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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1339/7/7/20

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11 Salisbury Square House
12 8 Salisbury Square
13 London EC4Y 8AP

Tuesday 10th September 2024

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16 Before:
17 DR MARIA MAHER
18 BRIDGET LUCAS KC (Chair)
19 CAROLE BEGENT
20

21
22 **BETWEEN:**

23
24 Mark McLaren Class Representative Limited **Class Representative**

25
26 v

27
28 MOL (Europe Africa) Limited and Others **Defendants**
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31 **A P P E A R A N C E S**

32
33 Sarah Ford KC, Nicholas Gibson and Sarah O’Keeffe (On behalf of the Class Representative)

34
35 Prof. David Bailey and Michael Quayle (On behalf of the First to Third Defendants)

36
37 Hanif Mussa KC, Anneliese Blackwood, and Julianne Kerr Morrison (On behalf of the
38 Fourth Defendant)

39
40 Brendan McGurk KC (On behalf of the Fifth Defendant)

41
42 Josh Holmes KC (On behalf of the Sixth to Eleventh Defendants)

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(10.30 am)

MS LUCAS: Thank you. Before you start I have to give the usual announcement. I might give a test one day, and see if some of you can recite it by heart. Some of you are joining us by Livestream on our website so I must start, therefore, with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual of the proceedings and breach of that provision is punishable as contempt of court.

Now, Ms Ford, before you start I thought I might make some introductory remarks. First of all to thank you for attending, because I suspect when you put in your Agreed Directions Order you were rather hoping this hearing would prove unnecessary, but we consider there are four issues before us today: the issues raised by our 30th August letter relating to upstream pass-on and vehicle discounting; I will touch on downstream pass-on and in essence I don't know if the parties are able to give us an understanding as to how the downstream pass-on claim in this case differs from that considered by the Tribunal and Court of Appeal in Trucks; we will need to finalise the directions order; fourthly, as part of that process I want to say a few words about hot tubbing. I think it is clear to me that hot tubbing will be needed in this case, and I want to make sure that we are planning for that in good time before the PTR, so that when we are at the PTR we can make some firm decisions about how that process is going to work rather than starting our discussions on that date.

So to start, some comments on the issues that gave rise to our letter. You will all be well aware in light of the Court of Appeal's comments in this case as regards case management and the need to ensure there is a trial preparation pathway, the Tribunal's adoption of a process of positive and negative position statements in this

1 case and then the Tribunal and Court of Appeal's observations in Trucks, in particular
2 about expert evidence, that there is ultimately a need to ensure that this case is triable
3 in an efficient and effective way.

4 Now, the expert economic evidence is obviously a very important part of the evidence.
5 It is not necessarily the be-all-and-end-all and there are limitations to it, but it is still
6 nevertheless important, and it has the potential to be of great assistance to the Tribunal
7 when we embark on what is undoubtedly a very complicated and difficult exercise of
8 considering causation and matters of quantification of loss in this case.

9 Now, plainly the expert evidence will be informed by the factual findings made in
10 relation to the correct framework for the exercise they will undertake. So whether or
11 not it is ultimately silo pricing or overall pricing that's the correct framework, or
12 a combination of the two with one being the best description relating to one vehicle
13 manufacturer, and the other to another vehicle manufacturer, for example, or it may
14 be something in between or something else, but what we are anxious to avoid is
15 a situation at trial where we discover for the first time that if the factual assumptions
16 on which a particular expert's report has been given are not upheld by this Tribunal,
17 there is, in fact, an alternative methodology that that party wishes to put forward. We
18 don't want to be discovering this for the first time at trial.

19 Now what we do accept is that not every possible factual permutation can be
20 considered and, of course, the experts will need to be flexible as the factual evidence
21 unfolds at trial.

22 If we can talk at the bigger-picture level, we would like a clear understanding of what
23 each party's expert says if the other side's (so the Class Representative's or the
24 Defendants') factual assumptions about how delivery charges are dealt with in pricing
25 are ultimately found to be correct.

26 Now, on reading the Class Representative's negative case we did note the three

1 alternative scenarios put forward by Mr Robinson and that the issue had been
2 considered. There had been an attempt to address the position should we decide in
3 favour of the Defendants on some or all of the issues in relation to overall pricing; but
4 it was not immediately apparent to us from the negative position statements of the
5 Defendants what their respective positions would be if we decided that the Class
6 Representative's silo pricing analysis was the correct one.

7 Now when I say that, I hope you don't all look at us in horror. That may be a failing
8 particularly on my part. The parties' positive and negative position statements have
9 been extremely helpful. I don't want anyone to go away thinking they are not. They
10 are very useful documents, and I certainly don't underestimate the amount of work put
11 into producing them or the role they will play moving forwards. It is a real achievement
12 to distil and condense the extensive factual and complex economic evidence in those
13 documents. They are effective, and we are very grateful to the parties for all that has
14 gone into producing them.

15 The issue is rather more that the expert evidence is extensive that underpins them,
16 and to be blunt I can't pretend to have got to grips with all of it or the potential
17 ramifications.

18 So it was for that reason we decided to proceed with this CMC, and it seemed
19 a particularly opportune moment to do so given the proposed joint expert meeting. To
20 be blunt, we wanted to ensure the joint expert meeting addresses what needs to be
21 addressed in a reasonable, constructive and effective way and importantly produces
22 a document that is of real assistance to us in understanding the parties' respective
23 positions, given the differing factual cases each side is putting forward.

24 Now we should make clear we are not requiring the parties or their experts to take
25 a fall-back position if they do not want to adopt one, or to modify a methodology to
26 meet the other side's case if they don't consider it to be appropriate to do so. I think

1 | what we are really concerned to ensure is that there is an understanding on the part
2 | of each of the experts that it may be necessary for them to consider whether, and if so
3 | how, it might be necessary to modify opinions should the factual assumptions made
4 | by that expert when making the report not stand up to scrutiny.

5 | We would also like the experts -- we think it would be reasonable for experts to accept
6 | there may be weaknesses in their own approach, and conversely that the approach of
7 | another party's expert is a potentially-reasonable one.

8 | We do obviously accept in a case such as this methodological harmony is unlikely to
9 | break out, but we would like to see if there are any issues on which the experts can at
10 | least hum a tune in the same key.

11 | I expect the parties will be well ahead of us on these sorts of issues. You will all be
12 | familiar with what has been said in the Tribunal and in particular recently in the Court
13 | of Appeal in Trucks and you will have that well in mind. We want the meeting to
14 | produce as far as it is possible to do so meaningful results and we would like digestible
15 | results, the last point being primarily I suspect for my benefit.

16 | We think it is important to the management of the trial that this exercise be undertaken
17 | in that spirit. We will obviously hear in due course the views of the parties on how the
18 | economic expert evidence should be dealt with. As I have mentioned, we think it is
19 | a prime candidate for hot tubbing, and there may need to be different hot tubs on
20 | different issues involving different participants. The point is that we see the joint expert
21 | report as really informing that decision-making process as to whose evidence is
22 | required and on which issues.

23 | Now having said all of that, and it comes across as a bit of a lecture for which
24 | I apologise, but we found the parties' skeleton arguments actually extremely helpful
25 | and it does seem to us that the parties are approaching the forthcoming joint expert
26 | meeting with the concerns we had identified, in particular in relation to upstream

1 pass-on, already firmly in mind, but in a way that brings me back round to the issue of
2 whether or not the parties' respective position statements articulate effectively their
3 position and, if not, what should be done about it.

4 I suspect it may be primarily an issue certainly in the first instance, for Ms Ford to
5 clarify for us that she understands that the cases articulated in your skeleton
6 arguments as alternative positions are actually articulated effectively in the underlying
7 evidence and, as I say, if not, what we consider should be done about that.

8 So having started with that, as I say something of a lecture, if I can ask you each
9 basically to see whether you are confident you understand everybody else's case for
10 the joint expert process that is going to unfold and that all of the relevant issues are
11 going to be addressed, and ideally we would like a document that sets out very clearly
12 the issues between you all and what the respective alternative positions are and
13 identifies meeting of minds as to whether someone else's approach is reasonable even
14 if not your expert's preferred approach.

15 So over to you, Ms Ford.

16 MS FORD: I am grateful, madam. Perhaps three points in response to the points,
17 madam, you just made. The first is the Tribunal has obviously seen the three
18 scenarios that Mr Robinson has included in his report. I should just clarify that those
19 do not encompass the entirety of our statement of fall-back positions and the Tribunal
20 may have appreciated this from the way in which we set it out in our skeleton, but in
21 relation to the question of siloing of delivery charges, our first fall-back position, should
22 the Tribunal not be with us on the position that we say that delivery charges are siloed,
23 is that nevertheless delivery charges should be used as the best available proxy.
24 That's our first fall-back position.

25 The reason we say that is that we have identified what we consider to be fairly
26 fundamental drawbacks in the approach the Defendants have taken. I don't propose

1 to spend a long time going through those but we have identified them in our statement
2 and again in the skeleton.

3 The second fall-back position is then Mr Robinson's scenario three, which is how he
4 envisages approaching the matters in the event that the Tribunal takes the view that
5 siloing is not viable at all.

6 Discounting at retailer level, if the Tribunal is not with us on our factual position on that:
7 our first fall-back position is that nevertheless as a matter of law any discounts should
8 be disregarded in quantifying the extent of loss to the class and that is the Fulton
9 Shipping point that the Court of Appeal has preserved. Then our second fall-back
10 position would be Mr Robinson's scenario two.

11 Just by way of my first point I want to make clear that the scenarios that Mr Robinson
12 has identified do not encompass the totality of our fall-back positions.

13 MS LUCAS: Yes.

14 MS FORD: The second point concerns the Defendants' fall-back positions. It is fair
15 to say, and the Tribunal will have appreciated from our skeleton argument, that it did
16 not appear to us that there were greatly extensive fall-back positions outlined in the
17 Defendants' negative position statements, that it did seem to us both in their
18 statements and in their skeletons they were largely reiterating variations on their
19 primary positions.

20 Having said that, our understanding of the procedure that the Tribunal had set out with
21 positive case followed by a negative case was that the opportunity the Defendants had
22 to identify alternative positions, should they wish to take it, was in their negative cases.

23 So as a matter of procedural efficiency, and given that we are now moving fairly rapidly
24 towards a trial, we would suggest that insofar as the Defendants have made
25 a conscious choice not to articulate alternative positions, now is not the time for them
26 to introduce new positions that have not been set out in the positive or negative case

1 process.

2 Madam, the third point is that we very much hear and endorse what the Tribunal has
3 said about the utility of the expert process. The Tribunal may appreciate that these
4 are concerns we have expressed in correspondence, that we want to make sure that
5 this is a useful and proportionate process, and we have to that end been engaging
6 with the other parties recently in correspondence, first of all to find out what the
7 availability is to have the immediate expert meeting and also we circulated a
8 provisional agenda for the meeting purely in efforts to try and focus minds and to
9 ensure that this is a useful and proportionate process. We can, if it is helpful, hand up
10 what we have circulated, but that is something that the Class Representative has very
11 much in mind as well.

12 MS LUCAS: Have you had any responses to that correspondence?

13 MS FORD: We have had responses. The parties have provided their respective
14 availability. It appears that there are dates up until 30th September when the experts
15 are available to meet. At the moment the draft order envisages the 20th. It looks as
16 though that is not going to be possible given the way matters have panned out, but it
17 appears that if the long stop date were moved to the 30th, then the experts have
18 availability, and no doubt the substantive content of the experts' discussions could
19 then be informed by the Tribunal's indications today.

20 MS LUCAS: Thank you.

21 DR MAHER: If I can just add to that when the experts do meet, they lay out areas
22 where they agree and disagree, it would also be very helpful if those experts could
23 also lay out areas they agree and disagree in the event that their factual case is not
24 supported, so you have two sides to that joint expert statement.

25 MS FORD: Absolutely. That is helpful.

26 DR MAHER: Thank you.

1 MS LUCAS: Can I just clarify this? Do you understand from the underlying documents
2 - which you will be a lot more familiar with than I am at present, the economic experts,
3 etc - that your understanding of the fall-back positions was as articulated in the
4 skeleton arguments.

5 MS FORD: Madam, yes, that's our present understanding.

6 MS LUCAS: Who shall we move to next? I think it is Professor Bailey.

7 PROFESSOR BAILEY: As we set out in our skeleton arguments, MOL's position if
8 the Class Representative is right about how prices move in a silo for delivery charges
9 separate from vehicle prices, is that we have set out essentially four points in our
10 negative position statement. They are in summary, and this is in paragraph 54 to 57
11 of our negative position statement, we take issue with the adequacy of the data that
12 had been relied upon by the Class Representative's expert. This is a case where, as
13 we understand it, almost 80% of the data doesn't exist in relation to OEMs and/or years
14 during the cartel period and any period thereafter. We put at figure 4 in our negative
15 position statement, a diagram that illustrates the scarcity of underlying data.

16 We then secondly in paragraphs 58 to 61 of our negative position statement take issue
17 with what the Class Representative has done in terms of fabricating or devising
18 a delivery charge, what we refer to as a synthetic delivery charge, and we point out
19 the problems in seeking to essentially assume that OEMs for which there are no data
20 on delivery charges are the same as other OEMs at other times.

21 The third criticism we make, if we are wrong on the facts, is that we take issue with the
22 methodology that has been put forward by the Class Representative's expert. This is
23 particularly explained in Dr Bagci's second report summarised at paragraph 99. In
24 essence, the criticism is that it is incapable of isolating the effect of the overcharge
25 attributable to the cartel as opposed to changes in other costs that go into the delivery
26 charge. So there is a risk of what economists refer to as a false positive, essentially

1 attributing an increase in delivery charge to the cartel when, in fact, other costs will
2 have brought about that change.

3 The fourth flaw that we have identified, if we are wrong on the facts, is that we take
4 issue with some of the loss estimates. That is set out in Dr Bagci's second report at
5 paragraphs 97 to 107.

6 Now, as the Tribunal will have seen from our skeleton, we don't stop there. Even if
7 the Tribunal were to reject all of our criticisms of the Class Representative's approach
8 and the underlying data, we do nonetheless have a series of objections to specific
9 aspects of the Class Representative's quantum methodology. Those, for the
10 Tribunal's note, are set out in section H of our negative position statement. That's
11 paragraphs 169 to 172.

12 Just to give you two brief examples, the Tribunal will have seen from Dr Bagci's first
13 report on pass-on she does a detailed analysis of the data from the Vertu dealerships
14 and the invoices disclosed by the Class Representative showing that discounting is
15 part of everyday life when it comes to how dealers engage with private customers.
16 She estimates that discounts can range from 9 to 20%.

17 So we say when you look at what Mr Robinson did in his fifth report, there needs to be
18 an adjustment made to reflect the reality that discounts were secured by customers.

19 One thing we would say, and gratefully accept, is that Mr Robinson's sixth report in his
20 second scenario seeks to acknowledge that. So we can see some maybe not
21 methodological harmony but reasons for optimism that the experts might be able to
22 find common ground, that if the Tribunal were to agree with MOL and the
23 other Defendants that there is this prevalence of discounting, it needs to be taken into
24 account, and it has a real impact on the loss estimates that are being made.

25 Another point that the Tribunal will have seen is a point of dispute between us and the
26 Class Representative relates to the duration of the run-off period. We do say that

1 when one looks at this properly by reference to the duration of the contracts affected
2 by the cartel, and looks at it from the point of view of when the last contract entered
3 into during the cartel period comes to an end, that has a profound impact on the overall
4 loss estimated by the Class Representative.

5 For the Tribunal's note these are all brought together in figure 15 of Dr Bagci's second
6 report, also at paragraph 172 of our negative position statement.

7 So we have sought to be constructive. We have sought to point out what we regard
8 as the material errors that vitiate the Class Representative's approach. It is true one
9 has to acknowledge that we have not put forward a different methodology to
10 Mr Robinson. Dr Bagci very fairly sets out in her second report the various
11 methodologies that are recognised by the European Commission in terms of how one
12 might assess pass-on. Her view is that Mr Robinson's approach is flawed. If the
13 Tribunal would find it of assistance as to other methodologies for the expert to consider
14 that, obviously that could be considered as part of the joint expert process, but that
15 essentially is MOL's position.

16 MS LUCAS: Thank you. Mr Mussa.

17 DR MAHER: Sorry. A clarification. Just to absolutely clarify that. So the position is
18 that Dr Bagci has not put forward any estimation or methodology to deal with the
19 contrary scenario or as to the witnesses of the factual evidence if the Tribunal were to
20 find that it was based on delivery charge rather than overall pricing.

21 PROFESSOR BAILEY: That's right. In paragraph 54 of her second report she sets
22 out the various methodologies. She makes particular criticisms of what the Class
23 Representative's expert has done. She has not put forward a different methodology
24 in a world of silo pricing.

25 DR MAHER: Okay. So --

26 PROFESSOR BAILEY: Obviously it will be a matter for the Tribunal to ask the expert

1 as to why she had not looked at those alternatives.

2 DR MAHER: So in the event that the Tribunal were to find on the facts that it was the
3 alternative approach, then Dr Bagci would have no estimates in that regard.

4 PROFESSOR BAILEY: Well, I don't think that's right because that's where the point
5 I just made about the various other criticisms that we make in terms of the degree of
6 discounting by retailers, the objection we take to umbrella effect, the length of the
7 run-off period, each of those points holds and Dr Bagci points those out in
8 paragraphs 150 to 157 of her second report. So even if we are wrong on the facts and
9 even if we are wrong on methodology that is used to identify the extent to which the
10 delivery charge line item is passed on, we nonetheless do have a sort of residual case
11 that criticises various aspects of the Class Representative's loss analysis.

12 DR MAHER: So in that event you would accept the approach of the Class
13 Representative's expert but that there would need to be adjustments is basically your
14 fall-back position in that case.

15 PROFESSOR BAILEY: I have put it as far as I can in terms of what I can say about
16 the case. If the Tribunal wants to ask the expert about her opinion, I think it is better
17 that the expert answer those questions rather than me. Obviously you have seen her
18 report. I don't wish to add to that.

19 DR MAHER: Thank you.

20 PROFESSOR BAILEY: Thank you.

21 MR MUSSA: I will start with our general position on pass-on before dealing with the
22 question of the joint expert process. In relation to the former issue, we set out our
23 position in our skeleton argument. At a broad level we essentially put our case in two
24 ways. The first point we make is that the burden of proof is on the Class
25 Representative to prove upstream pass-on, and it has failed to discharge that burden
26 at each relevant level of the supply chain.

1 The first level of the supply chain is at the OEM/NSC to dealer level. We deal with
2 that in our positive position statement at paragraphs 84 to 92, and in our negative
3 position statement at paragraphs 49 to 64.

4 The second level of the supply chain is the OEM to large fleet purchaser or dealer to
5 consumer level, so dealing with the final purchasers, and we deal with our position
6 there in our positive position statement at paragraphs 93 to 98 and our negative
7 position statement at paragraphs 65 to 8.

8 In the alternative, we rely on the methodology advanced by Dr Majumdar as a more
9 appropriate means of assessing upstream pass-on rates at each relevant level of the
10 supply chain.

11 Now Dr Majumdar has specifically sought to assist the Tribunal by identifying the
12 relevant factual assumptions that are critical to the choice of methodology, whether
13 one favours the Class Representative's upstream pass-on methodology or the
14 methodology that's put forward by Dr Majumdar.

15 If I might be so bold as to take the Tribunal to a document which just illustrates this, it
16 is the third report of Dr Majumdar, which was submitted with the negative position
17 statement at page 94.

18 MS LUCAS: Yes.

19 MR MUSSA: The Tribunal should see there table 11 entitled "Summary of the key
20 factual issues and implications for the correct framework". Now what Dr Majumdar
21 has sought to do is to identify what he sees are the critical underlying factual
22 assumptions that are relevant to the application of his methodology and the Class
23 Representative's methodology at the relevant levels of the supply chain, and he seeks
24 to set out the implications of those factual assumptions not being held good.

25 What Dr Majumdar has not done so far, because no factual findings have yet been
26 made, is to deal with every possible combination of findings that may be made in

1 relation to those assumptions. He has, however, sought to provide some further
2 assistance to the Tribunal even at this preliminary stage by looking at the weight of
3 evidence, both factual and industry, that has been deployed at the negative position
4 statement stage and to offer you his views on what he thinks is likely to be the more
5 likely and correct approach if you are taking a position across the board.

6 He deals with this, if I can just provide you with the references -- he deals with the
7 issue of which is the more appropriate methodology across OEMs in his third report,
8 pages 107 to 112. That's paragraphs 377 to 394. He has indicated his view that on
9 his reading of the evidence he has seen so far, he thinks in the large majority of cases
10 his own methodology would have to be favoured.

11 So we say we have sufficiently set out the position we are going to adopt, and indeed
12 Dr Majumdar has sought to offer specific assistance in relation to the particular issue
13 which troubles the Tribunal, which is that a range of potential factual findings might
14 actually be made at trial.

15 MS LUCAS: Yes.

16 MR MUSSA: And there will be an issue as to how one navigates through those factual
17 findings to produce upstream pass-on estimates.

18 MS LUCAS: Yes.

19 MR MUSSA: In relation to the question of the joint expert process and how that should
20 function, well, in short summary we agree with the observations made by the Tribunal.
21 It was our client who wrote recommending that there should be a joint expert process
22 in this case for many of the same reasons that the Tribunal has raised. Plainly it will
23 be of assistance to the Tribunal to have a clearer sense of the experts' views on
24 specific issues prior to them giving oral evidence in these proceedings. So we agree
25 with the observations that the Tribunal has offered.

26 MS LUCAS: Thank you. So Mr McGurk.

1 MR McGURK: Good morning. As the Tribunal knows, I am in a rather different
2 position. NYKK took the President at his word at the February 2023 CMC. We did not
3 put in a positive case, and we don't have expert evidence in relation to our negative
4 case.

5 You have seen our negative case. That has made clear that we maintain our pleaded
6 position. Our skeleton makes clear that we maintain our position in the negative case
7 in full. You have seen the primary position we have adopted in the negative case and
8 it is all premised on overall pricing.

9 MS LUCAS: Yes.

10 MR McGURK: I will not repeat the primary case. If we are wrong on that, and to the
11 Tribunal's question, we are dealing with a world of silo pricing, first of all, our position
12 is based on the industry evidence we refer to between paragraphs 151 and 168 of the
13 negative case that it is far more likely that the DCLI, the line item was not inflated, but
14 rather absorbed for the reasons the various industry experts give and in particular
15 those of K Line. So even on a siloed analysis, we say that the DCLI would not have
16 been increased.

17 In terms of whether any increase in DCLI was passed on, we share the concerns and
18 objections raised by the other Defendants methodologically about how Mr Robinson
19 has addressed this, and in particular the fact that his methodology is not reflected in
20 the EC pass-on guidelines, and you can't safely assume the increase in delivery
21 charges are attributable to anything that the cartel did. So I think we are in a very
22 similar position in relation to the three co-Defendants on that.

23 In relation to discounting, I would gratefully adopt what Mr Bailey has already said.
24 Our position is very similar to his.

25 Just as a caveat, in light of the fact that we don't have an expert and there is going to
26 be an expert process hopefully narrowing the issues going forward; the Class

1 Representative has obviously said we can't be involved in that, because we have no
2 expert and we agree with that.

3 The one marker I just want to lay down and I assume this is not controversial. My
4 solicitors would like to be kept informed of that process in the same way that my
5 learned friends' solicitors would be involved in the output of that process from time to
6 time, just so we are (on a solicitors' level) on equal footing to the other Defendants.

7 That's all I wanted to say about that, in light of the fact we have not filed expert
8 evidence.

9 MS LUCAS: Thank you. Mr Holmes.

10 MR HOLMES: Thank you, madam. First, may I say that we understand why the
11 Tribunal has called this CMC and we see as very useful the exercise which has been
12 undertaken in relation to pass-on. It is important at this stage to ensure that the
13 experts' evidence is robust under different factual scenarios, so we understand why
14 we are here.

15 Second point. The Tribunal has rightly apprehended that upstream pass-on is
16 an important element of this case, in circumstances where the claimants aren't the
17 immediate purchasers, but they are purchasers of products for which the service
18 supplied by the Defendants is an input and it is common ground that some method
19 needs to be arrived at for determining the rate of pass-on.

20 Third point. The process of expert engagement which is ahead of us will be important
21 also in ensuring that the Tribunal understands the parties' and their experts' respective
22 positions. It is true that on Friday -- last Friday at 9 o'clock at night we did receive a list
23 of topics from the Class Representative. Our experts are considering those, and we
24 will respond in relation to those as soon as possible.

25 Just to put on note now, as we see it, and we apprehend that this may also be the
26 Tribunal's position, it will be important that we go beyond broad topics in the

1 memorandum but have a list of propositions which are quite granular with which the
2 parties' experts can then agree or disagree, so that that process actually lifts the lid on
3 the experts' respective positions and provides something that is useful and additive to
4 the expert reports and doesn't simply regurgitate the positions which are already set
5 out there. Our experts will liaise with the Class Representative's expert, with a view
6 to ensuring that there is a list which captures the points with sufficient granularity to be
7 useful to you.

8 The fourth point is that while the factual scenarios -- the factual considerations are
9 important (and that will turn in part on factual evidence), the expert evidence and the
10 factual evidence are not hermetically sealed in relation to the selection of approach.
11 One of the issues with which the experts, including my clients' expert, has grappled is
12 whether one approach is more credible than the other, having regard first of all to
13 economic theory and also based on testing empirically the relationship between the
14 delivery charge and changes in the -- sorry -- let me get this right. This is one of the
15 risks of -- so one of the things that has been tested is whether there is evidence of
16 changes to shipping costs being passed on through the delivery charge; in other
17 words, that goes to test whether silo pricing is credible and is plausible. So part of the
18 expert evidence will be to assess which of these two approaches is correct alongside
19 the factual evidence which is before you. I say that only to make clear that there is
20 not a strict division between those two bodies of evidence. Both will be relevant to
21 that fundamental question.

22 With that said, you have seen how we have set out the position in our skeleton
23 argument. Dr De Coninck has advanced methodologies which apply under conditions
24 on the assumption that the overall pricing approach is the correct one. He considers
25 that those methodologies are also of relevance when assessing the likely level of
26 pass-on through the delivery charge, assuming that there is a separate and siloed

1 element through which pass-on occurs.

2 We have identified the sources that he has drawn on. One is an empirical analysis of
3 the VW data in order to determine how changes in variable cost affect downstream
4 pricing. Another is a consideration of the literature, which includes various empirical
5 studies of pass-on including within relevant sectors and he uses those to arrive at
6 pass-on rights.

7 As we have set out in our skeleton argument, he doesn't regard those methodologies
8 as applicable only in the event that the overall pricing approach is adopted. He thinks
9 that they could also be of use to the Tribunal in estimating pass-on within the confines
10 of the delivery charge.

11 He has also conducted various tests in order to assess the level of pass-on within the
12 delivery charge including, as I say, a regression approach to assess whether changes
13 to shipping costs are being passed on through the delivery charge. His conclusion is
14 that they are not. Now that's not to suggest that there is no pass-on. It simply suggests
15 that the vehicle of pass-on is not through the delivery charge.

16 So from our perspective and as set out in our skeleton argument, the Tribunal does
17 have before it an array of expert evidence which will be useful whichever of the two
18 approaches the Tribunal concludes is the correct one. It has been useful to verify that
19 that is the case, but we hope and think that it is for the reasons we have set out.

20 MS LUCAS: So it seems we are all comfortable going ahead with the joint expert
21 process. We will come to the directions order in a minute. We will do that all in one
22 go, but obviously we will give a direction for that process to happen. I think we may
23 need to do some fiddling with dates, but I think we are agreed that that should happen.

24 We did raise the issue of downstream pass-on just in my opening remarks. I accept
25 that didn't go into the letter, but it is obviously referred to in the Trucks decision. At
26 first blush there certainly seems to be a degree of similarity on the downstream issues

1 arising in Trucks and in this case and I just wondered whether you were in a position
2 today to articulate what the materially different position is on downstream pass-on. If
3 you are not, we will think of another method of dealing with that, but one thing I am
4 concerned to do is make sure that the time spent dealing with downstream pass-on
5 remains proportionate and if a number of the issues have already been addressed by
6 the Court of Appeal in Trucks, then that needs to be borne in mind.

7 MS FORD: Chair, our position on this is set out in our negative position statement
8 starting from paragraph 72. That may be really the best encapsulation of what we say
9 about it.

10 MS LUCAS: Let me have the paragraph number again.

11 MS FORD: It is paragraph 72.

12 MS LUCAS: This is in relation to the downstream pass-on?

13 MS FORD: Madam, yes. For the Tribunal's note I propose to address it from our
14 negative position statement, but there is also a section in Mr Robinson's sixth report
15 starting from his paragraph 6.40. Our position is summarised in these paragraphs.
16 We have set out a very brief summary of the legal position and in particular we
17 emphasise what's set out at paragraphs 75 and 76, because it has been
18 well-established now in the authorities, including in Trucks, that it is not enough for the
19 defendants to identify something which amounts to reliance on the usual planning and
20 monetary process and to say that costs feed into that. What they have to show is that
21 there is a legal and proximate causal connection between the overcharge and the
22 pass-on.

23 We point out in 76 that the factors relevant to that exercise will include the claimant's
24 knowledge of the nature and amount of the overcharge, the size of the overcharge,
25 the relationship or association between what the overcharge is incurred on and the
26 product, and whether there are identifiable claims or identifiable purchasers, and that

1 is the point that was endorsed by the Court of Appeal in Trucks.

2 Our position in a nutshell is that set out in paragraph 79. We say too that the
3 Defendants' various attempts to demonstrate downstream pass-on do not suffice to
4 meet the test that's been set out. They don't discharge the burden of proof to show a
5 legal and proximate causal connection between the overcharge and the pass-on.

6 Paragraph 80 then goes through those elements and points out, for example, that
7 class members were unaware of the amount of the overcharge, the fact that the
8 delivery charge represents one of many small inputs into total price and such like. So
9 we say that this was a case where the Defendants haven't done enough to discharge
10 their burden of proof. We do go on to deal in a degree of detail with the particular
11 points that have been made by the Defendants, but our global position is that they
12 have simply not done enough on downstream pass-on.

13 MS LUCAS: (Inaudible).

14 PROFESSOR BAILEY: May it please the Tribunal, in terms of the legal principles that
15 apply to downstream pass-on, they are set out in paragraphs 32 to 34 of MOL's
16 positive position statement. It might be just helpful to show you that. We acknowledge
17 in paragraph 32, which is on page 12, the Court of Appeal's judgment, to which my
18 learned friend has just referred.

19 MS LUCAS: Yes.

20 PROFESSOR BAILEY: But we do draw the Tribunal's attention to what we say in
21 paragraph 34, by reference to a recent judgment of the Commercial Court in Granville
22 where the court in that case acknowledged that documentary evidence may be limited,
23 but it is open to a defendant to seek to show mitigation of loss or downstream pass-on
24 based on a broader corpus of material, including economic analysis; and indeed that's
25 what the Commercial Court did in that case, looked at the insights of economic theory
26 as well as the claimants' internal documents and found a blended rate of pass-on of

1 65%. That is the sort of approach that we would be inviting this Tribunal to also adopt.
2 You can see the point also in paragraph 35, where the Supreme Court in the
3 Sainsbury's v Mastercard case has acknowledged that your ability to wield or wave
4 the broad axe applies just as much to estimating downstream pass-on as it does to
5 estimating the extent of any loss suffered by the class.

6 We draw your attention to those in terms of the sort of legal framework. In terms of
7 what MOL and MOL's expert has done if I could just ask very briefly to show you the
8 approach that was adopted. Essentially this issue is dealt with in section 6 of
9 Dr Bagci's first report on pass-on and in essence she makes three key points relating
10 to downstream pass-on.

11 The first is, as I think is common ground, business class members are an important
12 constituency within the class action. They are about 46% of the estimated loss. What
13 Dr Bagci does in section 6A is to analyse the business class members. In particular
14 she decides to focus on car rental companies. The reason for that is the Tribunal has
15 evidence in particular from Mr Cunningham, who worked at both Hertz and Europcar,
16 as to how car rental companies operated.

17 What she then does is a qualitative assessment of the features of the car rental
18 market. This is set out in section 6A2 on pages 39 and 40 of her first report. She
19 seeks to identify in particular three aspects of the car rentals market which in her view
20 suggests that downstream pass-on is likely.

21 The first is that all the major car rental companies will have incurred the overcharge at
22 least to some extent. The second is that cars for a car rental company are a significant
23 variable cost. And the third is that car rental companies frequently change their prices
24 in particular to changes in cost. Obviously, it will be a matter for trial and submission
25 to persuade the Tribunal as to whether that establishes a direct and proximate link
26 between the cartel and the prices charged by the car rental companies.

1 The Tribunal will note in her first report Dr Bagci did not seek to quantify that. She has
2 not engaged in a quantitative analysis. What she does do, however, in her second
3 report, and this is at paragraph 156, is she provides a conservative estimate
4 essentially of the impact she thinks would arise from downstream pass-on, together
5 with the other form of loss mitigation to which I am about to come, which is the resale
6 of new cars on the used car market. Her conservative estimate is that the overall loss
7 should be reduced by 15%. It is paragraph 156 of her second report.

8 The other type of mitigation that she identifies is as between new and used cars. That
9 is obviously a different one from the one that arose in the Trucks judgment, which was
10 concerned with supply pass-on. If I may just briefly summarise, what she does in
11 relation to that is she goes through firstly to identify the links that exist empirically
12 between the sale of new cars and the sale of used cars. She also then examines the
13 correlation between the price for new cars and the price for used cars.

14 Again Dr Bagci acknowledges that she has not quantified -- she actually says she
15 does not have the data to provide a (inaudible) precise figure. That is one of the
16 reasons why she looks at it more in the round qualitatively. That's the approach we
17 have taken to downstream pass-on. As my learned friend says, they join issue with
18 whether what we have done is enough. In my submission, the correct approach has
19 to be the experts engage together as part of the joint expert process, setting out where
20 they agree and disagree, and we can make submissions obviously on whether or not
21 the legal test has been met. That's essentially MOL's position.

22 DR MAHER: I have just a quick question of clarification. You referred to the resale
23 pass-on as not being an issue in Royal Mail.

24 PROFESSOR BAILEY: In the Court of Appeal's --

25 DR MAHER: Sorry. In the Court of Appeal.

26 PROFESSOR BAILEY: No. It was an issue at first instance in front of the Tribunal,

1 the sale of used trucks, but I don't think we have the judgment in front of us.

2 DR MAHER: I don't have the judgment in front of me. I thought the Court of Appeal
3 did deal with both supply pass-on and resale pass-on.

4 PROFESSOR BAILEY: My lady, you are absolutely right. It did. I was trying to
5 distinguish between the two different types of pass-on. So there is the first type, which
6 is where, as in Trucks, the question was whether or not Royal Mail was increasing the
7 price of stamps in light of the fact that the trucks were being overcharged, which I think
8 is referred to as supply pass-on. That is addressed by the Court of Appeal. That is
9 similar to the analysis that Dr Bagci is doing in relation to car rental companies.

10 There is then a distinct type of mitigation of loss relating to the resale of new cars, the
11 used car market. My understanding is that is not an issue that the Court of Appeal
12 addressed in its judgment. That was the only --

13 DR MAHER: Okay. I will need to verify that. I thought that it had been, but I could be
14 wrong. Thank you.

15 PROFESSOR BAILEY: Thank you.

16 MR MUSSA: I will give a provisional response for the time being, if I may.

17 MS LUCAS: Yes.

18 MR MUSSA: In relation to the legal principles we agree with what Professor Bailey
19 has said. There is one important distinction to note between this type of case and the
20 type of case that was being considered by the Court of Appeal in DAF.

21 Ordinarily when a claimant brings a claim for follow-on damages, that particular
22 claimant will be expected to provide disclosure of how they have dealt with costs in
23 their own prices. So it is the claimant who will bear an evidential burden of producing
24 relevant material that goes to establishing a downstream pass-on effectively, because
25 ordinarily that will not be in the hands of a defendant. Here we have a slightly different
26 position, because these are representative proceedings where that type of disclosure

1 is not readily available in the same sense. That has informed the approaches that the
2 parties have taken --

3 MS LUCAS: Yes.

4 MR MUSSA: -- to how to demonstrate downstream pass-on. Necessarily one is in
5 a position where one has to rely on other types of evidence to form an assessment of
6 whether pass-on is likely or not.

7 So as far as we are concerned, our case on downstream pass-on and how it is
8 established is set out in our positive position statement at paragraphs 179 to 194 and
9 Dr Majumdar engages in analysis -- some of it has to be qualitative in nature -- to reach
10 views on downstream pass-on rates where he can and he acknowledges there are
11 gaps in the evidence available.

12 We also agree with Professor Bailey that the question of whether or not a proximate
13 causal link is established will be a question at trial and we will make our submissions
14 on that in due course.

15 That's all I propose to say for the time being on downstream pass-on.

16 MS LUCAS: Yes. That is helpful. Thank you.

17 Mr McGurk.

18 MR McGURK: Ma'am, thank you. I might also make a provisional response at this
19 stage.

20 MS LUCAS: Yes.

21 MR McGURK: We, equally, broadly agree with the legal principles as Professor Bailey
22 has articulated them. I apologise for getting his name wrong previously.

23 We deal with pass-on, downstream pass-on, at part 10 of our NPS and we address
24 the Class Representative's reliance specifically on silo pricing as a basis for their
25 response to what the Defendants have said on downstream pass-on. We deal with
26 supply pass-on at paragraph 196 and resale pass-on at 199. We maintain those

1 remarks.

2 In terms of helping the Tribunal further, we could do it in two ways. One, we could
3 come back to you straight after this hearing, or if you thought it might be more sensible
4 to wait for the outcome of the expert process, we may give you a rather fuller position
5 on where we, NYKK, stand on downstream pass-on at that stage. We are in your
6 hands, but we will provide a fuller response on one of those two occasions as suits the
7 Tribunal.

8 MS LUCAS: Thank you. That's helpful.

9 Mr Holmes.

10 MR HOLMES: Madam, I can be very brief. I adopt the submissions of
11 Professor Bailey.

12 MS LUCAS: As everybody else.

13 MR HOLMES: Yes.

14 MS LUCAS: Thank you. I think that has been a helpful indication for us as to where
15 you're coming from. It does seem that you have raised some points that suggest that
16 there are different points arising in this case to the Trucks case and we will have to let
17 the experts have their discussion and see how the evidence pans out at trial, but thank
18 you for dealing with that.

19 So that I think leads us to the directions order. I have it here. Shall we work through
20 it from the beginning just to -- this is the consent order that was signed. That's the one
21 I am working off.

22 So the joint expert process economic -- so there is no joint expert process proposed
23 for industry experts I take it.

24 MS FORD: No, I don't think so.

25 MS LUCAS: No. So it is just the economic experts. You want until 30th September
26 for the meeting now. Then when do you want to produce and file the report?

1 MS FORD: Certainly we had not proposed changing that date at this stage, although
2 of course -- assuming the expert process remains essentially within the confines of the
3 positive and negative statements and so not -- we do have a degree of concern it
4 shouldn't be taken as an opportunity to elaborate and introduce new material that
5 hasn't been introduced previously. Assuming it remains between those appropriate
6 confines, then we think that the 11th October date is fine.

7 MS LUCAS: It can be done in that time frame. Is everybody else in agreement on
8 that?

9 MR HOLMES: So, madam, may we suggest, given that the parties are still liaising on
10 an appropriate date for the first step, that's to say the meeting, that we also just reserve
11 our position --

12 MS LUCAS: Yes.

13 MR HOLMES: -- on the date for the second stage, the report, because if a meeting
14 only proves feasible, say, in two weeks' time, then it might be that that date needs to
15 move slightly, but we are conscious it needs to be accommodated within the overall
16 time frame.

17 MS LUCAS: Okay. Is everybody content with that?

18 That does lead me actually to interpose something, which is that I mentioned earlier
19 hot tubbing. We would like the parties to give early consideration to hot tubbing. So
20 if we can -- what I envisage is an order that requires the parties to seek to agree the
21 timetable, issues and participants for the issues of any relevant hot tub evidence. We
22 would like those two weeks before the PTR. So you need to factor that into when you
23 do your joint expert report I think. So that --

24 PROFESSOR BAILEY: Madam, would it be of assistance -- in promising to agree that
25 timetable, the participants and issues, insofar as obviously we disagree, it would be
26 useful for us to try to provide you with a single document that has in red and green,

1 say, what the different positions of the parties are.

2 MS LUCAS: Yes, absolutely. That would be very helpful. That will give us time to
3 consider that and we can have a meaningful debate about that at the PTR, where we
4 may have issues to add or disagree with who we want to participate.

5 I should put down a caveat, which is that all of that will be subject to our preparation
6 leading up to the trial. So there may be other issues that we have to add to the list or
7 slightly re-frame, but it would be useful to have some structure to that exercise I think.
8 So that's two weeks before the PTR.

9 Now the date for the PTR, leaping ahead -- I think Professor Bailey is the one who
10 may be unhappy with the Tribunal -- the one day that we can all do is 4th December.
11 I think most people are available that day. The Tribunal has problems with the dates
12 that Professor Bailey may be available. So I am afraid the November dates of
13 18th November to 29th we are not currently available, so it will have to be the 4th.
14 So, reasoning backwards, I guess that means -- what does that mean for the date for
15 hot tub proposals? That is by 21st November.

16 Then other aspects on the directions order, we have some at paragraphs 2, 3 and 4.
17 Everyone is content with those still? We have the date in 5. Bundles for trial.

18 MS BEGENT: Skeleton arguments. (Inaudible).

19 MS LUCAS: Yes. Number 5:

20 "Organising and producing bundles for trial."

21 Are these aspects I should leave to the parties to discuss dates that actually work,
22 given the bare bones of the hearings we now have in mind or the meetings
23 and hearings we have in mind? Can I leave it to the parties to come up with sensible
24 dates on some of these other paragraphs?

25 MS FORD: Madam, yes. Provisionally the existing date should still be fine,
26 notwithstanding that we have just pushed the PTR back slightly. These should still

1 work, unless the Tribunal has concerns.

2 MS LUCAS: I am just looking. The 29th -- so paragraph 7, skeleton argument for trial.

3 You might not appreciate having to do that with the PTR moving into view.

4 MS FORD: That is a fair point, yes.

5 MS LUCAS: I will leave those dates. If you can formulate those and if you could come
6 up with a formulation for the hot tubbing direction, that would be helpful.

7 Apart from that, I think matters for today may have concluded, unless the parties have
8 anything else they wish to raise. Thank you very much for turning up and running
9 through your cases. I appreciate that some of it may have been found in the underlying
10 documents, but it wasn't immediately apparent to us, and we are very grateful for you
11 explaining it to us, and we are content with the way the parties are proceeding.

12 **(11.32 am)**

13 **(Hearing concluded)**

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