IN THE COMPETITION APPEAL TRIBUNAL

Case No.

BETWEEN

(1) Emerson Electric Co.
(2) Valeo SA
(3) Robert Bosch GmbH
(4) Visteon Corporation
(5) Rockwell Automation, Inc.

Claimants

- and -

(1) Morgan Crucible Company plc
(2) Schunk GmbH
(3) Schunk Kohlenstofftechnik GmbH
(4) SGL Carbon AG

Defendants

APPLICATION FOR PERMISSION TO INITIATE A CLAIM FOR MONETARY LOSS PURSUANT TO SECTION 47A OF THE COMPETITION ACT, 1998

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1. The Claimants make application to the Competition Appeal Tribunal ("CAT"):

(a) Under Rule 31(3) of the Competition Appeal Tribunal Rules 2003 ("the CAT Rules"), for permission to initiate a claim for damages and other monetary claims pursuant to section 47A of the Competition Act 1998 ("the Competition Act") against the Second Defendant, Schunk GmbH and the Third Defendant, Schunk Kohlenstofftechnik GmbH (together, "Schunk"); and the Fourth Defendant, SGL Carbon AG ("SGL") before the end of the period referred to in Rule 31(2)(a); and

(b) For permission to apply to the Tribunal, within a time period to be stipulated by the Tribunal, for appropriate directions as to the procedures to be followed in these proceedings until the end of the period referred to in Rule 31(2)(a) in relation to Schunk and SGL.

2. On December 3, 2003, the European Commission (the "Commission") issued Decision C(2003) 4457 in Case C.38.359 (the "Decision").

3. In Article (2) of the Decision, the Commission concluded:

> *"The addressees of the present Decision participated in a single and continuous infringement of Article 81(1) of the Treaty establishing the European Community (hereinafter "the EC Treaty or "the Treaty") and, from 1 January 1994, Article 53(1) of the Agreement on the European Economic Area (hereinafter "EEA Agreement"), covering the whole of the EEA territory, by which they:*
>
> 1. *agreed and occasionally updated a uniform, highly detailed method of calculating prices to customers, covering the main types of electrical and mechanical carbon and graphite products, different types of customers and all EEA countries where demand existed, with a view to arriving at identically or similarly calculated prices for a wide variety of products;*
> 2. *agreed regular percentage price increases for the main types of electrical and mechanical products and all EEA countries where demand existed, for the different types of customers;*
> 3. *agreed on certain surcharges to customers, on discounts for different types of delivery and on payment conditions;*
> 4. *agreed account leadership for certain major customers, agreed to freeze market shares in respect of those customers, and regularly exchanged pricing information and agreed specific prices to be offered to those customers;*
> 5. *agreed a ban on advertising and on participation in sales exhibitions;*
> 6. *agreed quantity restrictions, price increases or boycotts in respect of re-sellers that offered potential competition;*
> 7. *agreed price undercutting in respect of competitors; and*

8. *operated a highly refined machinery to monitor and enforce their agreements."*

4. The Decision was addressed to Morgan Crucible Company plc ("Morgan"), Hoffmann & Co Elektrokohle AG ("Hoffmann"), Le Carbone Lorraine S.A. ("Carbone"), Schunk, SGL and C.Conradty Hurnberg GmbH ("Conradty").

5. The Commission concluded that the undertakings concerned had participated in the infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement during at least the following periods:

Morgan:	from October 1988 to December 1999;
Hoffmann:	from September 1994 to October 1999;
Carbone:	from October 1988 to June 1999;
Schunk:	from October 1988 to December 1999;
SGL:	from October 1988 to December 1999;
Conradty:	from October 1988 to December 1999.

6. The Commission assessed fines totaling €101,440,000 against the addressees. The following fines were assessed in relation to each of the addressees of the Decision:

(a) As the first to provide information regarding the Cartel and the Cartel Activities, Morgan was granted a 100% reduction of the fine assessed against it.

(b) Hoffmann was fined €2,820,000 after a 30% reduction for cooperating with the Commission;

(c) Carbone was fined €43,050,000 after a 40% reduction for cooperating with the Commission;

(d) Schunk was jointly fined €30,870,000 after a 30% reduction for cooperating with the Commission;

(e) SGL was fined €23,640,000 after a 20% reduction in acknowledgment of severe fines imposed against the company for its involvement in two other cartels;

(f) Conradty was fined €1,060,000.

7. The Claimants are all purchasers of Electrical and Mechanical Carbon and Graphite Products and were purchasers from one, more or all of the Defendants of substantial quantities of Electrical and Mechanical Carbon and Graphite Products over the more than ten-year period during which the infringement took place.

8. As a direct consequence of the infringement by the Defendants, the Claimants purchased the products in question at prices that were artificially inflated and fixed, raised, stabilized and/or maintained at artificially inflated and non-competitive levels. They paid substantially more for the Electrical and Mechanical Carbon and Graphite Products which they purchased than they would otherwise have done, absent the Defendants' conduct in violation of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

9. The Claimants contend that the Defendants acted in breach of a statutory duty imposed under section 2(1) of the European Communities Act 1972 not to infringe Article 81(1) of the EC Treaty and/or Article 53(1) of the EAA Agreement and/or a

statutory duty imposed by Article 81(1) of the EC Treaty and/or Article 53(1) of the EAA Agreement.

10. The Claimants contend that they have suffered substantial monetary loss and damage and that the Defendants have been unjustly enriched as a result, and that the Claimants are entitled, pursuant to section 47A of the Competition Act, to advance monetary claims for damages and/or restitution before the Tribunal. The Claimants seek to recover, by way of this action, damages for the loss suffered or to obtain restitution of the amounts paid to the Defendants as a result of their conduct in violation of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.

11. Each Claimant has claims against each Defendant from whom it purchased Electrical and Mechanical Carbon and Graphite Products at artificially inflated prices.

12. In addition, the Claimants contend that each of the Defendants is jointly responsible for the acts of the other participants in the infringement and, as such, is liable to the Claimants for loss and damage suffered by each of them.

13. On February 20 2004, after the Commission had issued the Decision, Schunk and SGL each brought separate actions before the Court of First Instance ("the CFI Appeals") seeking the annulment or modification of the Decision.

14. Morgan did not appeal the Decision.

15. Section 11 of Schedule 4 of the Enterprise Act 2002 provides in relevant part:

"(1) Tribunal rules may make provision as to the period within which and the manner in which proceedings are to be brought.

(2) That provision may, in particular-

(a) provide for time limits for making claims to which section 47A of the 1998 Act applies in proceedings under section 47A or 47B;

(b) provide for the Tribunal to extend the period in which any particular proceedings may be brought."

16. Rule 31 of the CAT Rules is entitled "*Time limit for making a claim for damages*" and provides in relevant part as follows:

> *(1) A claim for damages must be made within a period of two years beginning with the relevant date.*
>
> *(2) The relevant date for the purposes of paragraph (1) is the later of the following –*
>
> > *(a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made;*
> >
> > *(b) the date on which the cause of action accrued.*
>
> (3) *The Tribunal may give its permission for a claim to be made before the end of the period referred to in paragraph (2)(a) after taking into account any observation of a proposed defendant."*

17. Section 47A(8) of the Competition Act 1998 ("the 1998 Act") contains the provisions which are relevant to determining the relevant date in respect of these proceedings. It provides:

> *"(8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are-*
>
> > *(a) the period during which proceedings against the decision or finding may be instituted in the European Court; and*
> >
> > (b) *if any such proceedings are instituted, the period before those proceedings are determined."*

18. The Decision was adopted by the Commission on 3 December 2003. Assuming that Morgan received notification of the Decision on that date, they would have been entitled to lodge an appeal against the Decision in the European Court at any time until 13 February 2004. Morgan did not appeal the Decision. Accordingly, the period within which to commence proceedings against Morgan arguably commenced running on 13 February 2004.

19. By a settlement that was reached concerning related proceedings in the United States, it was agreed between the Claimants and Morgan that the running of the limitation period in respect of non-US claims would be postponed by consent until 11 February 2007. In consequence, the Claimants have had to initiate these proceedings by Sunday, 11 February 2007.

20. It is for this reason that the Claimants have now commenced proceedings. However, the Claimants have commenced proceedings not only against Morgan, but also against other addressees of the Decision.

21. The Claimants acknowledge that, in relation to Schunk and SGL, the two year period contemplated by Rule 31(1) has not yet commenced to run. The proceedings instituted by these Defendants in the CFI, for the annulment of the Decision or a reduction of the fines imposed on them have still to be determined.

22. Nonetheless, it is clear from the Decision that the Claims against all of the Defendants are substantially similar and closely connected.

23. The following findings of the Commission, inter alia, are relevant in this regard:

(a) In Article (225) of the Decision, that:

"The activities of the cartel formed part of an overall scheme which laid down the lines of cartel members' action in the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive object and a single economic aim, namely to distort the normal movement of prices and to restrict competition in the EEA market for electrical and mechanical carbon and graphite products. The Commission considers that it would be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of several separate infringements, when what was involved was in reality a single infringement which manifested itself in a series of anti-competitive activities throughout the period of operation of the cartel."

(b) In Article (227), that:

"The mere fact that each participant in a cartel may play a role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realization of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement..."

(c) In Article (235), that:

"the complex of infringements in this case present all of the characteristics of a single and continuous infringement and/or concerted practice in the sense of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, in which all addressees of this Decision participated."

(d) In Article (242), that:

> *"This complex of agreements and concerted practices...had as its object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement."*

24. It would be contrary to the interests of justice and to the principles of the overriding objective if the Claimants were to proceed with their monetary claims against Morgan alone, without the participation of other major addressees in the Cartel, namely Schunk and SGL.

25. Subsequent separate proceedings against those Defendants would not be an efficient use of the Tribunal's time and resources, would be inconsistent with the need for the Claimants to bring all their Claims in a single proceeding, would run the risk of irreconcilable findings of fact and judgments and would not be fair to the addressees themselves, given the fact that appeals are still pending. At the same time, however, the Claimants are obliged to commence proceedings against Morgan at this stage in light of the arguable running of the applicable limitation periods. In short, the limitation period is running in relation to Morgan but has not yet commenced to run against the other Defendants.

26. The Claimants accordingly seek the Tribunal's permission under Rule 31(3) to bring their claims against Schunk and SGL at this stage and in the same proceedings as their claims against Morgan, before the end of the period referred to in Rule 31(2)(a).

27. The Claimants intend, however, at the appropriate time, to seek an order from the Tribunal for appropriate directions as to the procedures to be followed in these proceedings until the end of the period referred to in Rule 31(2)(a) in relation to Schunk and SGL. Matters that might need to be considered would include, for example, the appropriateness of proceeding with a consideration of the merits of the Claimants' claims prior to the end of that period; the length of time it may take for

the appeals brought by Schunk and SGL to be disposed of; the need to preserve documentary or other evidence; and the need for the Claimants to have access to relevant documentation by means of disclosure from the Defendants in order to be able properly to quantify their claims. These are matters that might conveniently be addressed by the Tribunal together with the parties. It may be practical to seek to agree a set of directions to this end in discussion between the parties and/or at a case management conference before the Tribunal.

28. In the circumstances, the Claimants seek an order permitting them to initiate their claim against all the Defendants and, to the extent necessary, for permission to apply to the Tribunal within a time period to be stipulated by the Tribunal for appropriate directions as to the procedures to be followed in these proceedings until the end of the period referred to in Rule 31(2)(a) in relation to Schunk and SGL.

29. The Claimants rely for this application upon the facts set forth in the Claim Form.

30. The Claimants seek an order in terms of the attached Draft Order.

Date: 9 February 2007

Crowell & Moring

Solicitors for the Claimants
Crowell & Moring
11 Pilgrim St
London, EC4V 6RN
Tel: 020 7413 0011
Fax: 020 7413 0333

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Claimants

- and -

(1) The Morgan Crucible Company plc
(2) Schunk GmbH
(3) Schunk Kohlenstofftechnik GmbH
(4) SGL Carbon AG

Defendants

DRAFT ORDER

UPON reading the Claim Form filed by the Claimants in the above proceedings

AND UPON reading the request for permission by the Claimants

AND UPON the proposed Second, Third and Fourth defendants having been given the opportunity to submit observations on the Claimants' request for permission

IT IS ORDERED THAT:

1. Pursuant to Rule 31(3) of the Competition Appeal Tribunal Rules 2003 ("Tribunal Rules"), the Claimants be granted permission to initiate a claim for damages and other monetary claims pursuant to section 47A of the Competition Act 1998 ("the Competition Act") against the Second Defendant, Schunk GmbH, the Third Defendant, Schunk Kohlenstofftechnik GmbH and the Fourth Defendant, SGL Carbon AG ("SGL") before the end of the period referred to in Rule 31(2)(a) of the Tribunal Rules;

2. The Claimants be granted permission to apply to the Tribunal, within [ ] of the date of this order, for appropriate directions as to the procedures to be followed in these proceedings until the end of the period referred to in Rule 31(2)(a) in relation to the Second, Third and Fourth Defendants;

3. There shall be liberty to apply.

The Competition Appeal Tribunal

Made [ ] 2007

Drawn [ ] 2007