



Period of limitations in follow-on competition cases: when does a 'decision' become final?

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Significant procedural issues need to be resolved before private enforcement can take off.



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- Where an infringement decision has been taken against **multiple infringers** by the Commission and a **follow-on action** has to be decided by the national court, the applicable period of limitations presents a complicated mix of EU and national law.
- The problem arises **when some addressees appeal** the Commission decision and **some do not**: does/should an appeal by a co-infringer prevent follow-on actions from being brought against a non-appealing addressee?
- Closely related, broader question: **when** does the Commission (or NCA) infringement decision become **'final' and thus, binding** on the national court in the presence of appeals by some of the addressees? (Art. 16, Reg.1/2003; sections 58 and 58A CA; forthcoming EU Dir. Art. 9)

In the UK, the problem is aggravated due to the 'window' during which a case can be brought before the CAT.



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- Section 47A CA – ‘follow-on’ claim for damages before CAT where NCA (or Commission) decision establishes infringement.
- Section 47A(5)(b) (with s 47A(7) and (8)) – a follow-on **claim cannot be brought** (as of right) **during any relevant appeal period/before the appeal against the ‘decision’ is determined.**
- Rule 31(1) Tribunal’s Rules: claim must be made within **two years**, beginning with the **‘relevant date’**, ie the later of:
 - The end of the appeal period ‘in relation to the decision on the basis of which the claim is made’; and
 - The date on which the cause of action accrued.
- The **‘window’** only opens on the date at the end of the period during which an appeal can be made against the decision or if there is an appeal, at the conclusion of appeal and closes two years after this date.

The question of whose appeal is relevant for the follow-on action has been answered in different ways in the UK.



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	Does an appeal by <u>any</u> co-infringer prevent the time from running or the decision from becoming <u>final</u> ?		
	CAT	CA	SC
<i>Emerson I</i>	Yes	-	-
<i>Emerson III</i>	-	-	-
<i>Deutsche Bahn</i>	No	Yes	NO

For all EU jurisdictions, the question is relevant for establishing when the Commission (or NCA) infringement decision becomes **final, and binding** on the national court considering a follow-on case.

(For the distinction between appeal against fine vs appeal against infringement, see Akman (forthcoming) JAE.)

In *Deutsche Bahn* the UK SC adopted the legally correct approach resolving part of the issue.



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- EU principles (*AssiDöman*, *TWD*, etc) establish that:
 - A decision which has not been challenged by the addressee within the time-limit laid down in the Treaty becomes **binding against her**.
 - On appeal, the matter to be tried relates only to those aspects of the decision which concern the appellant.
 - **Annulment has no effect on the validity of the decision vis-à-vis addressees who have not appealed.**
- ‘Decision’ does not mean the entire decision against all of the infringers but the **decision against the particular addressee** (cf *CAT Emerson I* and *CA Deutsche Bahn*).
- If it did, outcome would be bizarre – eg how would private claimant establish when the decision becomes final if appeals are separate?

In *Deutsche Bahn* the UK SC adopted the legally correct approach resolving part of the issue.



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- UK SC: successful appeal by one addressee has **no effect** on the validity and effects of the decision as against another addressee who has not appealed; [21].
- Even if the infringement decision is **annulled** in appeal by co-infringers, it would continue to be a valid infringement decision against addressees who did not appeal; [22].
- Causation and quantum would have to be determined on the basis that there was a cartel as the Commission held, **bindingly**, against the non-appealing addressee; [27].
- Non-appealing addressee carries **full civil liability, without the possibility of contribution**, for a cartel ‘the existence of which has been negated on appeal by its alleged fellow cartel members’; [27].

Bad news: The legally correct approach is unfair with bizarre implications.



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- Defendant can end up paying damages for an infringement which ***legally or factually*** did not exist, without the possibility of contribution.
- **Joint and several liability** means that the defendant can also end up paying damages even for the part of harm that was annulled in co-infringer's appeal.
- If defendant is the **leniency recipient**, then it also disincentivises applicants from coming forward. Public vs private enforcement.

Bad news: The legally correct approach is unfair with bizarre implications.



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- Forthcoming EU Directive on Damages: **presumption** that cartel infringements cause **harm**.
- All that is left is **causation**...
- ... which **cannot** be disproved by defendant by arguing that no cartel existed.
 - ➔ Possibility of opportunistic behaviour (eg extortion via settlements) where there is no genuine harm.
 - ➔ Possibility of compensating genuine harm in situations where infringement decision annulled on procedural grounds.

The clear message from the case law is that it is always better to appeal.

Good news: The legally-correct-but-unfair approach can be fixed.



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- Leniency recipient – not disclosing the identity; elimination of joint and several liability; no infringement decision, etc (cf forthcoming EU Dir.).
- Re all multiple infringers – **the result of a successful appeal establishing that eg infringement did not occur must be taken into account in the follow-on case.**
- **Legislation** to render the **EU principles** regarding the effect of appeals on non-appealing addressees **inapplicable** in follow-on competition cases. A missed opportunity re forthcoming EU Dir. and UK Consumer Rights Bill?
- Give NC the right or discretion to take into account any appeal outcome on the infringement decision **relevant** to the damages action at hand.
- Any other position implies **unjust enrichment** with no restitution: one must recognise that the **follow-on action is built upon the assumption that the underlying infringement decision is correct!**