to whether a document is a settlement submission: Tribunal Practice Direction relating to disclosure and inspection of evidence in claims made pursuant to Parts 4 and 5 of the CAT Rules 2015, para 4.



142. We should make clear that by principle (4) we do not mean that a defendant is entitled to ‘not admit’ a fact recorded as admitted in the Decision, and then proceed to full disclosure in that regard from the claimants in the hope that some material might emerge to show that the admission was made in error. That, as we understood it, was the submission advanced by Mr Harris QC for Daimler, which we firmly reject. Disclosure is not to proceed on that Micawberist basis. It is at the time of pleading its defence that a defendant who seeks to challenge a finding in the Decision must put forward its positive case, and accordingly be able to justify this on one of the grounds set out above.
143. However, we note that many of the recitals in the Decision are somewhat vague or general. They refer to what happened “in most cases”, or discussions happening “occasionally” or to meetings being “regular”. It will not be inconsistent with those statements for a defendant to deny that any particular instance was not such a case or occasion, or to dispute a pleaded allegation that meetings took place, say, every three months with an assertion that they occurred only twice a year. Accordingly, in such instances no question of abuse arises. Only if the defendant sought to assert that this never happened (or was very irregular) would there be an abuse.
144. Beyond this, we do not think it is practicable or appropriate to go through all the lengthy defences to determine in this judgment whether or to what extent a positive plea in response to the reliance on a recital constitutes an abuse. Insofar as that is not evident from the guidance above, we consider that it is in the first instance for each defendant, where it seeks to advance a positive case, to set out the justification for seeking to depart from the finding in the Decision which it had admitted. Where the claimants then do not agree that the defendant may resile from that finding, it would be for the Tribunal to rule in the particular circumstances of each case.
145. Mr Jowell submitted that for the Tribunal to hold that as a matter of English law the defendants could not dispute recitals which were not binding as a matter of EU law risked creating a lack of conformity across the EU in the approach of courts to the same Commission decision. However, save in limited respects under the Damages Directive, there has been no harmonisation of procedural rules concerning competition claims and many aspects of national procedural law are different, and sometimes very different, as between EU Member States. Provided that national rules do not infringe the EU

principles of equivalence and effectiveness, that does not form a basis to disapply national principles, and the defendants did not suggest that there was any conflict with those principles here. Moreover, in response to our inquiry as to whether courts in other EU Member States had addressed this issue, Mr Beard told the Tribunal that his clients (who have actions pending against them in several countries) believe that courts in different countries have taken different views as to the extent to which as a matter of their domestic law Commission decisions are binding. Mr Beard emphasised that this was somewhat anecdotal and that no proper survey had been carried out. But it indicates that there appears to be a lack of uniformity in any event. We should add that we leave out of account the formal departure of the UK from the EU on 31 January 2020: no party suggested that this should affect our decision.

146. Finally, we should state that we do not consider that our decision in any way ‘undermines’ the Commission settlement procedure, as suggested in argument for the defendants. The benefits of reaching a settlement with the Commission (see para 129 above) for undertakings involved in a cartel are such that we do not see that those undertakings otherwise wishing to take that opportunity would decide not to do so because they would be unable formally to admit facts concerning the nature and operation of the cartel to the Commission and then deny those same facts (other than a narrow “essential basis” of the resulting settlement decision) when faced with claims brought by those who suffered from the cartel.

## **F. CONCLUSION**

147. For the reasons set out above, we reject DAF’s primary case that none of the recitals in the Decision is binding as a matter of EU law. As we understood it, DAF aligned itself with the other defendants in the event that its primary case was not accepted: i.e. it was not then seeking to advance an alternative secondary case that a narrower category of recitals was binding than was accepted by the other defendants. In accordance with the framing of the preliminary issues, we therefore address the recitals which those defendants have not accepted as binding or which have not otherwise been admitted.
148. As explained above, we find that pursuant to Article 16 the defendants are bound by the following in sections 3, 4 and 7 of the Decision for the purpose of these proceedings:

- (a) The findings in recitals (46)-(49), (51), (57)-(58), (75) and (81) that:

The Addressees exchanged gross price lists and information on gross prices, including planned future gross price increases, and most of them exchanged truck configurators containing detailed gross prices as those came to replace gross price lists. This included information which was not publicly available and was commercially sensitive. The exchange of gross price information placed the Addressees in a better position to understand each other's European price strategy than on the basis of market intelligence alone. The exchange of configurators helped them to compare their own offers with those of their competitors, which further increased the transparency of the market. Some configurators only granted access to technical information, such as bodybuilder portals, and did not include any price information. In addition, between 1997 and 2004:

(a) the Addressees at their meetings in some cases also agreed their respective gross price increases; and

(b) occasionally they also discussed net prices for some countries.

(b) The finding in recital (51) that the participants agreed on the timing and the additional charge to be applied to emissions technology complying with EURO emissions standards, within the period 1997 to 2004.

(c) The finding in recital (52) that at a meeting on 6 April 1998 attended by representatives of the Headquarters of all of the Addressees:

“...the participants coordinated on the introduction of EURO 3 standard compliant trucks. They agreed not to offer EURO 3 standard compliant trucks before it was compulsory to do so and agreed on a range for the price additional charge for EURO 3 standard compliant trucks.”

(d) Recital (61).

(e) Recital (68) including the word “knowingly”.

(f) The final two sentences of recital (71).

(g) Recital (73).

(h) Recital (85).

(i) Recital (88).

(j) Recital (104).

(k) The finding in recital (116) that the infringement covered the entire EEA.

149. As regards all the other findings in the recitals in the Decision which the defendants have not accepted as binding or otherwise admitted, we hold that the question whether it is an abuse of process for the defendants to contest them in these proceedings is to be determined by applying the principles set out in para 141 above.

The Hon Mr Justice Roth  
President

The Hon Mr Justice Fancourt

Hodge Malek QC

Charles Dhanowa OBE, QC (*Hon*)  
Registrar

Date: 4 March 2020