Neutral citation [2026] CAT 64

Case No: 1702/5/7/25 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

3 August 2026

Before:

HODGE MALEK KC
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

LENZING AG & OTHERS

Claimants

- v -

WESTLAKE VINNOLIT GMBH & CO. KG & OTHERS

Defendants

Part 20 Claimants/Defendants

Heard at Salisbury Square House on 6 July 2026

RULING (CMC3)

APPEARANCES

Michael Armitage and Ciar McAndrew (instructed by Stewarts Law LLP) appeared on behalf of the Claimants.

Sarah Ford KC and Conor McCarthy (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Westlake Defendants.

A. INTRODUCTION AND BACKGROUND

1. This is the third case management conference (**CMC**) in these proceedings. This ruling concerns various applications made by the parties on 19 June 2026 and considered at the CMC held on 6 July 2026 (**CMC3**).

2. The case was initially filed in the High Court on 11 July 2023 and was subsequently transferred to this Tribunal by the High Court by order dated 30 January 2025. Following the transfer to the Tribunal, the Chair made a confidentiality ring order on 11 April 2025 (the **CRO**).

3. The first CMC in these proceedings was held on 12 May 2025 (**CMC1**), at which the Chair, Mr Hodge Malek KC, ruled upon various disclosure issues and settled the list of issues for trial: see the Tribunal's ruling dated 12 May 2025 ([2025] CAT 31) (the **CMC1 Ruling**) and the order made on 17 May 2025 and drawn on 19 May 2025 (the **CMC1 Order**).

4. A second CMC was held on 6 February 2026 (**CMC2**) which considered: pleadings amendments; disclosure; economic and accounting expert evidence; and listed the trial in these proceedings to commence on 10 May 2027, with a time estimate of 5 weeks: see the order of the Chair dated 6 March 2026 (the **CMC2 Order**).

5. The Claimants are all entities within the Lenzing corporate group (**Lenzing**). The Claimants are global producers and sellers of wood based viscose fibres, modal fibres, lyocell fibres and filament yarn, all of which are used in the textile and non-wovens industries.

6. The Claimants initially brought this case against two distinct corporate groups. The first to third and fifth and sixth Defendants are entities within the Westlake/Vinnolit corporate group (the **Westlake Defendants**, or the **Defendants**). The seventh to the thirteenth Defendants are entities within the Ineos/Inovyn corporate group (the **Ineos Defendants**). Both the Westlake and Ineos Defendants are, *inter alia*, manufacturers of caustic soda and were at all material times directly or indirectly engaged or involved in the production, sale

and/or distribution of caustic soda. Caustic soda is an important input for the Claimants' business, and the Claimants were and are direct purchasers of caustic soda from the Defendants.

7. In between CMC1 and CMC2 the Claimants and the Ineos Defendants reached a confidential settlement in these proceedings (the **Ineos Settlement**). As a result, the Claimants' claim against the Ineos Defendants was dismissed by way of order of the Chair dated 30 June 2025, with no order as to costs.

8. Following the Ineos Settlement and resulting dismissal, the Claimants made an application on 16 September 2025 requesting permission to re-amend the Amended Particulars of Claim (the **Amendment Application**). The Westlake Defendants opposed the Amendment Application by way of response dated 22 September 2025. The Tribunal determined the Amendment Application by way of reasoned order dated 16 October 2025 ([2025] CAT 62). The Tribunal considered the Westlake Defendant's opposition to the Amendment Application to be well founded and granted the Amendment Application only to the extent that the proposed amendments simply correct the identity of the Defendants to the ongoing claims in these proceedings (i.e. removing certain references to the Ineos Defendants). By way of consent order dated 21 November 2025, the Tribunal ordered the Claimants to pay the Westlake Defendants £27,000 in respect of the Westlake Defendants' costs of and occasioned by the Amendment Application and the consequential Amendment Application.

9. By way of short summary, it is the Claimants' case that the Defendants were party to anti-competitive agreements and/or concerted practices in relation to the supply of caustic soda (the **Cartel**) contrary to Article 101(1) of the Treaty on the Functioning of the European Union, and the Chapter 1 prohibition in section 2 of the Competition Act 1998, during a period covering at least July 2017 to February 2021 (the **Cartel Period**). The Claimants allege in particular that the infringing conduct involved the manipulation of caustic soda price indices produced by IHS Markit Limited (the **IHS Index**) which was relevant to caustic soda pricing.

10. The Claimants contend that they have suffered loss and damage as a result of the Cartel, including through the payment of overcharges on their purchases of caustic soda from the Defendants and others.

11. The essential basis for the Claimants' case is set out in the Re-Amended Particulars of Claim dated 4 November 2025 (**RAPC**) at §§36–37:

> "36. Before the second half of 2017, caustic soda pricing as reported in the IHS Index was relatively consistent, with prices in the IHS Index ranging from €445 to €490 per dmt between quarter 1 in 2016 and quarter 1 in 2017, representing an average price increase of 2.45% at each quarterly adjustment over that period. By April 2017, the reported price per dmt had reached €520 per dmt.
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> 37. In July 2017, prices in the IHS Index were €550 per dmt but began to rise sharply from there to €740 per dmt by January 2018 (approximately 35% higher than prices in the IHS Index had been in July 2017, and approximately 51% higher than prices in the IHS Index had been in January 2017 (i.e., one year earlier)). While there were fluctuations during the remainder of the Cartel Period, the price remained at over €700 per dmt throughout 2018, falling slightly in 2019 but remaining over €600 per dmt throughout that year. In 2020, the pricing ranged between €578 and €650 per dmt, and was at €523 per dmt in February 2021."

12. The Claimants infer that the explanation for these price developments is IHS Index price manipulation. The central allegation is set out in the RAPC at §40:

> "40. The Claimants infer that the explanation for the price trends observed in the IHS Index in the Cartel Period (and the corresponding trends in the prices actually paid by the Claimants during the Cartel Period) is that the Westlake/Vinnolit Undertaking~~, the Ineos/Inovyn Undertaking (together the "Defendant Cartelists")~~ and entities within the Dow, Covestro and Nobian corporate groups and the Ineos/Inovyn Undertaking (together the "Non-Defendant Cartelists") colluded with one another in order to manipulate the IHS Index, through the co-ordinated submission of artificially high pricing information and/or a failure to disclose accurate price information. Such collusion had the result that the prices reported in the IHS Index were artificially high during the Cartel Period thereby also resulting in the prices charged by the Westlake/Vinnolit Undertaking ~~Defendant Cartelists~~ and the Non-Defendant Cartelists (together the 'Cartelists') being inflated to artificially high levels that would not have arisen in the absence of the Cartel."

The effect of the alleged price manipulation is said to have been to increase prices reported in the IHS Index, which resulted in the prices charged by the Defendants and other alleged cartelists, the "Non-Defendant Cartelists" as defined in the RAPC extract above, being artificially high. It is notable that the Ineos Defendants are now "Non-Defendant Cartelists". The RAPC then pleads at §41 a series of bases for the inferences of price manipulation of the IHS Index, including assertions such as there being adequate capacity to meet demand during the **Relevant Period** (July 2017 – February 2021); an allegation that there were no cost-based explanations for the price trends; the consistent profitability and market shares of the Defendants; and the differences between the IHS Index and the equivalent export prices. The sustainability or otherwise of these inferences will ultimately be tested by factual and economic evidence at trial.

13. Following the dismissal of the Claimants' claim against the Ineos Defendants, the value of commerce in respect of which the Claimants allege they have suffered overcharge losses is €303.2 million. Applying an assumed overcharge percentage of 26%, the Claimants' overall overcharge losses are estimated to be €78.8 million, noting these figures will be refined during the course of evidence in these proceedings: RAPC at §62. The Defendants deny any wrongful or collusive conduct and also raise, *inter alia*, pass-on concerns as a relevant defence.

14. It is unsurprising that disclosure issues have taken up the majority of the parties' energy and the Tribunal's time to date in these proceedings given the importance of gathering the relevant evidence to substantiate, or not substantiate, the Claimants' inferential claim. The Claimants and Defendants have now both completed their disclosure as ordered at CMC1 and CMC2. The long-stop deadline was 26 June 2026, however the Defendants were granted a short extension by way of order dated 26 June 2026.

B. NON-PARTY DISCLOSURE

15. In accordance with §15 of the CMC2 Order, on 26 June 2026 the Claimants informed the Tribunal of the steps taken to obtain disclosure from various non-parties, namely:

    (1) Oil Price Information Service LLC (**OPIS**), which is a company domiciled in the US and is a Dow Jones company, which itself is a News Corp company. By way of relevant background, in 2022 News Corp acquired the base chemicals business of IHS Markit Ltd (the entity

which published the IHS Index during the Relevant Period). As a result, OPIS acquired the assets of the base chemicals business, including control over its documents and records.

(2) Argus Media Limited (**Argus**), which is a company domiciled in England and Wales and the producer of the **Argus Index**, which is an alternative price index, as defined in the RAPC.

(3) The Non-Defendant Cartelists (as defined in the RAPC), specifically: (i) Dow, a corporate group whose parent company is domiciled in Switzerland; (ii) Covestro, a corporate group whose parent company is domiciled in Germany; (iii) Nobian, a corporate group wholly domiciled in the Netherlands; and (iv) the Ineos Defendants.

16. As regards OPIS, the Claimants explained that they had first sought disclosure from the Defendants concerning the compilation of the IHS Index but had concluded that following the disclosure provided by the Defendants, it was now appropriate to seek documents directly from OPIS. Whilst OPIS has upon request voluntarily provided two "IHS Markit Chlor-Alkali Methodology documents", it had declined to voluntarily disclose communications with the Defendants and Non-Defendant Cartelists or provide other documents evidencing the methodology used to compile the IHS Index. The Claimants therefore proposed to pursue an application for disclosure of such documents under section 1782 of Title 28 of the United States Code (**1782 Disclosure**) as soon as possible, following resolution of confidentiality and collateral-use issues at CMC3. The Claimants are yet to finalise the categories of documents which they propose to seek disclosure of via their forthcoming 1782 Disclosure application; however, they have indicated they are open to the Tribunal providing comments on the categories (see further discussion of the process to be followed at §25 below). The Claimants anticipate that it may take up to six months for their 1782 Disclosure application to be determined once issued, in addition to some further time thereafter for OPIS to collate and provide any documents in respect of which disclosure is ordered.

17. As regards Argus, the Claimants informed the Tribunal that as with OPIS, they had initially focussed on obtaining documents relevant to the compilation of the Argus Index from the Defendants, whilst in parallel making enquiries with Argus as to whether it would be willing to give such disclosure voluntarily. Argus has provided historical versions of the "Argus Chlor-Alkali and Derivatives Methodology and Specifications Guide", however it has declined to voluntarily disclose communications with the Defendants and Non-Defendant Cartelists or provide other documents evidencing the methodology used to compile the Argus Index. It is the Claimants' position that they will first assess any further Argus-related disclosure ordered against the Defendants at CMC3 before deciding whether an application for third-party disclosure and/or information against Argus is necessary (see discussion of Lenzing Redfern Schedule (**LRS**) category 1 at §§65–73 below). The Claimants have stated that should any such application for third-party disclosure be required, it will be issued in the Tribunal pursuant to rules 63 and/or 53(3)(c) of the Competition Appeal Tribunal Rules 2015 (the **Tribunal Rules**). The Tribunal directs that the Claimants should take out any application for non-party disclosure from Argus by 5 September 2026.

18. As regards the Non-Defendant Cartelists, the Claimants had requested voluntary disclosure of relevant documents and information concerning the geographic location of potentially relevant documents. Perhaps not surprisingly, Dow, Covestro and Nobian each declined voluntary disclosure and indicated that relevant documents were held outside England and Wales, respectively in Switzerland, Germany and the Netherlands. In light of this information, the Claimants state they have explored whether it would be possible to obtain documents from each of the three jurisdictions in question via the Letter of Request process under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Once again, it is the Claimants' position that they will take a final view on whether any Letters of Request are necessary once any further disclosure ordered against the Defendants at CMC3 has been provided and reviewed.

19. As regards the Ineos Defendants, the Claimants sought voluntary disclosure from Ineos, however Ineos declined to provide disclosure. The Claimants do not presently intend to apply for any disclosure from Ineos.

(1) The 1782 Application

20. As stated above, the Claimants intend to pursue an application for IHS-related material in respect of documents held by OPIS in the US via the 1782 Disclosure procedure (the **1782 Application**). The Claimants envisage that the 1782 Application will broadly cover: (i) communications between IHS and the Defendants / Non-Defendant Cartelists during the Relevant Period in relation to caustic soda; (ii) documents relating to the reasons for the introduction of the **New IHS Index**;[1] and (iii) documents evidencing the methodology used to compile the IHS Index during the Relevant Period.

21. The Claimants propose to provide the Tribunal (and, for noting only, the Defendants) with the proposed 1782 Disclosure categories for its consideration and comment. The Claimants also initially requested a letter from the Tribunal in support of their 1782 Application, as such a letter could assist in relation to the relevant discretionary considerations for a 1782 Application.

(a) Legal principles

22. Section 1782 put simply provides that a US federal district court "may order" a person "resid[ing]" or "found" in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal … upon the application of any interested person." The full text of the provision is as follows:

> "**§ 1782 Assistance to foreign and international tribunals and to litigants before such tribunals**
>
> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or

[1] Being the index which IHS began to publish with effect from Q2 2021.

> international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
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> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
>
> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him."

23. The context for the Tribunal's involvement in the 1782 Application can be found in the relevant US legal principles as regards 1782 Disclosure. The leading US authority on the issue is *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004) (***Intel***), which concerned the authority of US federal district courts to assist in the production of evidence for use in foreign or international courts or tribunals and articulated what have come to be known as the "*Intel* factors": see in particular Justice Ginsburg writing for the majority at §§264–265 of *Intel*:

> "As earlier emphasized, see *supra*, at 2480–2481, a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so. See *United Kingdom v. United States*, 238 F.3d 1312, 1319 (C.A.11 2001) ("a district court's compliance with a § 1782 request is not mandatory"). We note below factors that bear consideration in ruling on a § 1782(a) request.
>
> First, when the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. App. to Reply Brief 4a ("When th[e] person [who is to produce the evidence] is a party to the foreign proceedings, the foreign or international tribunal can exercise its own jurisdiction to order production of the evidence." (quoting declaration of H. Smit in *In re Application of Ishihara Chemical Co., Ltd., For order to Take discovery of Shipley Company, L.L.C., Pursuant to 28 U.S.C. § 1782*, Misc. 99– 232(FB) (EDNY, May 18, 2000))). In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid. See App. to Reply Brief 4a.

> Second, as the 1964 Senate Report suggests, a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. See S.Rep. No. 1580, at 7. Further, the grounds Intel urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case. See Brief for United States as *Amicus Curiae* 23. Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. See id., at 27. Also, unduly intrusive or burdensome requests may be rejected or trimmed. See *Bayer*, 146 F.3d, at 196 (remanding for district-court consideration of "appropriate measures, if needed, to protect the confidentiality of materials"); *In re Application of Esses,* 101 F.3d 873, 876 (C.A.2 1996) (affirming limited discovery that is neither "burdensome [n]or duplicative")."

24. Section 1782 is a well-known route for obtaining disclosure of documents held in the US for the purposes of proceedings in England and Wales and experience shows that orders are quite often granted for this purpose: Matthews and Malek, *Disclosure* (6th ed., 2024), §§2-69–2-72 sets out an understanding of the principles and process.

(b) Tribunal comments

25. There are two issues as regards 1782 Disclosure. First, what disclosure the Claimants are seeking. The Tribunal is satisfied that the categories articulated by the Claimants at CMC3 make a lot of sense. The Tribunal requests additional detail be provided to it regarding what the Claimants actually intend to apply for. However, the 1782 Application or final categories requested do not have to be approved by the Tribunal, as it is ultimately a matter for the Claimants taking advice from their US lawyers to frame the categories of documents sought in an appropriate way. It would be helpful if the Claimants send the draft 1782 Application, listing the categories they intend to pursue, to the Tribunal and the Defendants. The Defendants do not have a right of veto, however if there are any additional categories of documents that they feel have been omitted and that there is a good prospect of success in getting them, then in principle, the Claimants should add them to their application. If the advice of the Claimants' US counsel is that any additional categories and amendments to the draft 1782 Application proposed by the Defendants may reduce the prospects of success on the 1782 Application or the categories suggested by the Defendants do not have good prospects of success, then the Tribunal is unlikely to require that they

be included in the 1782 Application to be filed by the Claimants. After all, it is the Claimants' application. Any disputes as regards the above may be resolved by the Tribunal on the papers.

26. Second, further to the basic test and the *Intel* factors noted above, the Tribunal wishes to make some brief comments on the Claimants' disclosure sought in the US:

(1) First, whether the party from whom discovery is sought is a participant in a foreign proceeding, or already subject to the jurisdiction of the foreign tribunal. In the present case, OPIS is not a party to the current proceedings before the Tribunal. It is the Tribunal's understanding that during the Relevant Period IHS Markit Ltd was headquartered in England, however since then it has been taken over by a US entity, and its records are now held in the US.

(2) Second, the nature and character of the foreign proceedings. These proceedings relate to an alleged cartel and according to the Claimants the IHS Index has been manipulated by cartelists. This has been done primarily by effectively high balling rather than low balling, exaggerating the price that one would expect on the market both historical and current and that the result was that the actual price being paid by purchasers of caustic soda was higher than it would otherwise have been. In cartel cases such as these, disclosure is absolutely central to the case. No doubt the US federal district court has a similar experience in relation to cartels. The documents sought in relation to the submissions to IHS which helped them set the rates are very important evidence for these proceedings. This Tribunal would appreciate any assistance the US federal district court may be able to provide in ordering such disclosure as it deems appropriate. In particular, of such classes of documents that would show what submissions and information was being provided from the alleged cartelists and how that fed into the pricing information that was being disseminated to the market. There are two other categories sought which as currently

formulated are also material that is reasonably necessary to be produced for the purposes of the fair disposal of the current proceedings.

(3) Third, the reciprocity of the foreign tribunal to such judicial assistance. The UK courts and tribunals are always willing, so far as they have jurisdiction, to order disclosure to assist foreign proceedings, including those in the US. There is the Letter of Request procedure under the Hague Convention.

(4) Fourth, whether the request is an attempt to circumvent foreign discovery restrictions. There is no question that the Claimants' 1782 Application, once it is made, will not be an attempt to circumvent the discovery restrictions in this Tribunal, or indeed under the legal system of England and Wales. Had IHS Markit Ltd still been operating from England and the records held there, the Tribunal would have been willing to make an order under its own rules for non-party disclosure, subject to any submissions that might have been made in opposition and the detailed wording of any such order.

(5) Fifth, whether the request is unduly intrusive or burdensome. That is a matter for the federal district court to resolve on its own. However, this Tribunal is sure the federal district court will appreciate that what may amount to extensive disclosure would be necessary for the fair disposal of these proceedings.

27. In addition to requesting a letter of support for their forthcoming 1782 Application, the Claimants seek the Tribunal's assistance as regards two objections raised by the Defendants in relation to 1782 Disclosure. These are addressed in turn below.

(2) Collateral use: use of Defendants' disclosure for US discovery purposes

28. The Claimants seek an order in the following terms:

> "The Claimants are permitted to use disclosure given by the Defendants in these proceedings in connection with an application, made under 28 U.S.C. §

1782, for disclosure of materials relevant to these proceedings and held in the United States. Such use of the Defendants' disclosure does not constitute a collateral use in breach of Tribunal Rule 102(1).

or alternatively

The Claimants have permission, pursuant to Tribunal Rules 102(2)(b) and 102(3), to use disclosure given by the Defendants in these proceedings in connection with an application, made under 28 U.S.C. § 1782, for disclosure of materials relevant to these proceedings and held in the United States."

29. The Defendants cite rule 102(1) of the Tribunal Rules and contend that use of the Defendants' disclosure in connection with the proposed 1782 Application would constitute a prohibited collateral use. They submit that the Claimants seek to deploy documents disclosed in these proceedings within separate foreign proceedings against a third party, namely OPIS, and that such use falls outside the purpose for which disclosure was provided in the present claim. The Defendants emphasise that much of the disclosed material is commercially sensitive, including documents concerning pricing, commercial strategy and customer relationships, and argue that it should not be provided to persons involved in foreign proceedings absent a specific and justified request identifying the documents concerned and the reasons for their proposed use. They maintain that, while they are willing to facilitate the use of particular documents where appropriate and with their consent, blanket authority to use disclosed material for the purposes of a 1782 Disclosure application would be objectionable and unnecessary. They further state that a reasoned and justified request for specific documents to be used in the 1782 Application will not be refused.

30. The Claimants dispute the Defendants' characterisation and contend that the sole purpose of the proposed 1782 Application is to obtain further evidence for use in these Tribunal proceedings. Therefore, use of the Defendants' disclosure to inform and target that application is reasonably necessary for the proper conduct of these proceedings. The Claimants submit that proceedings whose sole purpose is to obtain information for use in the primary action do not constitute an impermissible collateral use: *Omar v Omar* [1995] 1 WLR 1428, at 1437, citing *Wilden Pump v Fusfield* [1985] FSR 581 (***Wilden Pump***). They accordingly seek a declaration that use of the Defendants' disclosure for the purposes of preparing and pursuing the 1782 Application would not breach rule

102(1) of the Tribunal Rules. Alternatively, if contrary to the Claimants' primary position the prohibition on collateral use is engaged, the Claimants request the Tribunal's permission to use the Defendants' disclosure documents for the 1782 Application, pursuant to rules 102(2)(b) (in respect of non-confidential information) and 102(3) (in respect of confidential information) of the Tribunal Rules.

31. Rule 102(1) of the Tribunal Rules provides as follows:

> "**Subsequent use of documents provided in proceedings**
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> 102.—(1) Subject to paragraphs (2) to (4), a party to whom a document has been provided in the course of proceedings—
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> (a) by the Tribunal;
>
> (b) by another party; or
>
> (c) in accordance with an order under rule 63,
>
> may use that document only for the purpose of those proceedings."

32. The applicable high-level principles governing collateral use are set out in Matthews and Malek, *Disclosure* (6th ed., 2024), §§19-22–19-24, citing, *inter alia*, *Home Office v Harman* [1983] 1 AC 280:

> "**G. COLLATERAL OR ULTERIOR PURPOSE**
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> 19-22 In *Alterskye v Scott* Jenkins J described the undertaking in terms of use of documents "for any collateral or ulterior purpose" or "improper use". Although the authorities have described the nature of the undertaking in various ways, the basic test may fairly be described as the use of documents for any collateral or ulterior use not reasonably necessary for the proper conduct of the action. In Canada it has been held that the obligation is not to use the documents or information, not to refrain from disclosing them in the later proceedings. It is a collateral purpose under r.31.22 to show documents obtained on disclosure in civil proceedings to separate external counsel instructed to advise on whether persons involved in the case may have committed criminal offences.
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> 19-23 Usually, if not invariably, the use of documents disclosed in one action for the purposes of another action will be a collateral or ulterior purpose, even where the parties to both actions are identical and where the causes of action are identical. If a party begins an action based on documents disclosed in other proceedings, the action is liable to be struck out as an abuse of the process of the court. But 'use' goes further than this. Anything beyond merely realising that documents disclosed in one proceeding would be relevant to another may be a collateral use.

> 19-24 An exceptional case may be where documents disclosed in one action are used in separate proceedings, the sole purpose of the separate proceedings being the furtherance of the party's case in the original action. In such a case it has been held that there is no breach of the implied undertaking. It is submitted that in any case where it is intended to use documents disclosed in one action for the purposes of bringing another action, even in such an exceptional case, the prudent and proper course is to seek permission of the court do so. The court will grant retrospective permission only in limited circumstances."
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> (Footnotes omitted)

33. *Wilden Pump* is instructive. In that case there was an argument as to the scope of the collateral use restriction and whether or not using documents for the purposes of other proceedings, whose sole function was to obtain documents and evidence for the current proceedings, was a breach of the collateral use undertaking. The court in *Wilden Pump* decided that it did not constitute a breach of the undertaking, see page 605:

> "On the authorities I have referred to earlier, especially the opinions of their Lordships in the House of Lords in the *Harman* case, I take the implied undertaking given by the solicitor to a party, in civil litigation, to whom discovery has been given by the other party, to be that the disclosed documents will only be used for the purpose of the proper conduct of the litigation in furtherance of his client's case and that he will not himself use or allow his client or anyone else to use the disclosed documents for any collateral or ulterior purpose not reasonably necessary for the proper conduct of the litigation on his client's behalf. Except, possibly, for the concluding sentence in the passage I have cited above from the opinion of Lord Roskill, I do not find in the opinions of their Lordships in the *Harman* case any narrower formulation of the implied undertaking that, without the leave of the court or the party giving discovery, would restrict use of the disclosed documents to use only in the action in which they have been disclosed and that would prevent, without such leave, use such as has been made by the plaintiffs of these defendants' documents in the Cursons action. It is true, of course, that those documents were used for the purpose of the Cursons action; but the sole purpose of bringing the Cursons action was for the purpose of the conduct of this action on the plaintiffs' behalf and the furtherance of their case in this action.
>
> Giving the matter the best consideration I can, I have come to the conclusion that in such use of these defendants' documents as was made of them by the plaintiffs in the Cursons action there was no breach of the plaintiffs' solicitors' implied undertaking and, therefore, there has been no contempt."

34. Having considered the authorities and the parties' submissions, the Tribunal considers that using documents disclosed in the current proceedings by the Defendants for the purposes of obtaining advice from lawyers both in the UK and US so that an 1782 Disclosure application may be pursued does not amount to a breach of the collateral use restriction. This is particularly so in

circumstances where any application would be solely for the purposes of obtaining evidence for the proceedings and that the 1782 Application is being taken with the consent of this Tribunal. The Tribunal, as well as the Defendants, are encouraging the Claimants to take this application. So accordingly, providing documents to the US lawyers advising on the 1782 Application is not a breach of the collateral use restriction.

35. The Defendants appear to assert that if the Claimants provide the US lawyers with more documents and information than is necessary for the 1782 Application, that may be a breach of the restriction on the basis that they have gone beyond what is reasonably necessary to advance the present proceedings. The Tribunal considers that so long as the Claimants consider that they are providing information to their US lawyers for the purposes of advising on and pursuing the 1782 Application, the provision of such documents and information will not be a breach of the collateral use restriction. For the avoidance of doubt the Tribunal grants permission for such use.

(3) US lawyers' admission to the confidentiality ring

36. The Claimants seek an order pursuant to §4.2 of the CRO admitting five of their US legal advisers, who are lawyers within the law firm Selendy Gay PLLC, to the confidentiality ring in these proceedings so that they may review materials potentially relevant to the 1782 Application. They submit that the advisers cannot properly formulate and target the proposed 1782 Application without access to the relevant disclosed materials and that the Defendants' objections are bound up with their mistaken allegation of collateral use. The Claimants further contend that the Defendants' insistence on prior identification of specific documents is impractical and inappropriate, because it would require the Claimants to reveal to the Defendants which documents they consider relevant for the purpose of obtaining legal advice and advancing the contemplated 1782 Application. In the Claimants' submission, admission of the proposed US advisers to the CRO would provide adequate protection for any confidential material while enabling the 1782 Disclosure process to be pursued effectively.

37. The Defendants have refused to consent to the Claimants' US advisers being admitted to the CRO. The Defendants contend that admission of the Claimants' US lawyers should not be granted on a blanket basis where the Claimants have not identified the specific documents said to be required for the 1782 Application or explained why those documents are necessary. They submit that the confidentiality concerns are particularly acute because the material would potentially be used in foreign proceedings involving a third party and beyond the direct supervisory jurisdiction of the Tribunal. In those circumstances, the Defendants argue that the proper course is for the Claimants first to identify the documents they wish to provide to their US legal advisors, following which the Defendants would consider whether consent could appropriately be given.

38. The relevant legal principles regarding admission to confidentiality rings are set out in *Weis v Greater Manchester Combined Authority* [2025] CAT 27 (***Weis***) at §§21–30. The facts of *Weis* related to persons within the appellant's business being given access to the respondent's confidential documents for the purposes of the proceedings. The question here is whether or not the five lawyers for Selendy Gay PLLC should be added to the CRO for the sole purpose of advising and preparing the 1782 Application in these proceedings.

39. Selendy Gay PLLC is a serious law firm and they specialise in commercial litigation. They are not necessarily competition law experts; however they are officers of their own court and therefore have professional duties and obligations. As long as the five individuals named are members of a relevant bar in the US where they are subject to regulation and sign the CRO undertaking to keep material confidential, then this Tribunal is satisfied that the five individuals named should be added to the CRO.

40. As to the Defendants' request that they be kept informed of which specific documents the Claimants propose to provide to their US lawyers, the Tribunal does not consider that course is appropriate or necessary. Specifically, it raises issues of legal professional privilege. What really matters is what documents are proposed to be submitted to the US court or referred to in the 1782 Application.

41. It may well be that there are documents in the CRO that have been provided by the Defendants which are highly sensitive on a commercial basis and the Defendants have a legitimate interest in ensuring, so far as possible, that certain information does not enter the public domain as it could be used either by competitors or their customers to the Defendants' financial detriment. In those circumstances, the Tribunal will need to be satisfied that appropriate measures are taken to ensure that such documents do not enter the public domain.

42. Further, documents which are commercially sensitive should not be unnecessarily deployed in the 1782 Application. Accordingly, the Tribunal directs that prior to filing the 1782 Application, insofar as the Claimants wish to use any CRO documents disclosed by the Defendants, either by exhibiting them to the 1782 Application or by referring to their contents, those documents should be listed and the list provided to the Tribunal and the Defendants at the same time. The Defendants will then be able to comment on the documents, and the Tribunal will rule upon any disputes as to any particular document to be deployed in the 1782 Application.

43. Drawing the various threads together, the following points should be borne in mind, and the Tribunal will take them into consideration on any application to use documents disclosed in proceedings before the Tribunal that are subject to a collateral use restriction on use.

44. In principle it is not a breach of the collateral use restriction to use documents disclosed in Tribunal proceedings for the purposes of seeking advice on and using them for a 1782 Disclosure application where the sole objective is to use any documents and information provided in the same proceedings before the Tribunal in which the documents were disclosed. Where there is an element of doubt the matter can be placed before the Tribunal which can rule on the issue and provide consent as to use to the extent appropriate.

45. Proceedings before the Tribunal often involve highly confidential documents and information and these will generally be subject to additional restrictions, such as them being placed into a confidentiality ring, where access is limited to specified individuals who have provided express undertakings to the Tribunal.

46. Where a 1782 Disclosure application is contemplated, in practice, the intended applicant will need to take advice from US lawyers on the merits of any application and for pursuing such an application. For these purposes additional persons may need to be added to any confidentiality ring, as in this case. Further, the Tribunal and the party whose documents have been disclosed in the proceedings before the Tribunal may wish to be satisfied that material subject to a confidentiality ring does not unnecessarily enter into the public domain by being deployed in a 1782 Disclosure application.

47. Hence where a party is contemplating a 1782 Disclosure application, it is good practice and prudent to liaise with the party providing the disclosure and to place the matter before the Tribunal so that it can monitor the process to the extent necessary and ensure that confidential material subject to a confidentiality ring will continue to be protected insofar as necessary and appropriate. Consideration may have to be given as to whether it would be actually necessary to exhibit confidential documents in a 1782 Disclosure application and if so what protections there may be to ensure so far as is appropriate that they do not lose that status by getting into the public domain. The process adopted by the parties at this hearing is consistent with good practice and the various issues have been aired before the Tribunal in an appropriate manner.

C. CLAIMANTS' DISCLOSURE APPLICATIONS

(1) Further searches of Defendants' current employees' phones

48. An issue between the parties arises in relation to the devices, primarily either work or personal mobile phones, of the Defendants' current and former employees. At CMC2, the Tribunal made various orders in relation to such disclosure, including:

> "**(2) Priority disclosure**
>
> 7. In relation to the [Priority Disclosure Categories (**PDCs**)] set out in the Annex to the CMC1 Order:
>
> […]
>
> (b) For PDC 5(a)-(b):

> […]
>
> (ii) the Defendants are to make proportionate arrangements to undertake reasonable and proportionate searches of phone messenger apps of key employees still in the employ of the Defendants. As regards key employees no longer employed by the Defendants, they are to identify them by name, period of employment and position, and shall produce their relevant employment contracts (redacting pay) and any document or policy dealing with use and storage of data, mobile phones and messages, and what information or material that they should make available for inspection or delivery up during and upon termination of employment; and
>
> (iii) In the event of any disagreement regarding the searches to be undertaken pursuant to (i) or (ii), the parties may write to the Tribunal requesting that it resolve the dispute."

The Annex to the CMC1 Order as regards priority disclosure categories provides as follows:

> "5. Each Defendant shall give disclosure of:
>
> a. Communications (if any) between it and IHS in respect of the compilation of the IHS Index, including (without prejudice to the generality of the foregoing) any written records of interviews between it and IHS.
>
> b. Internal communications and documents prepared by it in connection with the preparation and provision of information to IHS."

49. The Defendants have responded to the above in their global disclosure statement dated 30 June 2026 (the **Defendants' Disclosure Statement**), which sets out in some detail the steps that were taken in relation to the disclosure categories ordered. In particular, the statement deals with data from devices, at §§71–74.

50. Three key employees were identified (Mr Kempf, Mr Luderer and Mr Quintus), all part of the sales and marketing team, which was the relevant team for dealing with the various indices. What has happened in relation to those individuals' devices is set out at §§71–72 of the Defendants' Disclosure Statement. It is rather unfortunate that despite both Mr Kempf and Mr Luderer being aware that data should be maintained, for one reason or another, their devices were wiped.

51. It does seem that there is a distinction between Mr Kempf, who himself did the wiping/deletion shortly after being told of the need to preserve the data, and Mr Luderer, where it seems the wiping was by way of the Defendants' IT staff, when it came to effectively reusing his phone and giving him a new device. In

relation to this issue, the Tribunal was taken to *Phones 4U Ltd (In Administration) v EE Ltd* [2020] EWHC 1921 (Ch) and in particular §§49–56 by Ms Ford KC, which state as follows:

> "49. It is well-known that where companies do engage in unlawful, collusive behaviour, the individuals involved sometimes use their personal devices and may deliberately avoid using their work email or work devices. It is notable that competition authorities engaged in investigating infringements of competition law are given express power to enter and search not only business premises but also, when authorised by a warrant from the court, domestic premises when they have reasonable grounds for suspecting that there will be relevant documents on such premises: Competition Act 1998, s. 28A. That the use of such a personal device is not mere speculation in the present case is shown by the fact that EE states that when its CEO, Mr Olaf Swantee, received anticompetitive approaches from Mr Ronan Dunne, the CEO of O2, as pleaded in EE's Defence at para 74, Mr Swantee made audio recordings of "all or part" of those conversations on his personal iPad (albeit that this iPad cannot now be found).
>
> […]
>
> "56. However, I recognise that as the devices are the personal property of the individuals and are likely to contain a lot of personal and private information, this interferes with the individuals' right of privacy under article 8 of the Convention. That does not preclude the court making an order for access to the devices and inspection, otherwise the competition authority's statutory right to seek such relief could never be exercised. But it means that the court must seek to ensure that the order interferes with the individuals' rights as little as possible. Further, any order must be proportionate. The requirement for proportionality indeed arises also by virtue of PD 31C and article 5(3) of the Damages Directive."

52. This is also an area that is dealt with in Matthews and Malek, *Disclosure* (6th ed., 2024), §5-98:

> "5-98 Data held by directors and employees on computers, phones and other devices can raise practical difficulties and whether data is in the control of the company they work or worked for is fact specific and can be complex. Where the devices themselves are the property of the company, then the information on them is within the control of the company, at least in relation to the confidential information of the company. Where an employee (or former employee) has information on his own devices which relate to the business of his employer, then such information ought, in principle, to be within the control of the employer. In practice many people work from home or send work related messages from their personal devices. The employer has a right to have such information to be provided to it both from current and former employees and so should be regarded as being in its control. This does not mean that the employer has a right to have the personal devices be provided to it or to have access to all the emails stored on them, irrespective of whether they are work related to personal. The employee may argue that his personal messages should not be reviewed or disclosed by the company, and it may be necessary to engage an independent IT expert to carry out searches. Where the devices are

> not owned by the company, then ordinarily the devices are not in the control of the company, but there may be a contract or data policy binding on the employee giving the company a right of access to such devices. This should bring the device or at least the company information on the device within the control of the company. The court has jurisdiction to direct a company party to direct their own custodians to voluntarily produce to IT consultants both their personal devices and the emails stored on them. The question of whether or not employees' personal devices are in the control of their employer company is a complex one. Often the issue is dealt with by an order that the party make a request to its employee or former employee to produce to the party all such records held on his personal devices or to produce the devices themselves.349 If the request is refused, it may be possible to seek a non-party disclosure order under CPR r.31.17, but this has its own limitations."

53. One has to be wary of how one deals with devices which could contain personal data, such as medical data, as disclosure of such devices can be particularly intrusive. But how one deals with the potential intrusiveness is that when personal devices in particular are to be reviewed, it is sensible to have an IT specialist that effectively acts as a barrier between the client side and the owner of the phone. Therefore, the only material that goes any further than the expert reviewing the device and its data, is potentially relevant material (e.g. not personal medical data), which will then go to the legal team for review.

54. The Claimants submit that the Defendants have adopted an unduly narrow approach in relation to the key employee devices which the Tribunal ordered the Defendants to identify at CMC2. The Defendants identified only individuals within the sales and marketing team, namely those involved in pricing, sales and dealings relating to the indices, and have not extended their identification exercise more broadly within the organisation.

55. The Defendants' approach was too narrow an interpretation of "key employees", as in cartel cases, it is not only persons submitting pricing information that can be involved in a cartel. That said, the Tribunal is satisfied that the three key employees identified and whose phones were searched are indeed key employees. However, for current purposes Mr Schellerer should be added as an additional key employee, albeit he was not a member of the marketing team, he does seem to be a central figure within the Defendants business.

56. The Tribunal is not presently inclined to order the identification of any further key employees for the purposes of searching their phones or other devices, to the extent that those devices have not already been searched. If a specific need or justification is identified in relation to any other individual, that should be raised either by the Defendants during the course of the disclosure process, should they identify someone whose phone they consider should be examined, or by way of an application by the Claimants. The 1782 Disclosure from the US may identify further relevant individuals as such disclosure is likely to produce contact lists and details of persons within the organisations of the alleged cartelists that were dealing with IHS during the Relevant Period. Any such application can be addressed at the next CMC.

57. As regards the Defendants' solicitors, the Tribunal is satisfied that they are a professional firm of solicitors who are well aware of their professional duties. If they have any reason to believe that any other individual was involved in the process of setting rates, developing those rates, or dealing with Argus and IHS, and they discover that to be the case, they will of course investigate further. If any relevant material comes to light, they will report it to the Tribunal in accordance with their continuing duty of disclosure, as well as their duty to provide any known adverse documents as they are identified.

58. As regards the two witnesses whose phones have been wiped, the Tribunal directs that they each provide a statement setting out the full circumstances. The statements should explain which applications and messaging platforms they used and describe their practices in relation to data backups, including any use of iCloud or other cloud storage solutions. They should both explain whether or not any action was taken to preserve any data such as contact lists before the phones were wiped. They should also state if they retained copies of their contact lists in any form. In addition, it is important that Mr Kempf be informed of his right against self-incrimination, such that he may decline to provide a statement or answer particular questions if doing so would tend to incriminate him in relation to a criminal offence. If that right is to be invoked, the Tribunal will need to be informed of the basis on which the privilege is claimed and the criminal offence in respect of which he asserts the privilege against self-incrimination.

59. Further, enquiries should be made as to the extent to which any data is available from the relevant service providers, such as Vodafone. Any such data should be obtained and disclosed for each key employee, as it would likely be useful to have that material available.

(2) Searches of Defendants' former employees' phones

60. The Defendants have identified four former employees as potentially relevant to the disclosure process, as set out at §73 of the Defendants' Disclosure Statement, which provides as follows:

> "**Phone messenger applications of key persons no longer in the employ of the Defendants and relevant policies**
>
> 73. In Tranche Two, the Defendants gave disclosure of seven employment contracts, for the following former employees who were identified as key employees by reason of their position in the Relevant Period:

Key ex-employee	*Period of employment*	*Position(s) in the Relevant Period*
Hans-Joachim Fox	November 1999 – March 2020	Commercial Manager (until October 2017) General Sales Manager (October 2017 – January 2020) Sales Manager (from January 2020)
Volker Wendt	September 1977 – October 2017	Senior Marketing Specialist
Kathrin Mühlschlegel	July 2018 – June 2021	Product Specialist (Commodity Chemicals)
Henriette Schreiber	October 2001 – June 2020	Sales Administrator (until February 2018) Supply Chain Manager (Order Management) (from February 2018)

61. The Tribunal is satisfied that the four individuals identified should be requested by the Defendants to make their personal mobile phones and data available for review and collection, and that that review should be carried out, once again, by an independent expert who can do the initial filter process in order to minimise the intrusiveness of the process.

62. Finally, the cost of the exercise carried out by the independent expert doing the initial filter should be paid by the Claimants. At the next CMC, the Tribunal can deal with whatever that cost is, as it is unfair to expect the Defendants to bear

that cost indefinitely. However, the Tribunal does not envisage it will be a particularly expensive endeavour in the context of these proceedings.

63. The filtering exercise to be carried out by the independent expert is plainly beneficial to all parties and is likely to encourage greater cooperation from former employees, as it will give them increased confidence in the process. In particular, they can be assured that sensitive personal information, such as their medical data, will not be reviewed by their former employers or lawyers on their behalf.

(3) Further disclosure pursuant to LRS category 1

64. At CMC2, the parties went through a Redfern Schedule process, which culminated in the CMC2 Order, which appends the final Redfern Schedules reflecting the Tribunal's rulings.[2]

65. As regards category 1 of the Claimants' Redfern Schedule, it reads as follows:

> "**Category / temporal scope**: Communications (if any) between the Defendants and Argus in respect of the compilation of the Argus Index (as defined in APOC, §41(c)) between 14 October 2019 and 14 October 2020, as well as internal communications and documents prepared by the Defendants in connection with the preparation and provision of information to Argus.
>
> The Defendants must additionally provide an information statement in the manner set out at paragraph 12 of the [CMC2] Order."

66. The Claimants initially sought these documents relating to communications with Argus in respect of the compilation of the Argus Index between July 2017 and February 2021. At CMC2 the Tribunal directed that this category should be considered incrementally, and ordered disclosure of one year alone, which was October 2019 to October 2020, to see what came out of that process and the burden on the Defendants it imposed. It was said by Mr Holmes KC, on behalf of the Defendants, that this category was going to involve a "massive trawl" and that it was going to be extremely burdensome.

[2] Note that the Claimants' and Defendants' Redfern Schedules were not made publicly available on the Tribunal website for confidentiality reasons.

67. The issue for the Tribunal at this CMC is whether, in the light of the previous exercise conducted, to extend the exercise to the whole of the Relevant Period, which is July 2017 to February 2021.

68. What was done by the Defendants is set out conveniently in the Defendants' Disclosure Statement at §§89–97. Paragraphs 92 and 93 are of particular interest and it seems that 1,119 documents from that one year were reviewed. However, only three documents were disclosed. It is said by the Defendants that this category does not advance matters in the case given so little came out of the process. The Claimants identify an email of 26 June 2020, which was one of the three documents disclosed under this category, as particularly relevant to their pleaded case. Having considered that email, the Tribunal considers it is relevant and is a sufficient reason along with the fact that it will not be a massive exercise to justify an expanded temporal search of this disclosure category.

69. In the present case, like many historical cartel cases, the evidence from any source is likely to be fragmented. The Defendants aver that an expanded search here will not uncover anything new, over and above what has been submitted to IHS, as the Defendants were giving the same information to both Argus and IHS. Whether or not that is correct, it may be that there are gaps in the data held by both IHS and Argus such that neither has a complete record of what they were being told by the Defendants. Further they may not have been requesting data for the same time period and what they were asking for and supplied may have been different. Therefore, information from both IHS and Argus is likely to be relevant to the issues in these proceedings and disclosure is reasonably necessary for this category.

70. The Argus and IHS methodology statements have been disclosed and are instructive. Like many indices, it is not a purely mechanical exercise, and it requires an element of skill and understanding of the different inputs and factors. That being said, one really key factor is the pricing information the major sellers of the product are giving and quoting.

71. The Tribunal appreciates only three documents came out of the initial disclosure exercise for this category and that the gathering of information from sellers was

primarily done by phone. However, in this day and age information can come from all sorts of directions and means, and if someone is involved in the setting or publishing of information as to market rates, they may on certain occasions send emails, for example, where someone is not able to catch another on the phone.

72. Therefore, the Tribunal is going to order further disclosure of this category in a slightly limited fashion. The category for further searches and review is not to cover all internal communications, rather only emails between the Defendants and Argus for the expanded temporal period (i.e. the Relevant Period). This will be a relatively limited exercise compared to the initial disclosure review for this category.

(4) Further disclosure pursuant to LRS category 6

73. This application relates to the approach the Defendants have adopted in relation to disclosure in respect of LRS category 6, which states as follows:

> "**Category**: Documents which concern any issues raised internally about the alleged conduct, or raising or in respect of concerns about the Defendants' pricing of caustic soda and its compliance (or otherwise) with applicable competition law.
>
> **Temporal Scope**: The Relevant Period."

74. The Claimants submit that the Defendants have failed to carry out any meaningful searches in respect of LRS category 6, having confined their review to annual compliance hotline schedules, it being the Defendants' view that any competition law concerns would necessarily have been raised through that channel. The Claimants say that there is not a rational basis for this assumption. They contend that at least some reasonable and proportionate searches should be undertaken across the proposed compliance repositories, and that objections based on burden or privilege have either not been substantiated or have previously been rejected by the Tribunal. The Claimants accordingly seek an order that the Defendants be required to undertake the following reasonable and proportionate searches and disclose any responsive documents by 17 September 2026:

> "Repositories: Email communications, Salesforce Chatter, and Westlake's European File server (and any other repository used by custodians who held roles in compliance in the Relevant Period).
>
> Search terms: caustic; soda; sodium hydr*; soude; caustique; NaOH; csl; lye; *lauge*; *natron*; competit*; Wettbewerb* Ineos; Inovyn; Dow; Covestro; Nobian; Nouryon; Akzo*; preis*; pric*; discount; abschlag; rabatt; bonus; rebate; change; veränderung; cost*; kost*; cap; floor; discount; suppl*; demand; compl*; antitrust; training; regulat*; cartel; collu*; kollus*; fixing; coordination; abstimmung; *absprache; rigging; *betrug; manipulation; report; memo*; directive; briefing; conduct; note; minutes.
>
> Custodians: The Claimants request that the Defendants confirm the relevant custodians who held roles in compliance in the Relevant Period and search documents belonging to those custodians."

75. The Defendants oppose the request and submit that adequate and thorough searches have already been conducted, including searches of the dedicated compliance hotline records, which they consider the most likely source of any responsive documents. Further, the Defendants contend that the Claimants' request for searches is speculative and amounts to a fishing expedition, particularly given that no documents evidencing internal concerns have been identified and no proper basis has been shown for believing that further searches would yield relevant material.

76. The Tribunal considers that this is a relevant and important category of documents which has been searched for to date using an overly narrow search base of the compliance hotline records. Whilst some compliance concerns can be expected to go through that route, experience shows that these sorts of issues may be raised on a number of levels and ways. The Defendants should undertake a reasonable and proportionate search for LRS category 6 documents including the searches set out at Annex 1 to the Claimants' Application.

(5) Further information requests

(a) IHS and Argus Information Statement

77. The Claimants' only remaining disputed request regarding the IHS and Argus Submissions Information Statement produced by the Defendants on 29 May 2026 pursuant to §12 of the CMC2 Order (the **Defendants' Information Statement**) concerns the Defendants' decision to stop providing forecast

pricing information to IHS and Argus in late 2020 or early 2021. The basis for this request is found in §16 of the Defendants' Information Statement, which states as follows:

> "In or around late 2020 or early 2021, there was a change to the information that was provided to IHS and Argus. The Sales & Marketing Team stopped providing the forecast range of prices or price movements. Rather, the pricing information given to both IHS and Argus was confined to the aggregate price ranges or price increases achieved for freely-negotiated contracts in the previous quarter."

78. In response, the Claimants have requested the Defendants:

> "Please explain:
>
> (a) Why the Defendants stopped providing the forecast range of prices or price movements to (i) IHS and (ii) Argus;
>
> (b) When precisely the Defendants stopped providing such forecasts to (i) IHS and (ii) Argus."

79. The Claimants contend that the reasons for, and precise timing of, the change are potentially significant given its temporal overlap with both the end of the alleged Cartel Period and the introduction of the New IHS Index. Accordingly, the Claimants seek a response now, rather than deferring the issue to witness evidence, so that any consequential disclosure can be addressed within the current disclosure phase.

80. The Defendants oppose the request and contend that the reasons for the change in approach to submissions, insofar as relevant, are matters for factual witness evidence in due course.

81. The Tribunal considers that this is a reasonable request for further information and the questions should be answered. The Defendants are either to provide the answers at this stage or within their witness statements exchanged for trial. If the Defendants decide to provide the response by witness statements exchanged for trial, they should indicate that now, in which case the Claimants have liberty to renew their request after witness statements have been exchanged.

(b) Ethylene Settlement Decision

82. The Claimants seek an order requiring the Defendants to reply to certain requests for information relating to the Commission Settlement Decision *Case AT.40410 – Ethylene* dated 14 July 2020 (the **Ethylene Decision**). Specifically, the Claimants' requests relate to the Defendants' participation in the ethylene cartel, and are as follows:

> "<u>In relation to Recitals 40, 44 and 70</u>
>
> 3. Recital 40 states that the parties "*coordinated their future behaviour through bilateral contacts*[23] *relating to the MCP, to their future market conduct during MCP 'settlement' negotiations with ethylene sellers and to views of the market trends; all prior to and during MCP 'settlement' negotiations*". Footnote 23 is redacted.
>
> 4. Recital 44 states that "*The bilateral contacts occurred via […]*[29]*, […]*[30]*, […]*[31] *and […]*[32]*. […]*[33]". Footnotes 29-33 are redacted.
>
> 5. Recital 70 states that "*The parties to the conduct refrained from determining independently the commercial policy that they intended to adopt for MCP but instead coordinated their behaviour related to MCP and MCP settlement negotiations through direct bilateral contacts*[57] *and exchanged commercially sensitive information, such as information on future market conduct during MCP settlement negotiations with ethylene sellers, as well as interpretation of market trends.*[58] " Footnote 57 is redacted.
>
> 6. It is not clear from the non-confidential version of the decision whether the redactions to Recital 44, or footnotes 23 or 29-33, relate to the names of individuals (or the companies /departments/divisions in which they worked), to methods of communication used for the bilateral contacts, or some other information. Please accordingly:
>
> (a) Provide a high-level explanation of the nature of each of the redactions (for example, name of individual, method of communication, etc).
>
> (b) Provide the redacted information insofar as it concerns:
>
> (i) The names, job descriptions or conduct of individuals who represent or at any point represented the Defendants (whether formally employed by them or otherwise);
>
> (ii) The names, descriptions or conduct of particular companies/departments/divisions that exist or at any point existed within the Defendants or their agents; or
>
> (iii) The types of bilateral contacts that the Defendants' representatives engaged in (in particular whether they included communications via mobile messenger/SMS apps including WhatsApp).
>
> (c) Confirm whether any individuals or companies/departments/divisions so identified have or had at any stage any involvement in the Defendants'

business activities relating to caustic soda (including making submissions to IHS/Argus regarding their respective caustic soda indices).

<u>In relation to Recital 60</u>

7. Recital 62 states: "*The conduct followed a consistent pattern over the entire duration of each undertaking´s participation in the infringement attempting to influence the MCP and was not limited to isolated or sporadic occurrences. The contacts between the parties were of a continuous nature, taking place in the same or similar manner in the context of the MCP settlement process, involving the same individuals (or their successors as the case may be) and covering identical or largely similar topics related to MCP and MCP settlement negotiation strategy. ORBIA was aware of its external consultant being involved in the infringement and it provided evidence to that effect. The individual elements of the infringement were in pursuit of the single anti-competitive objective described in recital (39), which remained the same throughout the whole period of the infringement*".

8. In relation to the "*continuous*" contacts between the parties "*involving the same individuals (or their successors as the case may be)*", please confirm:

(a) Whether the "*individuals*" or "*successors*" referred to include any individuals who represent or at any point represented the Defendants (whether formally employed by them or otherwise);

(b) If yes, provide a description of the names, job descriptions and conduct of such individuals."

83. The Claimants maintain their requests for information identifying the individuals or departments involved in the admitted ethylene cartel infringement and the means of communication used in connection with it. They contend that the requests are narrow and can be answered without recourse to third parties. The Claimants aver that the information sought may assist in identifying further custodians, repositories, or channels of communication relevant to disclosure in these proceedings and therefore represents a legitimate line of enquiry rather than a fishing expedition. They further argued that the Defendants' reliance on *Evans v Barclays Bank* [2025] UKSC 48 (***Evans***) is misplaced, since the Supreme Court recognised at §159 that findings in another decision may be relied upon for the purpose of identifying *evidence* that might reasonably be expected to be available at trial, even if those findings are not themselves admissible as evidence of the facts found.

84. The Defendants submit that the Ethylene Decision is wholly unrelated to the issues arising in these proceedings and that information concerning that infringement is therefore irrelevant. They emphasise that the Ethylene Decision

concerned a different product (ethylene gas), time period (26 December 2011 to 29 March 2017), form of cartel (buyers cartel), and pricing mechanism (monthly contract price) from those alleged in these proceedings. In particular, they contend that the ethylene infringement involved a *buyers'* cartel conducted by procurement personnel, whereas the present allegations concern the *sale* of caustic soda and thus entirely different people. The Defendants further argue that information about the persons involved in, or methods used for, the ethylene infringement could not assist in identifying relevant evidence in this case, especially given the disclosure already provided regarding communication methods.

85. *Evans* does not amount to a restriction on using a decision for the purposes of gathering and identifying relevant evidence for the purposes of proceedings before a court or tribunal. If persons involved in the infringement in the Ethylene Decision were also involved with the Defendants in the sale of caustic soda and were somehow involved in pricing or submitting pricing information to IHS or Argus, then the Claimants should be provided with this information. Accordingly, the Tribunal directs that the Defendants provide the information requested in 6(c) and 8 of the extract above.

(c) Further searches of Mr Quintus's phone messages

86. The Tribunal considers that a manual review should be undertaken of Mr Quintus's phone messages given the limited number of messages for the Relevant Period and the risk of missing relevant messages inherent in the keyword search.

(d) Identification of key employees

87. There is one minor clarification outstanding in relation to key employees. The Defendants should confirm whether all current employees holding the same job titles and/or roles as the four individuals identified as key ex-employees were identified as key employees for the purposes of searches of phone messenger apps and if not, why they were not so identified.

(e) LRS categories 4 and 5

88. In relation to LRS categories 4 and 5, these are set out as follows:

> [**Category 4**] "**Category**: Communications between the Defendants (or any of them) and any of Dow, Covestro, Nobian and/or Ineos regarding information prepared for, submitted to (or may be submitted to) and/or received from IHS, including notes and any other internal records of the above, such as recordings of calls and internal documents referring to the same communications.
>
> **Temporal Scope**: The Relevant Period.
>
> **Repositories**: Phone Messenger Apps must be included as a relevant search repository in relation to this category. The Defendants shall make proportionate arrangements to undertake reasonable and proportionate searches the messenger apps of key employees still employed by the Defendants. As regards former employees, see the Order and their position may be considered at CMC3 after the information and documents ordered in the Order has been provided. There be liberty to apply by letter to the Tribunal for it to resolve any disputes between the parties regarding the searches to be undertaken."
>
> [**Category 5**] "**Category**: Communications between the Defendants (or any of them) and any of Dow, Covestro, Nobian and/or Ineos (and internal records of the same including in hard copy and/or electronic form as applicable) regarding any aspect of: caustic soda supply; demand; pricing and/or contract negotiations with any caustic soda purchasers.
>
> **Temporal Scope**: The Relevant Period.
>
> **Repositories**: Phone Messenger Apps must be included as a relevant search repository in relation to this category. The Defendants shall make proportionate arrangements to undertake reasonable and proportionate searches the messenger apps of key employees. The parties shall seek to agree a proportionate approach to searches of these repositories, with the Tribunal being asked to resolve any disputes between the parties regarding the searches to be undertaken.
>
> **Search terms**: The Defendants to include "Argus" as a search term, combined with other appropriate search terms to narrow down the number of results to proportionate bounds."

89. The Claimants are concerned that some emails falling within these categories were extracted but not manually reviewed. Although not all emails were manually reviewed, the Defendants applied a search term that included "caustic soda". Only 494 documents were extracted, or 855 including family documents. A significant proportion of these documents were manually reviewed, but not all of them.

90. The manual review of the remaining extracted documents will not be expensive or unduly burdensome. The Tribunal therefore orders that the remaining documents be manually reviewed. At the time of CMC2 it was envisaged that there would be substantially more documents in these categories, however that has not proven to be the case.

D. DEFENDANTS' DISCLOSURE APPLICATIONS

91. At CMC2, the Defendants sought disclosure under category 15 of the Defendants' Redfern Schedule (**DRS**), which provides as follows:

> [**Category 15**] "**Category**: Documents recording how the Claimants set their downstream prices for any product in which caustic soda was used, during the Relevant Period and the Alleged Run Off Period, including but not limited to:
>
> a. documents relating to how caustic soda prices and changes in caustic soda prices are taken into account in the price setting of the Claimants' products;
>
> b. documents explaining how prices for each product are set, including any pricing policies, pricing manuals, pricing guideline and other similar internal documents;
>
> c. documents setting out or considering margin targets, revenue targets or sales targets for the Claimant's products and whether those targets were reached;
>
> d. Board and Committee papers, including meeting minutes, in which pricing for the relevant products were considered and/or approved; and
>
> e. documents recording any proposed or implemented changes in prices, and the reason for those changes.
>
> **Temporal scope**: Broad Temporal Period [1 January 2016 to 29 February 2024]."

92. The Tribunal did not order category 15 and instead ordered that a pricing statement be prepared: CMC2 Order at §10. A statement has been produced by Mr Wirth, dated 10 April 2026 (the **Pricing Statement**). Mr Wirth is Senior Vice President Global Legal, IP & Compliance at Lenzing AG, and his Pricing Statement provides a great deal of useful information which will be helpful to the experts in considering pass-on. In addition to giving the Pricing Statement, the Tribunal directed that the documents which were relied upon for the purpose of preparing the Pricing Statement be provided. Therefore, a considerable number of documents should have been provided with the Pricing Statement.

93. The Defendants were not content with the Claimants' Pricing Statement and sought effectively to re-open category 15.

94. In response to the Defendants' application, the Claimants filed the Fourth Witness Statement of Ms Inge Lucy Forster dated 26 June 2026 (**Forster 4**). In Forster 4, the Claimants materially opposed the Defendants' application, however they did indicate what disclosure they would be prepared to provide, which is set out in the annex to Forster 4. The Tribunal considers that the Claimants' approach is constructive and sensible. For the purposes of CMC3, the Tribunal's focus is on the additional disclosure, beyond what the Claimants are willing to provide, which the Defendants are seeking.

(1) Requests regarding pass-on and financing losses

95. The Defendants submit that further disclosure is now required from the Claimants in relation to both pass-on and financing losses, as the Pricing Statement, and a separate Financing Statement dated 10 April 2026 provided pursuant to §11 of the CMC2 Order, leave significant evidential gaps. They contend that the material they now seek is targeted, necessary and supported by their expert economists' views. In relation to pass-on, the Defendants seek, *inter alia*, disclosure concerning margin targets, pricing targets and assessments, internal price lists, certain negotiation materials, and documents showing how caustic soda costs were reflected in downstream pricing decisions. They argue that such material is required to properly assess whether any overcharge was passed on and rely on the fact that the Claimants' Pricing Statement is brief and contains significant gaps.

96. As regards financing losses, in the Financing Statement the Claimants identify various loans which, during the Relevant Period, it used to finance its business. The Defendants now seek documents explaining the purpose of the loans identified by the Claimants and any redemption penalties or relevant covenants, contending that this information is necessary to determine whether the claimed financing losses would in fact have arisen in the counterfactual scenario absent any overcharge. They reject the Claimants' suggestion that the material is

unavailable without searches being undertaken and maintain that the remaining requests are reasonable, proportionate and central to the quantification of loss.

97. The Claimants oppose the Defendants' application, principally on case management and proportionality grounds, submitting that no further such disclosure should be given at this stage of the proceedings. They submit that pass on and financing losses are quantum issues whereas the current focus of the proceedings is liability-related disclosure and the pursuit of non-party disclosure, including the proposed 1782 Application. They further aver that requiring further quantum disclosure at this stage would divert substantial resources away from the more pressing liability workstreams and create an unnecessary parallel disclosure exercise. The Claimants further contend that the Defendants' requests are excessively broad and disproportionate, particularly in relation to pricing information, and amount largely to a revival of earlier requests rather than the targeted disclosure envisaged by the Tribunal in the CMC2 Order. They emphasise that extensive pass-on disclosure has already been provided, together with a detailed Pricing Statement explaining how downstream prices were set, and argue that much of the further material sought is duplicative or of limited relevance.

98. As an alternative position, the Claimants propose a more limited disclosure exercise, maintaining that their proposed categories would provide all information reasonably necessary for expert analysis. They note that their pass on and financing experts, Ms Bagci and Ms Lim respectively, have confirmed that the Claimants' alternative proposals would in principle be sufficient for the expert analyses required, and submit that any further disclosure ordered should be confined to those narrower and more proportionate categories.

99. At CMC3, submissions were made by reference to rows of the table contained in the Annex to Forster 4 (the **Forster 4 Annex**). Several aspects of the Defendants' application for further disclosure were determined during CMC3, specifically rows 1–5 of the Forster 4 Annex. Following CMC3, the Chair invited the parties to file short further submissions on any remaining issues to be determined on the papers.

(a) Temporal scope

100. There is a dispute between the parties on temporal scope. The nature of that dispute is set out in a letter dated 5 July 2026 by the Defendants' solicitors, which relevantly states as follows:

> "Your Email states that "*the Defendants' Application is not made in respect of the Broad Temporal Period; it is confined to the Relevant Period and Alleged Run-off Period*". This is incorrect. The Application renews the Defendants request for disclosure of Westlake's Redfern Schedule Category ("**WRSC**") 15 (except for sub-category (b)) because this information is addressed in the Pricing Statement). Whilst WRSC 15 concerns "*Documents recording <u>how the Claimants set their downstream prices</u> for any product in which caustic soda was used, <u>during the Relevant Period and the Alleged Run Off Period</u>", the temporal scope for the category is 1 July 2015 – 29 February 2024* (the "**Broad Temporal Period**") and this has already been ordered by the Tribunal (see Annex 3, row 15 of the CMC2 Order).
>
> Accordingly, whilst the category focuses on price-setting in the Relevant/Run-Off Period, to assess the issue of pass-on it is necessary to look at the position prior to the alleged cartel and that is precisely why the temporal scope of WRSC 15 is the Broad Temporal Period, which is what the Tribunal has ordered. The Defendants further note that the Claimants have accepted that disclosure of documents from outside the Relevant Period and Alleged Run Off Period is relevant to this category, as they have provided documents from this period in support of the Pricing Statement (as referred to at paragraphs 5(h) and (i) of the Pricing Statement)."

101. Quite clearly, we should be looking at the "Broad Temporal Period" for the purposes of assessing pass-on.

(b) Timing of disclosure

102. There is also an issue as to when the pass on and financing disclosure/information ordered, or agreed as between the parties, should be provided. The Defendants have applied for all of the pass on and financing disclosure to be given by 31 August 2026. The Claimants have agreed to respond to all of the Defendants' requests in relation to financing losses by that date. However, in relation to the pass on disclosure, the Claimants ask for the period until 30 October 2026.

103. The Defendants object to the Claimants having four months to provide the pass on disclosure being ordered.

104. The Tribunal considers that given the 1782 Disclosure procedure going forward and that trial will not be in 2027, it is appropriate to give the Claimants until 30 October 2026 to provide the disclosure.

(c) Rows 1, 3 and 4: Cellulose fibres and dissolving wood pulp sales

105. The Defendants' request contained in row 1 provides as follows:

> [**Row 1**] "Information on how (changes in) caustic soda prices were taken into account in the price setting of Lenzing's downstream products (category 15(a)).
>
> Board and committee papers, including meeting minutes, in which pricing for Lenzing's downstream products were considered and/or approved (category 15(d)).
>
> Proposed and/or implemented changes in prices of Lenzing's downstream products and the reasons for those changes (category 15(e))."

106. The Claimants submit that dissolving wood pulp (**DWP**) was only sold externally on rare occasions by the First Claimant, Lenzing AG. On that basis, it is asserted that it is not proportionate to order disclosure of documents in relation to external sale of DWP.

107. The fact is that it does form part of the claim, and if there has been actual pass on, then the claim should be reduced. Either there is going to be no claim in respect of this portion of the Defendants' sales, in which case disclosure is not required, or if it is being pursued, then disclosure is required. Therefore, given that the pleadings have not been amended as such and the scope of the claim has not been changed, the Tribunal orders that the further documents sought in relation to this request be provided.

108. Further, the Defendants' requests contained in rows 3 and 4 provide as follows:

> [**Row 3**] "How Lenzing accounts for the cost of caustic soda when negotiating DWP prices with external customers, which is necessary to assess the extent to which Lenzing would have likely negotiated a lower price for DWP with external customers absent any alleged overcharge."
>
> [**Row 4**] "How the arm's length internal price of DWP is determined for sales between Lenzing group entities, and to what extent this price reflects the underlying costs of caustic soda for the production of DWP, which is necessary to assess the extent to which "arm's length" implies a cost-plus internal price

> between Lenzing entities which means that the upstream cost of caustic soda is a direct, variable cost for the cellulose fibre production."

109. The order made in relation to row 1 applies, *mutatis mutandis* to these requests. The Claimants accept that this should be the case.

(d) Row 2: Margin targets

110. The Defendants' request contained in row 2 provides as follows:

> [**Row 2**] "Margin targets or sales targets for Lenzing's downstream products and whether those targets were reached (category 15(c))."

111. The issue between the parties is whether any searches should be undertaken in relation to margin targets. In relation to sales targets, the Claimants have already agreed to make enquiries of relevant individuals as to whether they hold any relevant documents and, if so, where those documents may be located. No equivalent proposal was initially made in respect of margin target information.

112. It is now accepted that it would be appropriate for the enquiries proposed in relation to sales targets be extended to margin target information.

(e) Row 5: Documents setting out negotiations

113. The Defendants' request contained in row 5 provides as follows:

> [**Row 5**] "Fixed term contracts (which are to be disclosed under category 16 of Westlake's Redfern Schedule) and documents setting out the negotiation of these contracts, which is necessary to understand the basis of the spot prices that are negotiated individually with customers on a monthly or quarterly basis."

114. The Defendants acknowledge that the first part of this request is duplicative of the Claimants' disclosure response to DRS category 16, which was provided on 16 June 2026. According to the Claimants, it is for the Defendants to review that disclosure, after which they can come back to the Tribunal if they consider that there is any further material that they require.

115. As regards the negotiation documents, it is clearly going to be a big task and perhaps unnecessary and unfruitful to go through all the negotiation documents in relation to 2,226 sales.

116. The Tribunal directs that the Defendants review the contracts already disclosed and identify 25 contracts in respect of which they seek disclosure of the related negotiation documents. The Claimants shall provide negotiation documents in respect of the 25 contracts identified by the Defendants. The matter can then be revisited at the next CMC, when a decision can be made as to whether it is necessary to consider the remaining contracts.

(f) Row 8: Assessment of pricing targets

117. The Defendants' request contained in row 8 provides as follows:

> [**Row 8**] "Assessments of pricing targets (as described at paragraphs 38-39 of the Pricing Statement), including the internal price lists, market intelligence, target minimum prices, and gaps between target and achieved prices, to understand whether these assessments were based on cost information and/or historical cost-based pricing, which is necessary to understand whether these assessments were based on cost information and/or historical cost-based pricing."

118. The Claimants oppose the request. They submit that the request is duplicative of disclosure already ordered by the Tribunal. In particular, they contend that assessments of pricing targets would already be captured by DRS categories 15(a), (d) and (e), which concern documents relating to how downstream prices were set for products using caustic soda, and by DRS category 14, which concerns disclosure of documents concerning why sales or revenue targets and projections were, or were not, achieved.

119. The Defendants submit that Lenzing's assessments of pricing targets are relevant and necessary to the issue of pass-on because they may reveal whether pricing targets were based on cost information, including the cost of caustic soda. They rely on Mr Parker's evidence that documents such as internal price lists, market intelligence, target minimum prices and analyses of the gap between target and achieved prices are required to assess the relationship between costs, prices and profitability. The Defendants contend that pricing

targets complement, rather than duplicate, the disclosure of margin targets already ordered. They therefore submit that the request is focused, and proportionate, and invite the Tribunal to direct disclosure *in principle* under one or other of the categories of disclosure to be provided by the Claimants.

120. So far as is necessary and appropriate for disclosure, the information and documents provided under DRS categories 14 and 15(a), (d) and (e) should capture what should be disclosed. It is not necessary to make a further order at this stage, but there shall be liberty to apply at a later stage.

(g) Row 9: By-products

121. The Defendants' request contained in row 9 provides as follows:

> [**Row 9**] "How the cost of caustic soda was taken into account in the pricing of by-products are priced, which is necessary to assess the extent to which the price of by-products reflected the underlying costs of production."

122. The Claimants oppose the request. They submit that the request is disproportionate and unnecessary, given that the core of their business is the sale of cellulose fibres and that the relevant by-products each accounted for only a very small proportion of overall sales revenue during the Relevant Period. The Claimants further contend that providing such disclosure would involve a substantial exercise requiring engagement with additional business divisions and custodians. They also submit that any potential pass on issue could be addressed through more proportionate means, specifically, the Claimants are willing to agree that the rate of pass on which the Tribunal determines should apply to downstream sales of cellulose fibres (if any) should also apply to by-products.

123. The Defendants submit that the requested disclosure is necessary to assess the extent to which the price of by-products reflected the underlying costs of production. They note that the Claimants' Pricing Statement acknowledges that by-products generated through the production process were sold commercially to third parties and contend that, because the Claimants have included losses relating to caustic soda used in producing those by-products within their claim, the Defendants are entitled to test whether those losses were passed on (see the

Tribunal's discussion above at §91). The Defendants further rely on the Tribunal's approach to analogous disclosure concerning external sales of DWP (request 3) and submit that this request is focused and proportionate, particularly given by-products generated sales revenues of up to 3.65% of total sales revenue per year (individually) and therefore cannot be regarded as immaterial.

124. The Tribunal considers that this information should be provided in general terms and this can be done by way of a further pricing statement which seeks to address the type of information sought. There shall be liberty to apply after the further pricing statement has been provided.

(h) Row 12: Purpose and reason for loans

125. The Defendants' request contained in row 12 provides as follows:

> [**Row 12**] "What was the purpose and reason for each loan identified in [Confidential] Annex 1 of the Financing Statement? This is necessary for Mr Parker to assess whether Lenzing would have still taken out the loan in the counterfactual."

126. The Claimants oppose the request on the basis that they have already disclosed the relevant loan documentation and submit that, where a loan's purpose is recorded, it can be identified from the documents already disclosed. So far as the remaining loans are concerned, they were taken out for general business purposes and, to the best of the Claimants' understanding, no further material information exists as to their purpose.

127. The Defendants submit that information concerning the purpose of the loans is relevant to the counterfactual financing analysis and should be disclosed. They contend that the Claimants' assertion that no further information is available is inadequate without reasonable searches having been undertaken and argue that proportionate searches should be carried out to identify any documents explaining the reasons for the borrowing.

128. The Tribunal considers that the Claimants should provide a table listing against each of the loans its purpose. The description does not need to be detailed.

(i) Row 15: The cash pool

129. The Defendants' request contained in row 15 provides as follows:

> [**Row 15**] "Which Lenzing entities (including non-Claimant entities) were inside the cash pool and which (including any foreign entities) were outside the cash pool? Please provide a breakdown of the cash deposits that were held by each entity. This is necessary for Mr Parker to assess the cash holdings of the relevant Lenzing entity."

130. The Claimants agree to identify which Lenzing entities (including non-Claimant entities) participated in the cash pool, and which did not. However, they oppose providing a breakdown of the cash deposits held by each entity on the basis that such balances fluctuated daily and that compiling the information across multiple entities over a nine-year period would be disproportionately burdensome. Finally, they say the information is unnecessary for an analysis of the Claimants' financing losses and is not needed for the expert analysis.

131. The Defendants submit that information concerning the cash deposits held by each entity within the cash pool is relevant to assessing whether the relevant entities were cash-constrained and therefore whether they would have incurred the same debts in the counterfactual. They contend that the request is focused and is necessary for the expert analysis of the financing loss claim.

132. The Tribunal considers that in addition to identifying which Lenzing entities participated in the cash pool, the Claimants should in relation to each entity provide a breakdown of the cash deposits on a three-monthly basis across the Relevant Period. The Claimants do not need to provide daily balances.

(2) Claimants' use of technology assisted review

133. Finally, there is an issue between the parties as to the Claimants' use of technology assisted review **(TAR)** in its document review process. The Claimants' Third Disclosure Statement at §§7–10 sets out its approach to TAR, see in particular §§8–9:

> "8. TAR utilised a Support Vector Machine (SVM) algorithm to learn from reviewers' coding decisions. Each document in the TAR review was assigned a rank from 0 – 100, based on likely relevancy. Reviewers coded documents,

> including Relevant and Not Relevant. As reviewers code, the TAR model began to discern what made a document Relevant or Not Relevant and promoted the most likely Relevant documents to reviewers.
>
> 9. The TAR model matured with 19,894 of the 33,124 documents remaining (i.e., it understood Relevant and Not Relevant) and at this point first level review was stopped to run an Elusion test. This is a review of a statistical sample of those documents considered likely Not Relevant by TAR to determine the Elusion rate (i.e., the likely number of relevant documents in the 19,894 documents remaining). Every document in TAR has a rank from 0 – 100, and the cut off rank used for the Elusion test was 50. This means every document with a Rank less than 50 was randomly sampled using the following approach: Confidence Level 95% with a Margin of Error of +/- 3% (which means that 95% of the time the results are going to be within + OR – 3%). Sampling with this confidence level and margin of error typically results in circa 1,000 documents to review in the Elusion test (<u>in this case, 1,075</u>). The Elusion test was completed, resulting in an Elusion rate of 1% (meaning, of the 19,894 uncoded documents, <u>only roughly 198 documents were likely to be relevant</u>). Continuing to review nearly 20,000 documents to locate approximately 198 relevant documents was disproportionate, and therefore first level review concluded in reliance on the TAR model."
>
> (Emphasis added)

The statement explains that 19,894 documents (of a total of 33,124 responsive documents) were not reviewed beyond an initial sift by TAR.

134. The Defendants submit that this approach is entirely unsatisfactory and propose that: (a) the 198 documents referenced above be identified and then subject to manual review and disclosed as appropriate; and (b) the Claimants cross-check the accuracy of the TAR review of the 19,894 documents by manual review of the 1,075 sample set to check and verify the amount of relevant material likely to be included within this dataset.

135. The Tribunal directs that the Claimants manually review the 198 documents which have been identified as potentially relevant. Further, the Claimants are to disclose those documents which are found to be relevant to the extent that the documents so identified have not already been disclosed. Once this has been undertaken, there is liberty to apply in respect of the TAR exercise in relation to the 1,075 sample set. The Tribunal would like to see the result of the 198 document manual search before determining whether or not the 1,075 sample set should also be manually reviewed. In principle the Tribunal is satisfied that the Claimants are correct to follow a TAR exercise as it can substantially reduce costs.

E. CONFIDENTIALITY

(1) De-designation Application

136. The Claimants seek the de-designation of certain documents disclosed by the Defendants from confidential to non-confidential status pursuant to §6.1(C) of the CRO (the **De-designation Application**). They contend that the documents are more than five years old and that their disclosure is unlikely to harm any legitimate business interests of the Defendants. The Claimants further submit that the Defendants have failed to discharge the burden of justifying continued confidentiality over the relevant documents, criticising the Defendants' evidence of Mr Luderer as being generic and unsupported by document-specific analysis. They also emphasise that they do not seek the de-designation of any genuinely third-party confidential information, which could instead be protected by targeted redactions.

137. The Defendants oppose the De-designation Application on the basis that the documents contain highly sensitive commercial information concerning pricing, profitability, customer relationships and negotiation strategy, including material relating to the Claimants and Defendants' ongoing commercial relationship. They submit that, notwithstanding the age of the documents exceeding five years, the underlying commercial processes, pricing considerations and strategic approaches remain relevant today. The Defendants therefore maintain that wider disclosure would significantly prejudice their legitimate business interests and satisfies the confidentiality protections contemplated by the CRO.

138. In *Various Claimants v Mercedes-Benz* [2025] EWHC 1931 (KB) at §23 Constable J referred to an earlier review by Cockerill J (as she then was) of the law on confidentiality in *Cavallari v Mercedes-Benz* [2024] EWHC 190 (KB) at §§20–50 and summarised the relevant principles as follows:

> "23. (1) the burden lies on those seeking to displace the application of the open justice principle to produce clear and cogent evidence to explain why that departure is justified. The risk of damage caused to the affected party must be real;
>
> (2) the claim to confidentiality needs to be focussed by reference to the precise contents of documents. The Court will not readily accept that the entire

contents of a given document or a whole class of documents are confidential. The Court will expect a designation of confidential material within such documents to be very carefully considered, and for it to be limited to that which is truly required;

(3) the information must be such that a reasonable person in the position of the parties would regard it as confidential, and reasonableness, usage and practices in the relevant sector (for example, industrial or professional) are to be taken into account. There must be some value to the party claiming confidentiality (not necessarily commercial) in the information being treated as confidential;

(4) the subjective view of the owner regarding confidentiality is not decisive;

(5) material which is commercially sensitive to the extent that it is confidential may cease to be confidential because the value of the information is lost by the passage of time and technological progress;

(6) in this respect, regard may be had to a five-year rule of thumb by way of rebuttable presumption: "information which was secret or confidential, but which is over five years old must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes essential elements of its commercial position or that of interested third parties" *Evonik Degussa GmbH v European Commission* [2017] 4 CMLR 1149 at [64] (ECJ). Whilst originating in an EU context, this simply reflects the application of a broadly sound proposition that the older the information in question is, the harder it will be to substantiate its continuing utility or value (even if secret);

(7) information is generally no longer regarded as confidential once it has entered the public domain. […]"

139. It is not appropriate in an open ruling to detail the specific confidential documents and the arguments which are being canvassed by the parties.

140. There are mechanisms for de-designation of documents within the CRO, which provide as follows:

"6. CHALLENGE TO DESIGNATION OF DOCUMENTS/INFORMATION

6.1 A Party (the "Challenging Party") may request that the Disclosing Party amend the designation of a document/information as Confidential Information in accordance with the terms below:

(A) that Challenging Party must provide a written request to the Disclosing Party (copied to the other Parties) specifying the following:

(i) the relevant Confidential Information;

(ii) the designation the Challenging Party believes is appropriate; and

(iii) why it is reasonable and necessary for the designation of the Confidential Information to be amended;

(B) the Disclosing Party may consent in writing to the amendment of the designation of Confidential Information, with such consent not to be unreasonably withheld and, in any event, a response should be provided within seven (7) working days of having initially received the written request referred to at paragraph 6.1(A) above; and

(C) should the consent referred to in paragraph 6.1(B) above not be given, the Challenging Party may apply to the Tribunal for determination of whether or not the document (or parts of it) qualifies as Confidential Information, provided that notice is given of that application to the other Parties. Any such application must be made as soon as reasonably practicable. Save for where there are exceptional reasons that justify a hearing, applications under this paragraph 6.1(C) are to be dealt with on the papers. For the avoidance of doubt, the confidentiality designation of a document in respect of which an application is made shall continue until such time as the challenge is determined by the Tribunal.

6.2 Should the confidentiality of any document added to the bundle during any hearing be in issue, challenges will be dealt with in accordance with any directions the Tribunal may give.

6.3 The deadlines in this paragraph 6 may be extended by agreement between the Challenging Party and the Disclosing Party. Consent to a request for an extension shall not be unreasonably withheld."

141. Having reviewed the correspondence and evidence filed, the Tribunal appreciates there are only a limited number of documents for which de-designation is being sought. However, in order to form a reasoned view, the Tribunal would wish to have more detailed argument on each individual document. Further, the Tribunal does not encourage de-designation disputes to become an aspect which unduly complicates proceedings and increases costs. Therefore, parties are expected to correspond and attempt to resolve these issues amongst themselves before coming back to the Tribunal for a ruling.

142. The Tribunal is more likely to agree to de-designate documents the closer it is to trial. However, the Tribunal will have to look at the legitimate commercial interests of the disclosing party, in addition to third parties where relevant, and decide where the balance lies.

143. Given these proceedings are at a relatively early stage, the forthcoming 1782 Application, and that there will be a further CMC in early 2027, the Tribunal considers the most appropriate time to deal with this issue is at the next CMC

in these proceedings. At the next CMC, the Tribunal will hopefully be in a position to consider proposed amendments to the RAPC in light of the documents coming out of the 1782 Application process and the amendments which the Defendants are minded to apply for, which they have set out in general terms to the Tribunal as directed in the CMC2 Order.

144. Therefore, the Claimants' De-designation Application is not dismissed, rather it is to be adjourned to the next CMC. This course will allow the parties to consider the Tribunal's comments in respect of the De-designation Application and file additional evidence which may assist the Tribunal.

(2) Limited Access Persons Application

145. In the alternative, insofar as any of the relevant de-designation material remains designated as confidential, the Claimants seek an order pursuant to §7.3 of the CRO permitting them to show the material to three named Lenzing employees identified as Limited Access Persons (**LAPs**) under the CRO (the **LAP Application**). The employees are: (i) Mr Nader (Director Purchasing Europe & Americas, Senior Director Global Production Material, Global Purchasing); (ii) Mr Wirth (Senior Vice President Global Legal, IP & Compliance); and (iii) Mr Innerhofer (Senior Legal Counsel). The Claimants argue that disclosure to LAPs would remain subject to the safeguards imposed by the CRO and that the Defendants have not explained with sufficient particularity why disclosure to those individuals would create any prejudice. They also emphasise that two of the proposed LAPs are in-house lawyers and that no third-party confidential information would be shown to the LAPs.

146. The Defendants resist the LAP Application, relying on the risk that commercially sensitive information may be used, consciously or unconsciously, for collateral business purposes. They contend that the proposed material relates directly to Westlake's commercial strategy towards Lenzing and that one proposed LAP, Mr Nader, occupies a senior commercial purchasing role with responsibility relevant to the parties' continuing business relationship. Further, it is the Defendants' evidence that Mr Nader was historically a key business contact for the Defendants. The Defendants further submit that the Claimants

have failed to demonstrate why access by internal personnel is necessary for the conduct of the litigation, particularly where their external lawyers already have access to the material.

147. The Defendants further refer to the Tribunal Practice Direction "Disclosure – Management of Confidential Information" PD1/2024 at §6:

> "6. Rule 102 requires a party who is provided with a document in Tribunal proceedings only to use that document for the purposes of the proceedings. While the Tribunal recognises that, in some circumstances, the sensitivity of the information contained in some documents may warrant a higher degree of protection, the express prohibition contained in Rule 102 is the starting point when considering any additional protection that may need to be afforded to disclosed documents. <u>Moreover, the risk that documents may unconsciously be used for collateral purposes is a factor that explicitly needs to be borne in mind by a party's legal representatives when considering what disclosure particular client representatives can or should see and whether further protection, such as a confidentiality ring, may be required</u>. Client representatives should be informed in terms of the significance of Rule 102; and client representatives should be under no illusion as to the importance that the Tribunal attaches to compliance with Rule 102 by all parties."
>
> (Emphasis added)

148. The issue of giving such access was considered in some detail in *Weis* at §§21–30. As above, the Tribunal considers that the appropriate time to consider the LAP Application is at the next CMC, and if an order is to be made in respect of these LAPs, or one or more of them, the Tribunal would like more information about the specific individuals. In particular, insofar as the LAPs are lawyers, the Tribunal would like to know what their qualifications are and what professional body they remain regulated by and subject to. Further, the Tribunal invites the parties to consider what is said in *Weis* before the next CMC. Therefore, the LAP Application, like the De-designation Application, is adjourned to the next CMC.

(3) Third-party confidential information

149. The parties seek the Tribunal's guidance on the handling of third-party confidential information in these proceedings. The Tribunal is grateful to the parties for raising this matter at an early stage, particularly given the substantial volume of third-party confidential material typically involved in cartel claims of this nature.

150. Under the CRO, confidential information includes information which is confidential because its disclosure could significantly harm the legitimate interests of a person, including a third party, to which the information relates. Paragraph 5.1 of the CRO makes clear that "[a]ny document/information containing Confidential Information shall be designated as such by the Disclosing Party". Documentation containing confidential information must be marked up, highlighting that information: CRO at §5.3. As part of this "[t]he Disclosing Party must state the basis on which the identified information is claimed to be Confidential Information".

151. The Claimants propose a substantial yet well-reasoned departure from this approach. In short, the Claimants propose that where a document contains third party confidential information the disclosing party shall designate the *entire document* as confidential, *pro tem*. The Claimants then propose that it be for the other party (i.e. the non-disclosing party) to seek re-designation of the document by: (a) identifying the third-party material; (b) contacting the third-party to seek representations; and (c) if necessary, applying to the Tribunal for re-designation.

152. The Claimants characterise the issue of third-party confidentiality as a practical case-management problem rather than a matter of principle. The Claimants' proposed procedure is modelled on that adopted in the *Whistl v Royal Mail* proceedings (***Whistl***), whereby third parties would be consulted only when specific de-designation requests arise, which they say would be a proportionate and manageable approach.

153. The Defendants oppose the Claimants' proposed approach and favour the ordinary mechanism provided for in the CRO. They submit that the Claimants' proposal improperly shifts the burden of identifying third-party confidential information and consulting third parties onto the receiving party. The Defendants criticise the Claimants' proposal as unworkable since the non-disclosing party will be less familiar with the documents and any third-party confidential information they may contain. Accordingly, the Defendants aver that the more appropriate and proportionate course is for the disclosing party to identify and mark-up confidential information, including third-party

confidential information, at the point of disclosure, thereby preserving the ordinary allocation of responsibility under the CRO.

154. *Whistl* was a particular case whereby there was going to be a great deal of third-party confidential information, meaning it was going to be a huge undertaking for the disclosing party to markup confidential passages relating to third parties. In relation to the present case, the proposal is to apply an approach similar to that deployed in *Whistl* for these proceedings. The Tribunal's view is that the *Whistl* approach is probably only sensible for a limited period in these proceedings, as there will have to come a point whereby what is confidential and what is not confidential is determined. Further, getting non-party permissions to the extent necessary is primarily going to be done by the Claimants, as the party that is responsible for preparing the trial bundle. Additionally, it is not right to place such a burden on the Defendants, certainly at this stage, to have to go through this exercise, not least because many of the non-parties may be commercial rivals of the Defendants.

155. Therefore, the *Whistl* approach can only be a temporary solution. The Claimants have disclosed 14,012 documents, of which 11,443 were provided for inspection, of which 85% are designated confidential. The Tribunal proposes that rather than going through what would be an expensive exercise of dealing with confidentiality comprehensively now for all documents currently disclosed, the better approach is that the parties produce the trial bundle index particularly early in advance of trial. Then, when the parties produce that trial bundle index, they shall go through the exercise of identifying particular documents and passages that contain non-party confidential information, and those documents will then have to be marked appropriately for the trial bundle. The alternative is doing all that work now on a much larger pool of documents, which will be extremely expensive.

156. The Tribunal directs that the Claimants propose a draft order which reflects the above and deals with the mechanism utilised in *Whistl*. At the next CMC a more specific order will be considered which shall deal with redactions and non-party confidentiality for the purposes of the trial bundle. Confidentiality as regards the trial bundle will no doubt be a much smaller and more manageable exercise,

given that the parties should only include in the trial bundle those documents which are necessary for the Tribunal to have for the purpose of fairly resolving the issues in the proceedings, as highlighted by the Tribunal's recent practice direction on bundles: Tribunal Practice Direction "Bundles for Hearings" PD1/2026.

F. TRIAL LISTING AND CASE MANAGEMENT

157. The CMC2 Order directed at §20 that "[t]he trial listing will be revisited at CMC3, having regard (*inter alia*) to the timings of any proposed non-party disclosure applications." It is now common ground between the parties that the trial in these proceedings currently listed to commence on 10 May 2027 should be vacated as it is no longer achievable given the Claimants' stated intention to make a 1782 Application.

158. A fourth CMC will be listed in the last week of January 2027, for one day with a half day in reserve (**CMC4**). CMC4 will consider: any application for further disclosure, the CRO, de-designation of documents, further matters arising out of CMC3, any amendments to the RAPC, timetabling and directions to trial.

Hodge Malek KC
Chair

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 3 August 2026