



Neutral citation [2020] CAT 15

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1294/5/7/18 (T)

Salisbury Square House
Salisbury Square
London EC4Y 8AP

19 June 2020

Before:

HODGE MALEK QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

WOLSELEY UK LIMITED AND OTHERS

Claimants

- v -

(1) FIAT CHRYSLER AUTOMOBILES N.V.
(2) CNH INDUSTRIAL N.V.
(3) DAF TRUCKS N.V.
(4) DAF TRUCKS LIMITED

Defendants

- and -

DAIMLER AG

Additional Defendant

Heard remotely on 19 June 2020

RULING: DISCLOSURE

APPEARANCES

Mr Tristan Jones (instructed by Hausfeld & Co. LLP) appeared on behalf of the Wolseley Claimants.

Mr Ben Rayment and Ms Alexandra Littlewood (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Daimler Additional Defendant.

A. APPLICATION

1. By an application letter from the Claimants' solicitors dated 5 June 2020, the Claimants, a group of around 140 claimants, called for the purpose of this ruling "Wolseley", seek an order against one of the Part 20 defendants, Daimler, that it shall provide to the Claimants explanatory guidance on Daimler's database disclosure required by paragraph 5(b) of the order made by the Tribunal on 4 November 2019 ("the Daimler Order").
2. The Claimants contend that such explanatory guidance should contain at least the following information:
 - (a) comprehensive and precise descriptions of all data fields contained in the Daimler database disclosure; and
 - (b) additional information relevant for the purpose of analysing that Daimler database disclosure, in particular explanations that assist in identifying the relationship between those data fields including the manner in which different types of discounts contained in the data are taken into consideration to arrive at the net price (i.e. the final price charged for trucks to the end customers).

B. BACKGROUND

(1) Approach to disclosure in the trucks actions

3. This application for disclosure is being made pursuant to paragraphs 50 to 53 of the Tribunal's ruling on disclosure made on 15 January 2020 ([2020] CAT 3) ("the Disclosure Ruling"):

“50. To address any concerns the parties may have that there is insufficient time at a disclosure hearing and/or CMC to deal with all the disclosure issues in dispute, either the President or Mr Malek QC will be available in principle on one Friday each month to hear further disclosure applications, either matters that have been held over or new matters that may arise (“Friday Applications”). It is envisaged that any such hearings would deal with discrete issues between individual claimants and individual defendants. Outstanding issues in dispute between individual claimants and individual defendants may also be resolved on the papers if appropriate.

51. Before making any Friday Applications, the parties should engage with each other in a co-operative manner, in accordance with the governing principles, to seek to agree, as far as possible, any of the matters in dispute. As observed by Green J in *Peugeot*, “the efficacy of this process involves close and sensible cooperation between the parties and the experts”. Failure to do so may result in a costs order being made against the relevant party should a misconceived application be brought before the Tribunal.
52. The timetable for any Friday Applications is as follows:
- (5) No later than two weeks before the hearing date: the relevant party is to file its application with supporting evidence and an updated extract from the relevant Redfern schedule. Supporting evidence is limited to a maximum of two witness statements (including one from an expert) and an exhibit of no more than 25 pages.
 - (6) The Tribunal will confirm in writing to the parties whether the application is of a nature that is suitable for determination at a Friday hearing.
 - (7) No later than one week before the hearing date: the respondent(s) to the application are to file any responsive evidence, which is subject to the same limits set out at (5) above.
 - (8) Short skeleton arguments and a hearing bundle are to be filed two clear days before the hearing date.
53. As to the stage at which a particular disclosure application should be made, the Tribunal will adopt a common sense approach with a view to maximising the most efficient use of the Tribunal’s time and avoiding potentially inconsistent rulings on the same point. Therefore, if there are, for example, four defendants to a claim, and only three wish to pursue a disclosure application at a particular juncture, the Tribunal could well decide to proceed with hearing the application in which case the fourth defendant would need to be prepared to make submissions. Conversely, if a single defendant wishes to proceed with a disclosure application when the other defendants wish to defer it until a later stage, the Tribunal may defer consideration of the application until it can hear all defendants together.”

4. The Disclosure Ruling sets out the approach which the Tribunal has adopted in relation to the disclosure across all seven trucks actions which are being case managed together. In providing this ruling I am following the approach set out in the Disclosure Ruling, as well as the following specific provisions of the 2015 Tribunal Rules:

Rule 53(2):

"The Tribunal may give directions –

[...]

- (d) requiring clarification of any matter in dispute or additional information to any such matter."

Rule 53(3):

"The Tribunal may also, of its own initiative –

[...]

- (c) ask the parties or third parties for information or particulars;"

5. The present proceedings followed the decision in Case AT.39824 *Trucks* adopted on 19 July 2016 ("the Decision") by the European Commission (the "Commission"). The Commission found that five major European truck manufacturing groups, including Daimler, had carried out a single continuous infringement of Article 101 of the Treaty on the Functioning of the European Union over a period of some 14 years between 1997 and 2011 ("the Infringement"). The Decision found that there was a cartel which infringed competition by object, but made no finding as to the effect of the cartel. In these proceedings seeking damages, Wolseley, as do the claimants in the other six trucks claims, alleges that the purchase price for trucks was higher due to the Infringement. Both the defendant entities in the DAF and Iveco groups, and the 15 Part 20 defendants, including Daimler, strenuously dispute that. The trucks manufacturers claim that there was no impact on prices paid for trucks by the Infringement as found by the Commission.

6. As noted as paragraph 41 of the Disclosure Ruling:

"... it seems to us that the issues would probably have to be approached by the analysis of large amounts of pricing and market data, using established economic techniques to determine what, if any, was the effect of the infringement on prices and any pass-on through the relevant period."

7. Disclosure in this case was always going to be a challenge for a number of reasons:

- (1) The Infringement spanned 14 years, 1997 to 2011.

- (2) To assess the impact of the Infringement one would likely need to examine data both before and after the Infringement period.
 - (3) Systems would have changed over time and numerous databases would need to be examined in a number of jurisdictions and different people in different countries would need to be approached.
 - (4) There are inherent limitations in the databases and the data contained within them. They are not perfect and certainly they have not been designed for the purposes of the exercises which Wolseley's experts seek to carry out in the present case, so there will be gaps.
 - (5) Relevant employees who would have been familiar with the operation of the databases may no longer be available or at least difficult to trace.
 - (6) What may be obvious to someone familiar with a particular database may not be to someone in the position of the Claimants or their experts, indeed without clear explanations of the databases and the various fields there is a significant risk of confusion, misunderstandings and blind alleys.
8. For these reasons it is all the more important that the parties and their representatives should seek to engage constructively on disclosure in these cases. It also places a burden on the trucks manufacturers to provide proper disclosure from their databases in a way that the Claimants' experts can properly understand the data being provided. Thus in this case disclosure is not merely of data from databases and documents, but may extend to requiring a disclosing party to provide sufficient guidance and explanations for other parties and their experts to understand and use the data.

(2) Disclosure in the Wolseley proceedings

9. On 4 November 2019 I made the Daimler Order, namely an order for disclosure by both Wolseley and Daimler in these proceedings. Given the size of the task the disclosure was to be provided by the parties in tranches due on 20 December

2019, that is Tranche 1 in respect of the United Kingdom, and 31 January 2020, that is Tranche 2 in respect of France and Germany respectively.

10. As noted above disclosure was not confined to merely the disclosure of documents, including from databases, but also for information which would enable the parties to comprehend and make use of the data.
11. Paragraph 5 of the Daimler Order provides as follows:

“The Disclosing Parties agree that the data/documents to be disclosed pursuant to paragraphs 1 to 4 above:

 - (a) are confined to information and data readily available to the Disclosing Parties; and
 - (b) if contained in the form of an electronic database or extract therefrom, should be provided in their native electronic format or electronic excel format, together with (i) a statement setting out how the relevant information has been compiled for the database (including details of any data cleaning exercise conducted before disclosing the data), (ii) if appropriate, guidance on how the data is to be examined or any other explanatory notes or material which would assist the Disclosing Parties’ expert economists in analysing the disclosed information.”
12. Paragraphs (1) and (3) of the order required Daimler to provide disclosure of data documents referred to in annex 2 under the headings "Tranche 1" and "Tranche 2", namely in relation to data or documents relevant to the volume of commerce (“VoC2/O1”) and overcharge (“O2”) categories of disclosure in relation to the United Kingdom, France and Germany.
13. Pursuant to the Daimler Order, Daimler disclosed their Tranche 1 and Tranche 2 data on 20 December 2019 and 31 January 2020, containing native format data extracted from four databases in respect of VOC2/O1 and two databases in respect of O2 categories. Wolseley supplied the database material to CEG Europe (“CEG”), of which Wolseley's expert economist, Nils von Hinten Reed is the managing director.
14. Together with the documents disclosed as required by the Daimler Order, Daimler provided disclosure statements from Stefan Scherer dated 20 December 2019 and 31 January 2020 (the “Disclosure Statements”), which Daimler described in Quinn Emanuel's letter dated 6 February 2020, in response to

concerns raised by Wolseley's solicitors in its letter dated 27 January 2020, as follows:

- (1) Annex 1 contains an explanation of the use of each of the databases within Daimler's business and a general overview of the content of each database;
 - (2) The schedules to Annex 1 provide a detailed overview of each of the data fields contained in each of the databases; and
 - (3) Daimler provided a VIN dictionary, Baumuster (bare trucks) code descriptions and option code descriptions.
15. Wolseley makes the following criticisms of the explanations of the databases provided by Daimler.
- (1) Overall the Daimler disclosure and explanatory material do not provide sufficient guidance on how data fields should be interpreted, including the manner in which the relevant variables should be identified. Due to the lack of comprehensive descriptions of the relevant variables, it is said that the descriptions in schedule 1 to Annex 1 are exceptionally short, often incomplete or incomprehensible and unhelpful.
 - (2) Key concerns raised by CEG were:
 - (a) certain variables were either named similarly or contained similar data which made it impossible to match those variables to particular disclosure categories or discern the extent of the differences between them without further information;
 - (b) no descriptions were provided at all for some variables; and
 - (c) no explanations were given as to the relationship between particular variables.

The difficulties have been explained in the second witness statement of Nils von Hinten Reed.

16. In correspondence, Daimler has provided some further information and clarifications:

(1) On 6 February 2020 Daimler provided plant codes as requested by Wolseley.

(2) On 15 May 2020 Daimler responded to questions relating to three particular systems.

17. Wolseley accepts that the letter of 15 May 2020 provides useful guidance on specific questions raised, but in its letter dated 4 June 2020 says “[t]hese were merely examples of a wider problem.”. Therefore Wolseley seeks an order in the terms sought, as set out in paragraphs 1 and 2 above. Daimler, in its solicitors’ letter dated 7 June 2020, says it is willing to engage with queries in a constructive manner. Daimler contends that Wolseley’s application is misconceived and premature and instead Wolseley should have continued the process of seeking clarifications and further information in correspondence asking specific questions rather than seeking a general order across the board.

(3) Discussion

18. At the heart of the dispute between the parties in relation to disclosure are the following questions.

(1) What is the correct interpretation of the Daimler Order, in particular paragraph 5(b)?

(2) Has Daimler's response to date, including its explanations, been so inadequate that it should in effect be required to provide a new and comprehensive response to the Daimler Order or should there be a continuing process of responding to specific queries?

19. As regards the correct interpretation of paragraph 5 of the Daimler Order, it specifically requires:

- (a) guidance on how the data is to be examined, or
- (b) any other explanatory notes, or
- (c) material which would assist the disclosing parties' expert economists in analysing the disclosed information.

Whilst "or" is inserted between each of the three categories, in practice these need not be mutually exclusive as both (a) and (b) could fall within (c).

20. At the heart of it is the expectation, and certainly what I expected when I made the Daimler Order, that Daimler should provide sufficient guidance so that the data could be properly understood, used and considered by Wolseley's expert economist.

21. Wolseley's draft order seeks an order for compliance with the original order as including guidance containing (1) comprehensive and precise descriptions of all data fields contained in the Daimler disclosure, and (2) additional information relevant for the purpose of analysing Daimler's database disclosure, in particular explanations which assist in identifying the relationship between those data fields, including the manner in which different types of discounts contained in the data are taken into consideration to arrive at the net price (i.e. the final price charged for trucks to end customers). Daimler disputes that the Daimler Order goes this far and in any event it should not be ordered to do so.

22. In my view on these specific aspects, what is required is as follows:

- (1) Daimler should provide clear descriptions, even if brief, of all relevant data fields contained in its database disclosure.

- (2) It is not required to provide "comprehensive" descriptions initially. However, if any description is pointed out to be inadequate, then they should provide any necessary clarification or description.
 - (3) As regards the relationship between different data fields, this should be provided if it is reasonably necessary for Wolseley's experts to understand the material. I do not expect Daimler to provide an explanation for all the relationships, but only those which are reasonably necessary for the data to be understood in a way Wolseley's experts can work with. The best way to do that is by way of specific examples, as I will further order as part of this ruling, and in response to specific questions.
 - (4) How the different discounts contained in the data are taken into consideration in reaching the net price paid by the customer in my view is matter which should be provided, at least initially, in a general way through the pricing statement process (the pricing statement so far provided deals with this in part) and through worked examples that I have indicated I will require to be provided. There may be a need further down the line for a separate and focused application of Wolseley if the answers are not sufficiently clear.
 - (5) I shall point out I do not accept any contention, if that was sought to be advanced, that Daimler cannot be required to explain the relationship between net and gross prices on the basis that it may help Wolseley prove its case on a disputed issue. In the nature of things disclosure of documents and further information requests will often have the purpose of assisting the requesting party to prove its case.
23. Has Daimler's response so far to paragraph 5(b) of the Daimler Order fallen so short that the order proposed by Wolseley is appropriate? It is clear that the parties do not agree as to the proper interpretation of the Daimler Order. I have set out already how I consider it should be applied and interpreted going forward.

24. My conclusions on Daimler's explanations of the data in the Disclosure Statements and accompanying material are as follows.

- (1) Considerable time and effort has been put into providing the Disclosure Statements and Daimler have carried out the process in good faith and with reasonable diligence.
- (2) The general failure alleged by Wolseley, in the sense that there is a systematic failure by Daimler to provide information across the board, is not made out.
- (3) There are gaps and areas where further information and explanations were and are required in order that Wolseley's economic experts can use the data and understand how it could be used and interpreted and not all fields were properly explained, and instead some of them are capable of being misunderstood.
- (4) The specific information requests made by Wolseley and the answers given are evidence of the incomplete nature of the information given in the Disclosure Statements. Both parties have provided extracts from the data dictionary from the relevant system in support of their position. Wolseley produced an extract where the extract is not helpful to understand entries. Daimler say that extract is not representative and provides an extract which is entirely comprehensible. I do not accept the data dictionary is wholly deficient in the way described by Wolseley. There may well be examples beyond the ones given by Wolseley both in their evidence and today where further information or clarification may be required.
- (5) Wolseley contends that I should make an order requiring Daimler to provide a proper response in terms of the draft order and relies on three aspects in particular:

- (a) That the disclosure and explanations by others, MAN in particular, have been done in a more comprehensive and comprehensible fashion.
 - (b) The requests to date are only specific examples of gaps.
 - (c) Questions raised in the beginning of this year were not answered until May 2020, so there is a concern that this will be a long and drawn out process if we carry on on the current path.
- (6) As regards 5(a) it is difficult and potentially unfair to compare Daimler's disclosure with that provided by other defendant companies, who have different systems and different data.
- (7) As regards 5(b) I do not consider that the Disclosure Statements and accompanying information are deficient across the board. There are gaps and things that may require further explanation. Daimler has made clear in correspondence and in its submissions before me, both in writing and orally, that it will engage constructively in dealing with any reasonable requests.
- (8) As regards 5(c), I agree that explanations to date did take a while to be provided. It was a mixture of delays due to difficult working conditions (caused by responses to the covid-19 pandemic) and the need to ensure that answers are correct, that are the most likely explanations of the time taken. That said, going forward this process must be carefully organised and a timetable imposed by the Tribunal.
- (9) In response to Wolseley's overarching criticisms, Daimler points out that none of the other claimants had the same criticisms of Daimler's approach, and indeed in relation to disclosure in other proceedings common with that in current proceedings, the Ryder claimants have raised 13 specific questions and the Dawsongroup claimants have raised 12 specific questions. Daimler states that neither have suggested that they were unable to understand Daimler's database disclosure.

C. CONCLUSION

25. In all the circumstances I have decided to make the following order:

- (1) Wolseley shall send to Daimler a list of requests for further information and clarification by way of a schedule by 4pm on 3 July 2020.
- (2) Daimler shall respond by 4pm on 18 September 2020, either by providing the information requested or explaining why the information cannot or should not be provided.
- (3) Wolseley shall respond to (2) by way of a third column to the schedule by 4pm on 16 October 2020.
- (4) Daimler shall provide any further response by way of a fourth column to the schedule by 4pm on 6 November 2020.
- (5) Daimler shall disclose to Wolseley the substance of the further information and explanations provided to the Ryder and the Dawsongroup claimants in relation to the disclosure common to these proceedings (“the Common Disclosure Guidance”). Daimler shall disclose to Wolseley: (i) the Common Disclosure Guidance provided to the Ryder Claimants by 4pm on 26 June 2020; and (ii) the Common Disclosure Guidance provided or to be provided to the Dawsongroup Claimants by 4pm on 7 August 2020.
- (6) Daimler shall provide to Wolseley worked examples to get to the net price, two per database. The first set of worked examples shall be provided by 4pm on 8 July 2020. The second set of worked examples, in relation to each of the databases, shall be provided by 4pm on 18 September 2020.
- (7) By 4pm on 27 November 2020, a further disclosure statement shall be provided by Mr Scherer or other suitable officer or employee of

Daimler, incorporating the further information and explanations provided since its original statements.

- (8) There shall be liberty to apply by notice in writing by either party.
26. I do not expect to see, necessarily, hundreds of questions from Wolseley but only those that are targeted, such as will enable its economic experts to understand and use the data provided. I do understand that if there are a number of fields where further information is required, that may mean that there is going to be a significant number of questions, but I do not expect to see a vast number.
27. Once a schedule has been completed, if there are outstanding issues between the parties, then those issues can be the subject of a separate application in due course.

Hodge Malek QC

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 19 June 2020