



Neutral citation [2011] CAT 4

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

Case: 1077/5/7/07

Victoria House  
Bloomsbury Place  
London WC1A 2EB

21 March 2011

Before:

THE HONOURABLE MR JUSTICE BARLING (President)  
DR ADAM SCOTT OBE TD  
DR VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) EMERSON ELECTRIC Co**  
**(2) VALEO SA**  
**(3) ROBERT BOSCH GmbH**

Claimants

-v-

**(1) MORGAN CRUCIBLE COMPANY PLC**  
**(2) SCHUNK GmbH**  
**(3) SCHUNK KOHLENSTOFFTECHNIK GmbH**  
**(4) SGL CARBON SE (sued as SGL CARBON AG)**  
**(5) MERSEN SA (sued as LE CARBONE LORRAINE SA)**  
**(6) MERSEN UK PORTSLADE LIMITED**  
**(sued as LE CARBONE (GREAT BRITAIN) LIMITED)**

Defendants

Mr. Jon Turner QC and Miss Laura Elizabeth John (instructed by Crowell & Moring LLP) appeared for the Claimants.

Mr. Daniel Beard (instructed by Hogan Lovells International LLP) appeared for Mersen UK Portslade Ltd.

Heard at Victoria House on 10 December 2010

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**JUDGMENT (Jurisdiction/strike out)**

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## I. INTRODUCTION

1. This is an application by the sixth defendant, Mersen UK Portslade Ltd, formerly known as Le Carbone (Great Britain) Ltd, to dismiss certain claims for damages against it on the ground that the Tribunal lacks jurisdiction, alternatively to strike out the claims pursuant to rule 40 of the Competition Appeal Tribunal Rules 2003 (“the Tribunal’s Rules”) on the basis that there are no reasonable grounds for making the claim (“the Application”). We shall refer to the sixth defendant/applicant as “Carbone GB” in this judgment.
2. The monetary claims in this case arise out of a decision by the European Commission dated 3 December 2003 in Case No C.38.359 – *Electrical and mechanical carbon and graphite products* (“the Decision”)<sup>1</sup>. The Commission stated in the Decision that the undertakings to which it was addressed participated in a single and continuous infringement of Article 81(1) of the EC Treaty (now Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”)) on the market for carbon and graphite-based products for electrical and mechanical applications. The Commission imposed fines totalling €101.44 million. Le Carbone-Lorraine SA<sup>2</sup> (“Carbone SA”), the parent company of Carbone GB and one of the addressees of the Decision, was fined €43.05 million. The correct interpretation of the Decision is central to the Application and we shall therefore return to it in section III below.
3. Each of Carbone SA, SGL Carbon AG (“SGL”), Schunk GmbH and its subsidiary Schunk Kohlenstofftechnik GmbH (together, “Schunk”), who were all addressees of the Decision, subsequently appealed to the Court of First Instance of the European Communities (now known as the General Court), claiming that the court should either annul the Decision or substantially reduce the fines imposed. Another addressee of the Decision, Morgan Crucible Company plc (“Morgan Crucible”), did not appeal. On 8 October 2008 the General Court dismissed each of these three appeals in their entirety: Case T-68/04 *SGL Carbon AG v Commission* [2008] ECR II-2511; Case T-69/04 *Schunk GmbH v Commission* [2008] ECR II-2567; Case T-73/04 *Le Carbone-Lorraine*

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<sup>1</sup> A summary of the Decision was published in the Official Journal of the European Union on 28 April 2004 (OJ 2004 L 125, p. 45).

<sup>2</sup> Carbone SA has since changed its name to Mersen SA.

*v Commission* [2008] ECR II-2661. SGL and Carbone SA appealed the General Court's judgments to the Court of Justice. On 12 November 2009 the Court of Justice dismissed those appeals: Case C-554/08 P *Le Carbone Lorraine SA v Commission* [2009] ECR I-189 and Case C-564/08 P *SGL Carbon AG v Commission* [2009] ECR I-191.

4. The monetary claims before us were brought under section 47A of the Competition Act 1998 ("the Act"), which permits a claim for damages to be brought by a person who has suffered loss or damage as a result of the infringement of a relevant prohibition, including Article 101(1). Such a claim may be brought in the Tribunal only if a decision of a UK competition authority or of the European Commission has already established that there has been a breach of a relevant prohibition. Where such a decision is under appeal a claim under section 47A may be brought only with the permission of the Tribunal.
  
5. The salient steps leading up to the Application are as follows:
  - (a) On 9 February 2007 five companies<sup>3</sup> issued a claim form in the Tribunal, applying at the same time for permission to initiate claims against SGL, Schunk and, subsequently, Morgan Crucible under subsection 47A(5)(b) and rule 31(3) of the Tribunal's Rules. The application for permission was made in view of the then still outstanding appeals to the General Court. Carbone SA and Carbone GB were not among the proposed defendants.
  - (b) On 10 October 2007 the claimants applied to add Carbone SA as an additional proposed defendant.
  - (c) An issue arose as to whether permission to commence proceedings against Morgan Crucible was required, given that it had not challenged the Decision by appeal to the General Court. On 17 October 2007 the Tribunal held that the appeals by other addressees of the Decision had the effect that

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<sup>3</sup> The original claimants were: (1) Emerson Electric Co, (2) Valeo SA, (3) Robert Bosch GmbH, (4) Visteon Corporation and (5) Rockwell Automation Inc. Following the amendment of the claim form the claimants are now: (1) Emerson Electric Co, (2) Valeo SA, (3) Robert Bosch GmbH.

permission was required for the claim to be brought against Morgan Crucible, as well as against those who had appealed ([2007] CAT 28).

- (d) On 16 November 2007 the Tribunal gave permission under rule 31(3) for the claimants to commence their monetary claim against Morgan Crucible ([2007] CAT 30).
- (e) On 28 April 2008 the Tribunal refused the claimants permission to bring their claims against Schunk, SGL and Carbone SA whose appeals were still pending before the European Courts ([2008] CAT 8).
- (f) On 2 April 2009 the Tribunal ordered that the proceedings brought against Morgan Crucible be stayed until 21 days from the handing down by the Court of Justice of the judgments in the further appeals brought by SGL and Carbone SA.
- (g) On 12 November 2009 the Court of Justice handed down its judgments dismissing SGL's and Carbone SA's appeals.
- (h) On 11 March 2010 the Tribunal refused a further stay of the proceedings and ordered that the parties seek to agree further directions for the purposes of bringing the damages claims to trial.
- (i) On 31 March 2010 the claimants applied under rules 34 and 35 of the Tribunal's Rules respectively for permission to amend the claim form in certain respects and to join as additional defendants Schunk, SGL, Carbone SA and Carbone GB.
- (j) Upon there being no objection to those applications, the Tribunal granted them by order dated 19 May 2010.
- (k) On 13 September 2010 Carbone GB lodged the Application, which was opposed by the claimants.
- (l) The Application was heard on 10 December 2010.

## II. THE LEGAL FRAMEWORK

6. So far as material, section 47A of the 1998 Act provides as follows:-

### “47A Monetary claims before Tribunal

(1) This section applies to—

(a) any claim for damages, or

(b) any other claim for a sum of money,

which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

(2) In this section "relevant prohibition" means any of the following—

...

(c) the prohibition in Article [101(1) TFEU];

...

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings—

(a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.

(6) The decisions which may be relied on for the purposes of proceedings under this section are—

(d) a decision of the European Commission that the prohibition in Article [101(1) or Article 102 TFEU] has been infringed;

...

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.

...”

7. The nature and limits of the Tribunal’s jurisdiction under section 47A were clarified by the Court of Appeal in *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* [2009] EWCA Civ 647. Patten LJ stated at paragraphs 30-31:

“30. The jurisdiction of the Tribunal is therefore limited to determining what are commonly referred to as follow-on claims for damages based on a finding of infringement of the Chapter II prohibition or Article 82 which has been made by the OFT or one of the sectoral regulators ..... The existence of such a finding is not only a pre-condition to the making of a claim under s.47A(1). It also operates to determine and define the limits of that claim and the Tribunal's jurisdiction in respect of it.

31. For there to be such a claim (and, with it, the jurisdiction of the Tribunal to adjudicate upon it) the regulator must have made a decision of the kind described in s.47A(6). The use of the word "decision" makes it clear that s.47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement of the Chapter II prohibition. It is not open to a claimant such as ECSL to seek to recover damages through the medium of s.47A simply by identifying findings of fact which could arguably amount to such an infringement. No right of action exists unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. The corollary to this is that the Tribunal (whose jurisdiction depends upon the existence of such a decision) must satisfy itself that the regulator has made a relevant and definitive finding of infringement. The purpose of s.47A is to obviate the necessity for a trial of the question of infringement only where the regulator has in fact ruled on that very issue. We were not referred to any procedure for seeking clarification of any points of uncertainty from the decision-maker. The Tribunal ought therefore, in my judgment, to be astute to recognise and reject cases where there is no clearly identifiable finding of infringement and where they are in effect being asked to make their own judgment on that issue.”

8. Rule 40 of the Tribunal’s Rules provides that:-

“40. (1) The Tribunal may, of its own initiative or on the application of a party, after giving the parties an opportunity to be heard, reject in whole or in part a claim for damages at any stage of the proceedings if -

(a) it considers that there are no reasonable grounds for making the claim;

...

(2) When the Tribunal rejects a claim it may enter judgment on the claim in whole or in part or make any other consequential order it considers appropriate.”

9. The general principles that apply to rule 40 applications are not in dispute. They were also helpfully summarised by Patten LJ in *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* (above), at paragraphs 27 to 28:

“Rule 40 has adopted the same wording as CPR 3.4(2) and I agree that the same test should be applied. Rule 40 therefore permits the Tribunal to strike out claims which are certain to fail. In the context of CPR 3.4(2), this can include claims which are bad in law even assuming that the pleaded facts are established. Mr Beard makes the point that in exercising that jurisdiction, the High Court will not usually strike out claims which depend upon a developing branch of the law and which therefore make it desirable for a trial to be held in order to establish the actual facts before considering whether the law can be extended to cover the claim

But in a claim before the Tribunal under s.47A, this is an unlikely scenario. As I explain below, the role of the Tribunal is limited to the determination of loss which results from a finding of infringement by a regulator. The Tribunal is not therefore concerned with the correctness of that finding but only with whether it has been made. Any challenge to the finding of infringement has to be resolved on an appeal to the Tribunal under s.46 of the CA 1998; not in proceedings under s.47A. The Tribunal is, for those purposes, bound by the finding which the regulator has made: see s.47A(9). Its function is to do no more than to identify the findings of infringement in the decision. The possibility of being faced with a developing area of the law will not normally arise.” (omitting authorities)

### **III. THE COMMISSION DECISION**

10. Before dealing with the substance of the Application, we should refer to the content of the Decision, which is a detailed document comprising some 120 pages. A non-confidential version of the Decision was annexed to the original claim form and is available on the Commission’s website<sup>4</sup>. The Tribunal has not seen the confidential version.
11. Mr Beard, who appeared for Carbon GB, described the way in which EU decisions, including Commission decisions in the competition field, are structured. They have a relatively short operative part or *dispositif* and an often lengthy statement of reasons. The operative part identifies the addressee(s) of the decision and, for example, makes a finding of infringement and/or imposes penalties and/or requires the persons to whom the decision is addressed to bring the infringement to the end. The statement of reasons, which normally precedes the operative part, contains what are called the recitals to the decision, setting out the factual and legal assessment which the Commission has made in reaching its decision.
12. The operative part of the Decision, consisting of four articles, comes after 364 paragraphs of recitals. Article 1 of the operative part reads:

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<sup>4</sup> <http://ec.europa.eu/competition/cartels/cases/cases.html>

“The following undertakings have infringed Article [101(1) TFEU] and – from 1 January 1994 – Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices in the sector of electrical and mechanical carbon and graphite products:

- C. Conradty Nürnberg GmbH, from October 1988 to December 1999;
- Hoffmann & Co. Elektrokohle AG, from September 1994 to October 1999;
- Le Carbone Lorraine S.A., from October 1988 to June 1999;
- Morgan Crucible Company plc, from October 1988 to December 1999;
- Schunk GmbH and Schunk Kohlenstofftechnik GmbH, from October 1988 to December 1999;
- SGL Carbon AG, from October 1988 to December 1999.”

13. Article 2 imposes fines on each of the undertakings listed in article 1, with the exception of Morgan Crucible (whose fine had been commuted to zero as a result of the application of the Commission’s leniency arrangements<sup>5</sup>). Article 3 requires those undertakings to bring to an end the infringements referred to in article 1 and refrain from repeating such conduct and from conduct having a similar effect. Article 4 lists the addressees of the Decision (which are the same undertakings as those referred to in article 1) together with their postal addresses.

14. The 364 paragraphs of recitals to the Decision explain the reasons for the findings of infringement and the fines imposed. The first and second recitals state:

“(1) This Decision is addressed to the following undertakings, suppliers of electrical and mechanical carbon and graphite products:

...

Le Carbone Lorraine S.A. (hereinafter “Carbone Lorraine”)

...

(2) The addressees of the present Decision participated in a single and continuous infringement of Article [101(1) TFEU] 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:

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<sup>5</sup> Commission *Notice on the non-imposition or reduction of fines in cartel cases* (OJ 1996 C 207, p. 4).

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 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 resellers 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.”

15. The recitals go on to describe first the industry for electrical and mechanical carbon and graphite products (recitals 4 to 13), before introducing each of the infringing undertakings (recitals 14 to 36). Recitals 20 to 24 refer to Carbone SA and record that:

(20) Le Carbone Lorraine S.A. was created in 1937 by the merger of La Compagnie Générale Electrique de Nancy and la société Le Carbone. It is now the parent company of what it calls a "federation of small and medium enterprises", together constituting the Group Carbone Lorraine. Carbone Lorraine is a publicly-traded company. Its headquarters are located in Paris, France.

...

(22) Carbone Lorraine is a global company. Forty percent of its staff and more than half of its industrial sites are located outside of Europe. For all products together, it has 19 industrial sites in Europe (mainly in France, Germany, the United Kingdom, Spain and Italy), 5 in Asia, 12 in the USA and 3 in South America and Africa.

...”

16. It is common ground that Carbon GB is not mentioned by name anywhere in the Decision.

17. It will be necessary to return to the recitals later in this judgment.

#### **IV. THE APPLICATION**

18. The basis for the Application is relatively straightforward. Mr Beard submitted that no claim for damages under section 47A could be brought against his client unless there existed a decision of the kind described in subsection 47A(6)(d) of the Act, namely a decision by the European Commission that Article 101(1) TFEU has been infringed. Here there was no such decision so far as Carbone GB was concerned. There was therefore no basis for the claim against Carbon GB and it must be struck out. In this regard he relied upon two separate strands of argument, either of which in his submission would suffice to dispose of the claim against Carbon GB.

19. Mr Beard's primary argument was that it is a fundamental principle of European Union ("EU") law that a decision only has effect in relation to the persons to whom it is addressed; only they are bound by it. Further, under EU law only the operative part of a decision is capable of producing legal effects; statements in the recitals to a decision are not, in themselves, capable of any legal effect and cannot establish any liability. The only exception is where the operative part is ambiguous, in which case resort could be had to the recitals in order to resolve the ambiguity. He submitted that in the present case the relevant decision for the purposes of subsection 47A(6)(d) of the Act was the Commission's determination in article 1 of the Decision that Carbone SA, together with the other legal entities named in that article, had infringed the prohibition in Article 101(1). Carbone GB was not cited as an infringer in article 1, nor was it listed in article 4 as an addressee of the Decision. It was not mentioned or referred to anywhere in the operative part, which was entirely unambiguous. Therefore the Decision was not addressed to Carbon GB, and did not bind that company; in consequence there exists no relevant infringement decision for the purposes of the Act. That, submitted Mr Beard, was an end of the matter. If this argument was accepted there was no need to consider the second argument at all.

20. In support of these propositions Mr Beard took us first to Articles 288 and 297 of the TFEU (ex Articles 249 and 254 of the EC Treaty). It was common ground that these

provisions apply to decisions made by the Commission under Article 101 TFEU, such as the Decision. They provide so far as relevant:

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

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.” (Article 288)

“... directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification.” (Article 297)

21. Therefore, it was submitted, decisions must be notified to those to whom they are addressed and have no effect upon those addressees until such time as they are so notified. The position was even clearer in relation to non-addressees: they cannot be notified of the decision in question as addressees, and therefore it can have no legally binding effect upon them. It was beyond question that Carbone GB was neither an addressee nor notified of the Decision. It followed that the Decision could have no binding effect on Carbone GB and that there was no basis for the claim against it.
  
22. In relation to the binding effect of the operative part of a decision, Mr Beard drew our attention to the judgment of what is now the Court of Justice of the European Union (“ECJ”) in Joined Cases 40-48/73 et al. *Suiker Unie and others v Commission* [1975] ECR 1668. This was an appeal against the Commission’s decision finding that a number of producers and sellers of sugar had infringed the EU competition rules. In the operative part of the decision four parties are mentioned as having been involved in the unlawful conduct in the southern part of Germany. These parties did not include an unrelated company, known as SZV. However, in the recitals to the decision the Commission had made clear findings that SZV was an active participant in the unlawful concerted practice. At the hearing before the ECJ the Commission submitted that its complaint was directed to SZV as well as to the other four companies, and that it was only through inadvertence that SZV had not been named in the operative part. The Commission sought to rely upon the statement of reasons, upon which the decision was based. The Court dismissed the Commission’s argument, stating at paragraphs 315-317 of its judgment:

“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 this decision must be considered, provided that it is not open to more than one interpretation.

...[the operative part] sets out clearly the undertakings blamed for the infringement, namely [four named companies not including SZV].

Therefore there are grounds for finding that this subparagraph does not apply to SZV.”

23. We note that under a different head of the same appeal the appellants argued that the operative part of the decision did not accurately describe the conduct which constituted the infringement and which they were called upon to cease, and that therefore the decision itself was invalid. The ECJ stated that in those circumstances it was permissible to examine the recitals, holding that when the operative part was considered in the light of the statement of reasons the nature of the infringing conduct was clear (see paragraphs 121-123 of the judgment).

24. To the same effect was the judgment of the General Court (then the Court of First Instance) in Case T-61/99 *Adriatica di Navigazione SpA v Commission* [2003] ECR II-5349, at paragraph 43, where it said:

“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.” (authorities omitted)

25. Mr Beard also relied upon the TFEU provisions which relate to a person’s standing to challenge a Commission decision. Article 263 TFEU (ex Article 230 EC Treaty) grants the ECJ competence to “review the legality of legislative acts, of acts of the Council, of the Commission ..., other than recommendations and opinions ...”, and provides:

“It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law ....”

The article then deals with standing to initiate such proceedings:

“Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”

26. Case T-358/06 *Wegenbouwmaatschappij J. Heijmans v Commission* [2008] ECR II-110, a judgment of the General Court (then CFI) concerned a challenge brought under what is now Article 263. The judgment assumed some importance in the arguments put to us. No official version was available in English at the time of the hearing but we were helpfully provided with the judgment in French and with an unofficial translation into English.
27. This decision, which for convenience we shall refer to as *Dutch Bitumen*, arose out of proceedings for annulment of an infringement decision of the Commission relating to the Dutch Bitumen cartel. The applicant had been an addressee of the Commission’s statement of objections in that investigation, as an alleged participant in the cartel along with certain associated companies. However it was not an addressee of the Commission’s eventual decision, which contained no express finding of infringement on the part of the applicant. In paragraph 18 of the recitals the applicant was mentioned as being indirectly a 100 per cent owned subsidiary of the parent company of the Heijmans group of companies. At recital 276 the Commission stated that the “undertaking” that committed the infringement was the Heijmans group of companies “including Heijmans NV [the group parent company] and Heijmans Infrastructuur BV [the applicant’s immediate parent]”. Recital 278 stated that “This Decision is accordingly addressed to Heijmans NV and Heijmans Infrastructuur BV as they form part of the undertaking that participated in the infringement and as the Commission considers that these legal entities within the undertaking should be held liable for the infringement.” Those two companies were addressees of the decision and were expressly identified as infringers in the operative part of the decision.
28. The Commission argued that the applicant’s action for annulment was inadmissible on the ground that the company had no standing to bring the challenge under what is now Article 263. The applicant contended that it had sufficient standing first because it was an addressee of the statement of objections and the decision was ambiguous as to its

involvement in the cartel in view of its inclusion in recital 18; and secondly because it would be deprived of essential rights if it were unable to challenge the decision, as the decision could be invoked against the applicant in the national court, which could take account of the whole decision and not just the operative part. The Court held the challenge to be inadmissible.

29. As to the applicant's first point, the Court confirmed that, as the applicant was not an addressee of the decision, it was necessary to consider whether it could establish standing as being directly and individually concerned by the decision. It then said at paragraph 22:

“According to case-law, only the operative part of a decision may produce legal effects and modify a person's legal position, and the considerations in the statement of reasons cannot be the subject of an action for annulment, except if these form the necessary basis for the operative part of this decision (Order of the Court of 17 September 1992, *NBV and NVB/Commission*, T-138/89, Rec. p.II-2181, point 31). The Court has also stated that in the event that no infringement has been attributed to a company in the operative part of a decision, the company does not have an interest to bring proceedings against this decision, even if the Commission had noted the existence of an infringement attributable to a company in the reasoning of the decision (refer to the Judgment of the Court of First Instance dated 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse/Commission*, T-474/04, not yet published in the Recueil, point 74). Therefore, the fact that the contested decision mentions the applicant among the companies subject to the proceeding is not sufficient to award it an interest to bring proceedings.”

30. Having dismissed the applicant's reliance on its being an addressee of the statement of objections, and on the alleged ambiguity of the reasoning, the General Court turned to the argument that standing was justified by the fact that the decision might be relied upon in national proceedings against the applicant. The Court stated at paragraphs 29 to 30 of the judgment:

“In any case, the applicant cannot maintain that, in the present case, the absence of the possibility to institute proceedings against the contested decision before the Community judge would undermine what it refers to as its “essential rights”.

Indeed, it must first be pointed out that neither the statement of objections nor the statement of reasons of the contested decision constitute elements on which a national court could directly rely in order to invoke the liability of the applicant, since the final decision does not hold it liable for an infringement under Article [101 TFEU] in<sup>6</sup> the operative part.”

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<sup>6</sup> Mr Turner QC, who appeared for the claimants, referred us to the original French where for “...in the operative part.” one finds “...ainsi qu'il resort de son dispositif.” which he translated as “...in so far as

31. Mr Beard made the following points in the light of *Dutch Bitumen*. First it was to be noted that there was no attempt to argue that the applicant was somehow to be treated as an addressee of the decision – the only question was whether it had standing by reason of “direct and individual concern”. Second, the Court confirmed once more that only the operative part of a decision can create legal effects, and that if the operative part does not establish an infringement on the part of a company, that company cannot challenge the decision even if an infringement is attributed to that company in the recitals. Third, the applicant’s inability to challenge the decision did not prejudice its rights because a national court could not rely upon the non-operative parts of the decision in order to establish any liability on the part of the applicant, there being no finding of infringement in the operative part.
32. Mr Beard submitted that it could not be right that a person could be bound by an infringement decision without having an absolute right to challenge it. Yet this was the effect of the claimants’ argument. It was no answer that such a person could challenge the decision if he could establish “direct and individual concern”, as that depended on an assessment of the particular facts, and the person might still be left without any remedy. Therefore, as the Decision was not addressed to Carbone GB and there was no finding of infringement against that company in the operative part, which was unambiguous, there was no decision within the meaning of subsection 47A(6)(d) so far as Carbone GB was concerned.
33. Carbone GB’s fall-back argument was made on the premise that, contrary to its primary submission, one is entitled to look (or there is any utility in looking) beyond the unambiguous operative part of a Commission decision, in order to see whether there is a finding of infringement on the part of someone who is not an addressee of the decision. On that basis Carbone GB submitted that in any event there is nothing in the recitals to the Decision which could assist the claimants. The company was not named anywhere in the Decision including the recitals; although a reference is made in the recitals to a UK subsidiary of Carbone SA, it was not accepted that Carbone GB was the subsidiary in question. Nor was there a finding by the Commission that Carbone GB formed part of any “undertaking” found to have infringed Article 101.

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it emerges from the operative part.” He submitted the distinction was significant in relation to his contentions. We shall return to this when we consider the claimants’ submissions.

34. In relation to the latter point it was common ground that infringements of Article 101 are committed by “undertakings”, and that in EU law the notion of an undertaking can cover one or more natural or legal persons engaged in an economic activity, regardless of their legal status. So, depending on the specific facts, a parent company and its subsidiaries are capable of being treated as a single “undertaking” where they form a single economic unit, such as where the parent exercises “decisive influence” over the subsidiary (see, for example, Judgment of the ECJ in Case C-97/08 *Akzo Nobel NV and Others v Commission* [2009] ECR I-8237, at paragraphs 58-61).
35. However, Mr Beard contended that it was not enough to be able to point to findings in the recitals to the Decision from which it might, for example, arguably be *inferred* that Carbone GB formed part of the same infringing undertaking as its ultimate parent Carbone SA. Where, as here, no relevant determination has been made by the Commission, a follow-on claim cannot be made under section 47A. In this regard he referred us to the passages in the Court of Appeal’s decision in *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* cited at paragraph 7 above.
36. Mr Turner QC for the claimants took issue with Carbon GB’s submissions. In summary his contentions were (1) that although Carbon SA, the parent company, is the sole company in the Carbone Lorraine group which is mentioned as an infringer in the operative part of the Decision, that is not the same as saying that no other company is part of the infringing undertaking; (2) that one therefore has to look at the recitals to the Decision in order to ascertain whether and if so which other companies are comprised in that undertaking, and in particular whether in that event the parent is being addressed in a representative capacity in the operative part; (3) that when that exercise is carried out it is clear that Carbon GB is part of the infringing undertaking; that (4) if there is any doubt or ambiguity on the previous point, the Tribunal should ask the Commission to clarify the matter pursuant to Article 15(1) of Council Regulation (EC) No 1/2003 (OJ 2003 L 1, p. 1).
37. In the course of argument Mr Turner reminded the Tribunal that the essential question is whether there is “a decision of the European Commission that ...[Article 101] has been infringed” within the meaning of subsection 47A(6)(d) of the Act. That is undoubtedly correct. In his oral argument Mr Turner made clear that his primary

contention was that in the present case the operative part of the Decision, properly understood in the light of the reasoning, contains the finding of infringement necessary to found the Tribunal's jurisdiction against Carbon GB. However, he reserved the right to argue, if the facts supported it, that even a finding contained in the reasoning alone and not reflected in the operative part, would be sufficient for the purposes of the UK statute. Although he did not put it in these terms, there may be an implication in his reserved argument and also possibly in his main argument, that a finding of the Commission which was without any legal effect *as a matter of EU law* could nevertheless satisfy the Act and provide the basis for a claim under section 47A.

38. In relation to his main argument, Mr Turner acknowledged that in order to enforce the competition rules it was necessary that the operative part of a Commission decision should identify a particular legal person or persons who then become liable for payment of any fine. However he submitted that the Commission's practice is not always to specify in the operative part all the legal entities which form the "undertaking" which has been found to infringe. Where, for example, there is a corporate group with numerous subsidiaries, all of whom form a single infringing undertaking, he stated that the Commission's practice has been to specify the ultimate parent company or "Topco", rather than listing in the operative part of the decision each and every subsidiary involved in the unlawful conduct. He submitted that where this occurs the legal person named in the operative part of the decision as the "undertaking" will be a representative, and the finding of infringement is not limited to that entity. Any problem which might exist in light of the case-law as to whether, for example, the subsidiary has standing to appeal against the finding to the General Court, is resolved by virtue of Topco's undoubted right to appeal. So, in the present case, the operative part of the Decision should be read as referring to the parent company Carbone SA *as representing* the "undertaking" which has been found to have infringed.
39. In order to make good these arguments Mr Turner took us first to two of the recitals to the Commission's decision relating to the Dutch Bitumen cartel (OJ 2007 L 196, p. 40 (summary)). This was the decision which led to the *Dutch Bitumen* judgment to which we have referred. Recital 189 of that decision simply makes the now familiar point that an infringing "undertaking" is an economic concept and therefore not necessarily identical to the legal person or persons within a group whose representatives actually

took part in the cartel meetings. Mr Turner also emphasised recital 190, where the Commission states:

“Despite the fact that Article [101 TFEU] is applicable to undertakings and that the concept of undertaking has an economic scope, only entities with legal personality can be held liable for infringements. This Decision should therefore be addressed to legal entities. It is accordingly necessary for each undertaking that is to be held accountable for its infringement of Article [101 TFEU] in this case to identify one or more legal entities that represent the undertaking.”

40. As we read this the Commission is making the non-controversial point that, since the infringing “undertaking” is an economic concept and may therefore not be co-extensive with a single legal entity, it is necessary to identify one or more such entities who are to be “held liable for” the infringement, and who must therefore pay any penalty and comply with any “cease and desist” order included in the operative part. The legal persons who are “held liable” are so held as representing the *undertaking*. It is not at all clear that they are intended to represent other specific legal persons not identified in the operative part, or at least not in a way which has legal significance.
41. Next Mr Turner took us to the decision of the Commission relating to the *Cartonboard* cartel (OJ 1994 L 243, p. 1). He referred first to the fact that among the addressees of that decision were the parent companies of two separate corporate groups. These parents were Cascades SA and a parent which we shall call “MoDo”. In each case no other company within the group was an addressee of the decision, or was cited as an infringer in the operative part, or was made the subject of a penalty. Mr Turner drew to our attention the following recitals in the statement of reasons:

“(140) ... In the context of large corporate groups, any of the following may, depending upon the circumstances, be treated as an ‘undertaking’:

- the parent or holding company of the group,
- the whole group consisting of the parent and its direct and indirect subsidiaries,
- intermediate holding companies,
- the subgroups or divisions formed by the subholding companies and their subsidiaries,
- the individual subsidiary companies.

(141) In the cartonboard industry many of the major operators are broad-based 'forest product' groups whose activities range from forestry and timber products through pulp to paper, cartonboard and packaging.

...

(143) In the present case, the members of the PG Paperboard were usually identified in its records as the individual operating companies rather than the group itself (e.g. 'Papeteries de Lancey SA' rather than 'Aussedat Rey SA'). Normally, however, the Commission would have been entitled to address the decision to the group, particularly in the case of an integrated forest product undertaking. In order, however, to avoid the argument (which tends to blur the distinction between a 'company' and an 'undertaking') as to whether the parent company of the group ought to be held responsible for the actions of what are said to be autonomous subsidiaries, the Commission has in principle treated the entity named in the membership lists of the PG Paperboard as the appropriate 'undertaking' for the purposes of addressing the present proceedings, subject to the following exceptions:

1. where more than one company in a group participated in the infringement; or
2. where there is express evidence implicating the parent company of the group in the participation of the subsidiary in the cartel,

the proceedings have been addressed to the group (*represented by the parent company*).

...

(147) Prior to their acquisition by Cascades in 1989, Kartonfabriek van Duffel N.V. and Djupafors AB were participants in the cartel as independent undertakings. But for the acquisition, proceedings could have been addressed to both undertakings in their own name. Duffel and Djupafors were renamed and continued to exist as separate subsidiaries in the Cascades group. However, it is appropriate to address this Decision to the Cascades group *represented by Cascades SA* in respect of the participation in the infringement of all of Cascades cartonboard operations (see recital 143).

...

(152) During the administrative procedure in the present case, MoDo argued that the statement of objections (and any decision) should be addressed not to it but to Iggesund Paperboard AB which it claimed was an 'entirely separate undertaking' from the group holding company MoDo.

It is of course true that, as with any large industrial group, MoDo is organized operationally in several business areas of which Iggesund Paperboard is one. Indeed, it might well be that Iggesund Paperboard AB as a subgroup or division could be treated as an undertaking for the purposes of Community competition proceedings, as could other entities inside the group (see recital 140). This does not, however, mean that any proceedings must be addressed to it or that the MoDo group itself is freed from all responsibility.

(153) In the first place, there might be difficulties in collecting the fine were a decision to be addressed to Iggesund Paperboard AB. As a so-called 'commission

company' of the MoDo group, it has itself a nominal capital of only SKr 50 000 (= ECU 5 500), the minimum permitted by law. As MoDo itself admits, there is some doubt in Swedish law as to the responsibility of a parent company for the debts of this type of subsidiary. To overcome this problem in its commercial dealings, MoDo has made a statement in its annual accounts accepting contractual liability for the commitments of its commission companies but it is not known whether this guarantee would apply to a fine imposed by the Commission.

Secondly (and in so far as the 'autonomy' argument might be relevant) Iggesund Paperboard AB is not as functionally independent of the group, as MoDo has claimed. Iggesund Paperboard AB neither owns the production facilities for cartonboard nor employs its labour force. The cartonboard assets formerly owned by Iggesunds Bruk AB remain owned by that company which is now a dormant company entirely owned by MoDo. All personnel in Sweden are employed by MoDo itself. MoDo exercises ultimate management and financial control over its divisions. It is therefore appropriate for the purposes of the present proceedings to address the decision to the MoDo group itself rather than to a subsidiary which has no real independence, owns no assets and employs no staff. For the reasons set out earlier (for example, in recital 141), *the top holding company is taken to represent the group.*"

(The Tribunal's emphasis.)

42. Therefore, as far as we can judge, the Commission had taken the following approach in that case: where an operating subsidiary was implicated in the cartel documents the Commission treated that subsidiary as the "undertaking" to which the proceedings should be addressed. That was apparently done for the practical reason that it avoided any argument as to whether the parent company ought to be held responsible too. Where, however, more than one company in a group were involved in the infringement, or where the parent itself was specifically implicated, the Commission had addressed the decision to the parent alone. Both Cascades SA and MoDo appear to have been chosen as addressees on the basis of the first exception to the general approach.
43. Mr Turner submits that these recitals reveal an important distinction between, on the one hand the specific findings which the Commission has made in respect of participating entities within the Cascades and MoDo groups, and on the other hand the fact that the parent companies alone were identified in the operative part. In his submission, treating the parent company in that way for administrative convenience or other reasons does not detract from the underlying findings of infringement contained in the recitals. Mr Turner also pointed out that in rejecting an appeal by MoDo from the same Commission decision, the General Court (then CFI) had made no criticism of the fact that the Commission had treated MoDo as the sole addressee of the decision, when,

as the Court accepted, two named subsidiaries had also participated in the infringement (see Case T-352/94 *Mo och Domsjö AB v Commission* [1998] ECR II-1989, at paragraphs 87-95).

44. Therefore, he submitted, Mr Beard was fundamentally wrong in his argument that the Commission always specifies in the operative part all the legal entities which form the infringing undertaking. Mr Turner submitted that in order to determine whether an apparently unambiguous finding of infringement on the part of a specified company in the operative part of a decision was to be taken at face value, or was instead to be regarded as a finding that the company in question was being addressed by the Commission as a representative of other legal persons who also formed part of the infringing undertaking, it was necessary to examine the whole decision including the recitals.
45. Nor did he consider that the case-law relied upon by Mr Beard, presented any obstacle to this approach. In both *Suiker Unie* and *Adriatica* (above) the European Courts had indicated that it was permissible to look beyond the operative part of a decision and have regard to the statement of reasons where the former “was open to more than one interpretation” or “where there is a lack of clarity in the terms used in the operative part”. In the claimants’ submission, in the light of the *Cartonboard* decision and the judgment of the General Court in *MoDo*, it was clear that where the Topco of a group was the only addressee of an infringement decision it would always be permissible to examine the recitals in order to see whether there were other companies within the offending “undertaking” who were being represented by Topco. Such a situation was, he argued, sufficient to raise a question of interpretation. As to the ECJ’s decision in *Suiker Unie* not to allow recourse to the recitals in order to establish that the company SZV was in fact found by the Commission to be an infringer, Mr Turner submitted that the decision was distinguishable because SZV was not related to any of the companies addressed in the operative part. In other words it was not a case involving a Topco, and there was therefore no reason to question the clarity of the operative part as regards the composition of the infringing undertaking.
46. As for the question whether it is possible in law for a company such as Carbone GB to be bound by a finding of infringement which it has no standing to challenge, Mr Turner

contended that *Dutch Bitumen* was distinct from this case. First, in that case, unlike the position alleged here, the company in question had not been found to have infringed, either in the operative part or in the decision as a whole. Secondly the Court in *Dutch Bitumen* was given no details of the national court proceedings which are referred to in the judgment. In particular the Court was given no reason to suppose that the Commission's decision was going to be treated by the national court as establishing an infringement on the part of the applicant. If, he argued, the General Court were to be faced with a case where there was a finding of infringement in a decision, and where the Tribunal had assumed jurisdiction in a claim under section 47A, the Court might well take a different view as to whether the decision was of "direct and individual concern" to a company in Carbon GB's position, so as to give it standing to challenge the decision under Article 263. Mr Turner submitted that in any event here Carbone SA, representing the wider "undertaking", would certainly be able to appeal the Decision, and that might well be sufficient protection for Carbone GB's essential rights from the viewpoint of EU law.

47. Skilfully presented as they were, we do not find the claimants' submissions on this aspect of their case convincing. The fact that the Commission has a discretion whether to address an infringement decision to one, or some, or all of the legal persons who arguably make up an infringing "undertaking" begs the question whether, when that discretion is exercised by making some but not all such candidates addressees, there can be any legal effects on those who are omitted from the operative part. Neither the recitals in the Cartonboard cartel decision, nor the judgment in *MoDo* on the appeal from it, seem to us to provide the answer to that question for which the claimants' contend. Nor do they alter the fact that in that case the decision was addressed to one specific company (the parent) which in the operative part of the decision was the only company in the group found to have infringed, the only company on which fines were imposed, and the only company subjected to the "cease and desist" order. In recital 141 (above), when discussing civil enforcement proceedings in the national courts to recover fines, the Commission clearly envisaged such proceedings being brought only against the addressee. Neither the Commission nor the General Court suggested that any other company in the group was bound by the decision in any way whatsoever. It is difficult to see how such a suggestion could be reconciled with the judgment of the ECJ in *Suiker Unie* or with those of the General Court in *Adriatica* and *Dutch Bitumen*.

48. In the present case we can discern nothing which can sensibly be described as unclear or ambiguous about the finding of infringement against Carbone SA in article 1 of the Decision (above). Nor do we see how that finding could be “open to more than one interpretation”. That being so *Suiker Unie* appears to be an insuperable obstacle to the claimants’ proposed use of the recitals, unless there is any substance in Mr Turner’s ingenious attempt to distinguish that case (i.e. on the ground that SZV, the company inadvertently omitted from the operative part of the decision in question, was not a subsidiary of any Topco to which the decision was addressed). Yet if there existed such an important exception to the general rule that the operative part is definitive unless ambiguous, it is extraordinary that it was not mentioned in that case or in the other authorities which followed it.
49. For similar reasons we consider that the claimants’ submissions cannot easily co-exist with *Dutch Bitumen*. At paragraph 22 of that judgment the General Court postulates a situation similar to that in *Suiker Unie*, where there is a finding of infringement against a company in the recitals which is not replicated in the operative part. According to the Court there is no standing to challenge that finding *because it has no legal effect and cannot affect the company’s legal position*. The Court then administers what appears to be the *coup de grace* to the claimants’ argument, by stating that the recitals to the decision could not be relied upon directly by a national court in order to hold the company liable, because it is not held to be an infringer in the operative part (paragraph 30). We have noted earlier that there is said to be an infelicity in the unofficial translation of the French version of the relevant passage in the judgment (see footnote 6 above). However we doubt that Mr Turner’s preferred translation of the words in question is likely to be decisive in relation to the success or otherwise of his argument here.
50. The words upon which Mr Turner relies in the Cartonboard decision (paragraph 41 above) are a somewhat shaky foundation upon which to seek to construct a general principle to the effect that wherever a Topco is the sole addressee of a decision the operative part is open to the interpretation urged by Mr Turner. We are doubtful that any such general principle exists. Even if the Cartonboard words had some legal significance (which we consider unlikely), it seems odd to apply a general principle said to be derived from those words to a case such as the present where they are not

actually used: there is no reference whatsoever in the Decision to Carbone SA being treated as a representative addressee. If such words have significance in the Cartonboard decision, why should no significance be attributed to their absence here?

51. Therefore it seems to us that Mr Turner is reading too much into the Commission's references to Topco's representative capacity in the Cartonboard recitals. The Commission appears simply to be stating that it is sufficient to address, convict and penalise Topco in order to cover the participation in the particular infringement of any and all other members of the group. There is nothing to indicate that the Commission means that although only Topco is named as addressee, the decision is also being directed through that medium to other legal persons who are therefore equally bound by it. Had that been the intention of the Commission one would have expected some explanation of how such an approach could be reconciled with the case-law relied upon by Mr Beard.
52. For these reasons we would be inclined to dismiss Mr Turner's main argument, and to hold, in line with Mr Beard's primary submission, that the infringing undertakings are unambiguously identified in the operative part of the Decision, and that as they do not include Carbone GB, which is not an addressee of the Decision, there is no relevant decision of the Commission for the purposes of initiating a claim against that company under section 47A. However, both parties' main arguments, as well as Mr Turner's reserved argument, would be hypothetical (and therefore better left for final determination in another case) if Mr Beard's fall-back position is correct and there is nothing contained in the recitals which could on any view be said to amount to a finding of infringement on the part of Carbone GB. We therefore turn to Mr Turner's submissions as to the effect of the recitals.
53. First Mr Turner reminded us that undertakings in Article 101 are not necessarily the same as companies. He then submitted that Carbone SA, the parent and addressee of the Decision, was acting unlawfully through a whole number of subsidiaries in the group, drawing our attention to various passages in the recitals to the Decision which, in his submission, showed that the Commission had decided that Carbone GB had infringed Article 101(1). For convenience we have set out in the Annex to this judgment the main recitals upon which Mr Turner relied.

54. For example Mr Turner referred to the Commission’s finding that Carbone SA was a “global company” with “19 industrial sites in Europe” including in the UK (recital 22). This, he said, was clearly a reference to the group. Recital 69 referred to Carbone SA’s leniency application, which, he said, meant that there would be a great deal of material describing what the infringement consisted of. Mr Turner also placed emphasis on the finding that local cartel meetings to discuss price increases and other unlawful conduct, had taken place in countries including the UK, and that at such meetings “representatives of the local subsidiaries of cartel members participated as well”. There were “regular contacts between representatives of the cartel members”. There was a list of cartel meetings, which included several in the UK, and the source of this latter information is recorded as having been Carbone SA. Information as to the identity of participants in certain meetings was redacted in the published version of the Decision. (See, in particular, recitals 77 to 80 and Annex 1 to the Decision.)

55. Perhaps the high watermark of the claimants’ case on this point involved the following references. Recital 100 records that Morgan Crucible, one of the other addressees of the Decision, would calculate the new prices for the UK, and that Carbone SA would do so for France, Schunk for Germany etc. The members of the cartel would then circulate their revised price lists to each other to show compliance with the arrangements. Recital 140 records a local meeting in the UK between Morgan Crucible and Carbone SA in March 1991 to exchange price information “regarding major UK clients of the two companies”. Recital 145 states:

“On 6 January 1995, Morgan faxed its 1995 price list for brushes supplied to Boss, a UK client, to Carbone Lorraine’s UK subsidiary.”

56. Mr Turner submitted that this finding, understood in its factual context, clearly refers to unlawful behaviour on the part of Carbon GB, contrary to Article 101(1). He added that the source for this finding was a submission made by Carbone SA to the Commission (see footnote 203 attached to recital 145).

57. In relation to this Mr Beard did not dispute that Carbone SA had subsidiaries in the UK at the material time and that one of those subsidiaries was Carbone GB. However, he emphasised that his client did not accept that it was the only UK subsidiary during the period of the cartel or that the Commission was identifying Carbon GB in this

paragraph or, indeed, that anything in the Decision amounted to a finding that it was part of the same “undertaking” as Carbone SA at the material time.

58. We agree that there is simply nothing in the recitals relied upon by the claimants which could possibly justify our concluding that the Commission made the finding against Carbone GB for which Mr Turner contends. Even if ‘[Carbone SA’s] UK subsidiary’ were to be shown to be a reference to Carbone GB, that of itself would not amount to a finding by the Commission that Carbone GB had infringed Article 101. It might constitute *evidence* on the basis of which the Commission *could* so find, but that is a very different matter. Similarly, there may be material in the recitals from which it could be inferred that at the material time Carbone GB was part of the same undertaking as Carbone SA, but no determination to that effect appears in the Decision.
59. The case-law establishes that the Tribunal’s jurisdiction in proceedings under section 47A is limited to resolving issues of causation and quantum of loss resulting from an already established infringement (see the Court of Appeal in *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* (above), at paragraphs 30-31, and *Enron Coal Services (in liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2, per Jacobs LJ at paragraphs 148-9). To paraphrase Lord Justice Jacobs in the latter case, it is not possible for a party claiming damages in a follow-on claim under the Act to root around in the decision of a competition authority to find stray phrases or sentences and claim that this amounts to an infringement decision. Unsatisfactory as it may be, the Tribunal’s jurisdiction in this context does not extend to an evaluation of findings of fact or material contained or referred to in a Commission decision in order to conjure up an infringement decision which the Commission did not itself clearly and unequivocally make.
60. Mr Turner suggested that, if there were any room for doubt about the nature and scope of the Commission’s findings of infringement, any uncertainty could be dispelled by asking the Commission for information pursuant to Article 15(1) of Regulation 1/2003. Specifically he suggested that the Tribunal could ask whether the finding of infringement against the parent company Carbone SA was limited to that company, or extended to its subsidiaries; and, secondly, whether a UK subsidiary of Carbone SA

was part of the “undertaking” condemned by the Decision, and if so whether that subsidiary is Carbone GB.

61. In our view recourse to the Commission on those questions would be entirely inappropriate. Neither question is in our view a request for information of the kind envisaged by Article 15, and each would invite the Commission to put a gloss on the Decision. Both questions include mixed issues of law and fact, as to which argument could no doubt be raised by interested parties. As far as any legal element in the questions is concerned, the Commission could do no more than express an opinion. The best that could be hoped for would be that the Commission might be persuaded to identify the participants in meetings whose names are currently redacted, or to state that Carbon GB was the subsidiary to which reference is made in recital 145. But for the reasons given, this would take the matter no further in view of the current limits to the Tribunal’s follow-on jurisdiction: such factual material, even if capable of being characterised as findings of fact within the Decision, could not be evaluated by the Tribunal as amounting to an infringement decision.
62. In the light of the above it is not necessary for the Tribunal to decide what the position would be in the event that the recitals contained a clear and unambiguous Commission finding of infringement against Carbone GB which was not reflected in the operative part of the Decision.

## **V. CONCLUSION**

63. It follows that there is no infringement decision of the Commission within the meaning of subsection 47A(6)(d) of the Act on which the claimants can base their claims against Carbone GB. There are therefore no reasonable grounds for making those claims within the meaning of rule 40, and they must be struck out.
64. The precise form of the order which the Tribunal should make should if possible be agreed between the parties and a draft sent to the Tribunal for its approval. Failing agreement rival versions should be lodged with the Tribunal by 4pm on 31 March 2011.

The President

Adam Scott

Vindelyn Smith-Hillman

Charles Dhanowa  
Registrar

Date: 21 March 2011

## ANNEX

“(1) [see paragraph 14 of judgment]

(2) [see paragraph 14 of judgment]

(3) The undertakings participated in the infringement during at least the following periods:

Conradty: from October 1988 to December 1999;

Hoffmann: from September 1994 to October 1999;

Carbone Lorraine: from October 1988 to June 1999;

Morgan: from October 1988 to December 1999;

Schunk: from October 1988 to December 1999;

SGL: from October 1988 to December 1999.

...

(20) [see paragraph 15 of judgment]

...

(22) [see paragraph 15 of judgment]

...

(69) The facts set out in this Chapter are based principally on the following evidence:

...

– Letter from Carbone Lorraine requesting leniency, 16 August 2002 [04631-04633];

– Submission from Carbone Lorraine regarding leniency, 22 August, 2002 [04624-04629];

...

– Submission by Carbone Lorraine of 13 September 2002 regarding leniency, entitled "Communication (non-exhaustive) de documents" (Non-exhaustive communication of documents) [05444-05501];

...

– Submission from Carbone Lorraine, 24 September 2002 regarding leniency (hereinafter also "CL") [05511-06698];

– Reply from Carbone Lorraine to Article 11 letter, 27 September 2002 (hereinafter also "CL11") [06699-08606];

...

- Declaration and submission by Carbone Lorraine of 12 and 13 February 2003 respectively [09822-09832];

...

- Declaration and submission of Carbone Lorraine of 18 and 19 February 2003 respectively [09810-09813];

...

- Submission of Carbone Lorraine, 26 February 2003 [09836-10737];
- Submission of Carbone Lorraine, 7 May 2003 [14997-14998];

...

## **6 THE ORGANISATION OF THE CARTEL**

### **6.1 Organisation of contacts**

(74) Cartel contacts took place at several different levels.

(75) The senior executives for carbon and graphite products in the member companies met in periodic European Summit meetings. The purpose of these meetings was not to discuss specifics, but to ensure the stability of the cartel, to ratify agreed price levels, price increases and other conclusions of preceding Technical Committee meetings, to resolve any outstanding issues from those meetings, to deal with any issues of non-compliance with the cartel's rules, and, if necessary, to agree on compensation

...

(77) Local meetings were held on an ad hoc basis in Italy, France, the United Kingdom, Benelux, Germany, and Spain (covering also the Portuguese market). They included many of the companies' representatives at Technical Committee meetings. These meetings discussed price increases in the country concerned, as well as the accounts of single local customers. In these meetings, representatives of the local subsidiaries of cartel members participated as well.

(78) Regular contacts between representatives of the cartel members were necessary to ensure that the agreements made in the meetings were upheld in daily practice by all parties.

(79) For a list of cartel meetings that participants have reported to the Commission for the period 1988 to 1999, see Annex I. The functioning of the cartel was essentially unchanged throughout this period.

(80) Table 2: Participants in the different types of meetings of the cartel in the course of the operation of the cartel

...

(100) Once the autumn Technical Committee meeting had established the annual percentage price increases for different countries, and the Summit had ratified

them, the cartel members' sales departments would issue new internal price lists reflecting those agreed changes. Morgan would calculate the new prices for the United Kingdom, Carbone Lorraine for France, SGL for Spain and Schunk for Germany. They would circulate their revised price lists or announcements of price increases to each other to show that they were complying with the agreed price increases and to ensure that the other cartel members sold at the same prices in the country concerned<sup>103</sup>.

<sup>103</sup> ... Examples of price lists of competitors and announcements of price changes by competitors received by Carbone Lorraine are given in CL, annex 8, items 29 to 34 [6151-6358].

(140) A local meeting between Morgan and Carbone Lorraine on 8 March 1991 in the United Kingdom exchanged pricing information regarding major UK clients of the two companies.

(145) On 6 January 1995, Morgan faxed its 1995 price list for brushes supplied to Boss, a UK client, to Carbone Lorraine's UK subsidiary<sup>203</sup>.

<sup>203</sup> Submission by Carbone Lorraine of 13 September 2002 – Communication (non-exhaustive) de documents, United Kingdom 8 [5490-5498].

(192) These four producers were all very active members of the cartel throughout its period of operation, each participating in all the activities described in Chapter IV and most of the meetings listed in Annex I<sup>278</sup>. The only nuance to be made to this is that Carbone Lorraine, because of its relatively small turnover in mechanical products, played a less important role in the cartel's activities on those products than Morgan, Schunk and SGL. This is demonstrated, for instance, by the fact that the client leadership list for mechanical products mentioned in recital (132) allocates customers only among the latter three companies. Also, Carbone Lorraine did not participate in a number of meetings on mechanical products that were organised between two or all three of the other companies. Nevertheless, Carbone Lorraine participated in the Technical Committee meetings regarding mechanical products as well as in the Summits, where mechanical products were also discussed. Carbone Lorraine also complied with the cartel's agreements on mechanical products by, for instance, seeking the advice of the appointed client leaders when it came to offering mechanical products to particular clients.

<sup>278</sup> Instances of participation by each of the four companies in the cartel's activities during the period of its operation are too numerous to list individually. A complete list of reported cartel meetings has been provided in annex 1.

...

(219) The facts described in Chapter IV demonstrate that during the relevant period Conrady, Hoffmann, Carbone Lorraine, Morgan, Schunk and SGL:

[the list of agreements and concerted practices is identical to those contained in recital 2 quoted above]

...

(229) In this case, the Commission considers that the behaviour of Carbone Lorraine, Morgan, Schunk and SGL, all of which regularly participated in most or

all of the Summit, Technical Committee and local meetings listed in Annex I, as well as in the other contacts described in Chapter IV, during the entire period for which each undertaking is held responsible, constitutes a single and continuous infringement.

...

### **13.8. Addressees of this Decision**

(254) For the reasons mentioned in sections 10 and 13.3, the Commission considers that Conrady, Hoffmann, Carbone Lorraine, Morgan, Schunk and SGL should bear responsibility for their respective infringements.

(255) As a general consideration, the subject of [EU] and EEA competition rules is the “undertaking”, a concept that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The term “undertaking” is not defined in the Treaty. It may, however, refer to any entity engaged in a commercial activity. According to the circumstances, it may be possible to treat as the relevant “undertaking” for the purposes of Article [101 TFEU] and Article 53 of the EEA Agreement the whole group of companies or individual subgroups or individual subsidiary companies.

...

(264) The addressees of this Decision are therefore:

...

- Le Carbone Lorraine S.A.;

...

(299) As explained in section 13.7, the undertakings concerned participated in the infringement during at least the following periods:

...

- Carbone Lorraine: from October 1988 to June 1999, a period of 10 years and 8 months;

...

(324) Carbone Lorraine applied for leniency soon after having received the Commission’s Article 11 letter. Its co-operation largely exceeded the required replies to the Article 11 letter. Carbone Lorraine spontaneously provided considerable number of contemporaneous documents, including several reports of cartel meetings not identified in the Commission’s Article 11 letter<sup>389</sup>. Carbone Lorraine also provided several signed declarations from company officials and former company officials, attesting to their part in the cartel’s activities. Finally, it provided a detailed and useful description of the product market and the cartel’s activities in respect of each type of client. Because of the quantity and quality of the evidence already provided by Morgan, the voluntary evidence submitted by Carbone Lorraine, as indeed that of the other leniency applicants, added only limited value to the evidence already in the possession of the Commission. Nevertheless, the Commission considers that the voluntary evidence provided by

Carbone Lorraine as a whole did materially contribute to establishing the existence of the infringement.

<sup>389</sup> The most useful evidence provided by Carbone Lorraine can be found in CL, items 20 to 25 [5831-5859], 26 to 36 [5862-6403], 37 to 40 [6406-6414], 41 to 46 [6417-6530], 61 to 66 [6586-6604], 67 to 71 [6607-6633], 72 [6636-6683] and 73 to 77 [6686-6698].”

(omitting footnotes save those relied on by the parties)

Annexed to the Decision is a list of reported cartel meetings based on the information and evidence provided to the Commission during its investigation. The table shows that a number of those meetings took place in the UK and that Carbone SA was the source of information for some of them.