Neutral citation [2023] CAT 66

Case No: 1435/5/7/22 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

2 November 2023

Before:

JUSTIN TURNER KC
(Chair)
SIR IAIN McMILLAN CBE FRSE DL
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) PSA AUTOMOBILES SA
(2) GIE PSA TRÉSORERIE
(3) STELLANTIS NV
(4) OPEL AUTOMOBILE GMBH
(5) FCA ITALY SPA
(6) FCA SRBIJA D.O.O. KRAGUJEVAC
(7) FCA POLAND SA
(8) MASERATI SPA
(9) SOCIETA EUROPEA VEICOLI LEGGERI (SEVEL) SPA
(10) VAUXHALL MOTORS LTD
(11) OPEL ESPAÑA SLU

Claimants

- v -

(1) AUTOLIV AB
(2) AUTOLIV, INC.
(3) AUTOLIV JAPAN LTD
(4) AUTOLIV B.V. & CO. KG
(5) AIRBAGS INTERNATIONAL LTD
(6) ZF TRW AUTOMOTIVE HOLDINGS CORP.
(7) ZF AUTOMOTIVE SAFETY GERMANY GMBH
(8) ZF AUTOMOTIVE GERMANY GMBH
(9) TRW SYSTEMS LTD
(10) ZF AUTOMOTIVE UK LTD
(11) TOKAI RIKA CO., LTD
~~**(12) TOYODA GOSEI CO., LTD**~~

Defendants

Heard at Salisbury Square House on 20 October 2023

RULING (EXPERTS)

APPEARANCES

Tristan Jones and Sean Butler (instructed by Hausfeld and Co. LLP) appeared on behalf of the Claimants.

Robert O'Donoghue KC (instructed by White & Case LLP) appeared on behalf of the First to Fifth Defendants.

Sarah Ford KC (instructed by Macfarlanes LLP) appeared on behalf of the Sixth to Tenth Defendants.

Max Schaefer (instructed by Steptoe and Johnson UK LLP) appeared on behalf of the Eleventh Defendant.

A. INTRODUCTION

1. At the end of the second case management conference in this matter, on 28 and 29 March 2023, we declined to give consent to the Defendant groups each having their own expert in the field of competition economics at trial, notwithstanding that no objection to this course had been raised by the Claimants. The parties were not in a position to present detailed argument in relation to the need for separate experts on that occasion. A *pro tem* order for a single joint expert for the Defendants was made and the Defendants were given permission to apply for additional experts. The Defendants have now made that application and we have heard extensive argument in relation to this issue. The matter having been raised by the Tribunal, the Claimants enthusiastically adopt the approach of a single joint expert.

2. This is a claim for damages against the Defendants for concerted practices to prevent, restrict or distort competition in the supply of occupant safety system products ("OSS products") to the Claimants. The claim arises after two decisions of the European Commission ("the Commission"): the first being a decision of 22 November 2017 (AT.39881 – *Occupant Safety Systems Supplied to Japanese Car Manufacturers*) hereafter referred to as "OSS1" and a decision of 5 March 2019 (AT.40481 – *Occupant Safety Systems (II) Supplied to the Volkswagen Group and the BMW Group*) hereafter referred to as "OSS2". Those decisions did not concern supplies to the Claimants.

3. The Claimants are manufacturers of motor cars and are now all part of the Stellantis Group. The First to the Fifth Defendants are members of the Autoliv Group of which the Second Defendant is the ultimate parent company ("Autoliv"). The Sixth to Tenth Defendants are members of the ZF/TRW Group ("ZF" or "TRW"). The Eleventh Defendant is incorporated in Japan ("Tokai Rika").

4. OSS1 and OSS2 establish the existence of the following cartels:

Supplies	Participating undertaking	Period of participation
Sale of seat belts in the EEA to Toyota	Tokai Rika	6/7/2004 – 11/2/2010
	Takata	6/7/2004 – 25/3/2010
	Autoliv	18/12/2006 – 25/3/2010
	Marutaka	6/7/2004 – 15/4/2009
Sale of airbags in the EEA to Toyota	Takata	14/6/2005 – 26/7/2010
	Autoliv	18/7/2006 – 26/7/2010
	Toyoda Gosei	14/6/2005 – 15/7/2009
Sale of seat belts in the EEA to Suzuki	Takata	14/2/2008-18/3/2010
	Tokai Rika	14/2/2008-18/3/2010
Sale of seat belts, airbags and steering wheels in the EEA to Honda	Takata	28/3/2006 – 22/5/2010
	Autoliv	28/3/2006 – 22/5/2010

Supplies	Participating undertakings	Period of participation
Sales of seat belts, airbags and steering wheels in the EEA to Volkswagen ("VW")/Porsche	Autliv	4/1/2007 – 30/3/2011
	Takata	4/1/2007 – 30/3/2011
	TRW	4/1/2007 – 28/3/2011
Sales of seat belts, airbags and steering wheels in the EEA to BMW/Mini	Autoliv	28/2/2008 – 16/9/2010
	Takata	28/2/2008 – 17/2/2011
	TRW	5/6/2008 – 17/2/2011

5. The OSS1 and OSS2 decisions were reached by way of settlement between the addressees and the Commission which involved an admission of breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and Article 53 of the Agreement on the European Economic Area ("EEA Agreement").

6. This is not a follow on claim but is a stand alone action brought by the Claimants. It is contended that from 6 July 2004 until 30 March 2011 Autoliv, ZF and Tokai Rika colluded to seek price increases with respect to responses to requests for quotation ("RFQs") and periodic amendments to agreed prices in breach of Article 101 TFEU or Article 53 of the EEA Agreement. Paragraph 39 of the draft Re-Re-Amended Particulars of Claim in respect of which the

Claimants, with the consent of the Defendants, sought the Tribunal's permission to amend states:

> "39. Over a period which extended from at least as early as 6 July 2004 until at least as late as 30 March 2011 (hereinafter "**the Cartel Period**"), the Undertakings to which the Addressees of the Decisions belonged, or any two or more of them in combination, entered into (and thereafter implemented) one or more agreements or concerted practices to prevent, restrict or distort competition in the supply of OSS products to automotive OEMs including PSA, FCA and Vauxhall/Opel (or any of them) as well as Toyota, Honda, Suzuki, Subaru, BMW/Mini and VW/Porsche."

7. And paragraphs 41 to 43 make the following allegations:

> "41. The co-ordination alleged (examples of which are identified in paragraphs 40AA-40G, above) accordingly concerned responses to RFQs; attempts by PSA and FCA to seek price reductions during the terms of their respective supply contracts; further and in the alternative attempts by OSS product suppliers to seek price increases on grounds such as changes in raw material prices in connection with the tendering processes as pleaded at paragraph 10 above.
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> 42. The said agreements or concerted practices were intended to and did have the effect of increasing the prices of OSS products supplied by the parties to automotive OEMs (including PSA, FCA and Vauxhall/Opel) above those which would have prevailed in a counterfactual in which each supplier had instead competed on the merits. The said agreement(s) or concerted practice(s) were arrived at by means of contacts or exchanges which the Claimants cannot currently particularise save as set out above, but which they allege involved face-to-face meetings and exchanges by email and telephone.
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> 43. Alternatively, if (for reasons of which the Claimants are currently unaware) any cartels concerning OSS products had to be or were in fact limited to supplies to individual customers, PSA and FCA contend that there were separate cartels between all or at least two of the Undertakings to which the Addressees of the Decisions belonged concerning supplies of OSS products to PSA, FCA and Vauxhall/Opel (or any of them), with the same features as pleaded above in relation to the Claimants' primary case."

8. In the alternative there is an umbrella claim, being that, irrespective of whether there was a cartel in respect of supplies to the Claimants, the effect of the cartels established by the Commission would have been to increase the prices charged by the cartelists of supplies to other OEMs by tending to lessen the degree of competition in the market. It is said that the Defendants are liable for higher prices paid by the Claimants arising from that lesser competition.

9. It is unclear why the Commission found that there were a number of individual cartels rather than a single cartel.

B. THE LEGAL APPROACH

10. Submissions on behalf of the Defendants, opposing the suggestion they should share a single expert in the field of competition economics, were principally made by Ms Ford KC who represents ZF, although we were additionally assisted by written submissions from Mr O'Donoghue KC for Autoliv. Tokai Rika did not take a position in respect of this matter.

11. Ms Ford placed reliance on Article 48 of the Charter of Fundamental Rights of the European Union (the "Charter") which requires "Respect for the rights of the defence of anyone who has been charged shall be guaranteed". Further she drew our attention to *Emerald Supplies Ltd v British Airways plc (Nos 1 and 2)* [2015] EWCA Civ 1024 ("*Emerald Supplies*") in support of the proposition that Article 48 of the Charter applies to duties owed under Article 101 TFEU.

12. In *Emerald Supplies* the Court of Appeal overturned an order made by Peter Smith J to disclose an unredacted copy of a Commission decision in which it made findings that certain airlines had infringed Article 101 TFEU. The disclosure of the entire unredacted decision meant that "protected materials" were disclosed contrary to the *Pergan* principle in EU law. The provisions of Article 48 of the Charter were relevant to the establishment of the *Pergan* principle. The Court of Appeal held that the judge was not entitled to relax or amend the *Pergan* principle and that Article 48 of the Charter applied to national courts. From this Ms Ford contends that Article 48 of the Charter is engaged in these proceedings because these too concern an alleged breach of Article 101 TFEU.

13. Whereas proceedings brought by competition authorities may properly be seen as quasi-criminal, such that Article 48 of the Charter is engaged, we have some doubt that a private action for damages falls into the same category. More importantly it does not follow that because Article 48 is engaged there is a presumption that each defendant should be entitled to its own expert in

competition proceedings. In the end we did not understand the Defendants to go so far as to say that the Tribunal has no power to order a single expert in the light of Article 48, but their submission was that it would be a breach of Article 48 and the rights of the defence if the Defendants were not permitted to each instruct their own expert in the circumstances of this case.

14. The governing principles at rule 4 of the Competition Appeal Tribunal Rules 2015 ("CAT Rules")[1] provide that the Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost and that the Tribunal shall actively manage cases. This is reflected in rule 53, that the Tribunal may give "such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost". Such directions extend to the provision of expert evidence (see rule 53(2)(e)). The Competition Appeal Tribunal Guide to Proceedings 2015 states at paragraph 7.65:

> "As regards expert evidence, the Tribunal will take into account the principles and procedures envisaged by Part 35 of the CPR, notably that expert evidence should be restricted to that which is reasonably required to resolve the proceedings. It is for the party seeking to call expert evidence to satisfy the Tribunal that expert evidence is properly admissible and relevant to the issues which the Tribunal has to decide and would be helpful to the Tribunal in reaching a conclusion on those issues."

15. Ms Ford drew our attention to the power of the courts to order a single joint expert under the CPR and to two cases where this was not ordered, being *ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2003] EWCA Civ 1284 and *Yearsley v Mid Cheshire Hospitals NHS Trust* [2016] EWHC 1841 (QB). We are not contemplating a single joint expert in this case to be shared by the Claimants and Defendants and it is difficult to identify any general points of principle from these cases which provide relevant guidance in the current situation.

16. It was urged upon us by Ms Ford that the consistent practice of this Tribunal and the Courts in cartel cases has been to permit defendants to rely on the evidence of their own experts in relation to core economic issues. This position was supported with evidence from Autoliv's and ZF's solicitors and ZF's expert

[1] Unless otherwise stated, all references to rules in this Ruling are to the CAT Rules.

economist. They submit that this consistent practice is underpinned by considerations of justice, fairness and the rights of defence.

17. We were referred to *UK Trucks Claim Limited v Stellantis NV & Others* [2023] EWCA Civ 875 ("*UK Trucks*") in which the Court of Appeal identified a conflict of interest between the purchasers of new trucks and purchasers of used trucks in relation to resale pass-on and that, in these circumstances, a direction for separate experts would be appropriate for different categories within the Claimant class. The Court of Appeal found that the Tribunal had erred in its conclusion that there was only a *potential* conflict at that stage of the proceedings, when it should have held that there was an *actual* conflict. It had also erred in accepting the suggestion that the proposed expert Dr Davies could straddle this conflict.

18. We were also shown a transcript of a hearing before Green J (as he then was), sitting as Chair in this Tribunal, in *Peugeot S.A. & others v NSK Ltd & others* (Case No. 1248/5/7/16). It records an exchange with counsel about whether defendants should share an expert. Counsel for the claimant initially submitted that there should be a single expert but then modified his submissions to propose a staged approach to the issue. It was ordered that each defendant had permission for its own expert, subject to further permission at a future case management conference. In this passage Green J had regard to whether conflicts were likely to arise between the defendants.

19. We have given careful consideration to the suggestion that there is an established practice in this Tribunal of defendants instructing individual experts in cartel cases. Given that few cartel cases have gone to trial and that there is only really one reasoned decision on this point (*UK Trucks*) we are of the view that such a practice cannot of itself be determinative. We believe the following matters bear on the approach to be taken:

    (1) First, there is a power for the Tribunal to limit expert evidence which includes determining whether it is appropriate for defendants each to advance their own expert evidence. In determining the correct approach,

the overriding consideration of the Tribunal should be ensuring the proceedings are dealt with justly and at proportionate cost.

(2) Second, in deciding what is just, it is necessary to consider whether or not there is a risk of a conflict of interest in relation to the matters to which the expert evidence is directed. If there is such a conflict it will not ordinarily be appropriate to order joint experts. (That is not to say that it is necessary to be assured that there is a common interest in relation to all aspects of the litigation.) The risk of a conflict of interest should be real rather than merely theoretical and should be first assessed by reference to the claim and defence as they are understood at the time when permission for expert evidence is ordered. Insofar as the dispute evolves, and unforeseen conflicts emerge, the need for additional separate experts should be revisited.

(3) Third, in determining what is just, it is appropriate to have regard to the complexity of the proceedings. In a case where three different defendant expert opinions are being proposed on the same topic this necessarily presents additional challenges for the Tribunal which may be required to reconcile or combine those opinions. We recognise that challenges of reconciliation may arise from evidence presented by a single claimant expert and a single defendant expert (where the opinion of one is not being dismissed altogether), but these types of challenges are magnified where multiple and unreconciled positions are being advanced by experts on behalf of different defendants. There is an expectation that better quality justice will be administered where disputes are appropriately focused and streamlined.

C. THE ANALYSIS

20. The Claimants have explained that they intend to prove the existence of a cartel between the three Defendant groups by reference to documentary disclosure evidencing communications between employees of the Defendants in relation to RFQs and amendments. Some disclosure has already been provided and this has led to particularisation in the draft Re-Re-Amended Particulars of Claim. In

the alternative, or additionally, the Claimants will be relying upon an econometric analysis showing differences in prices between the period of the cartel and the subsequent "clean" period, from March 2011, when no cartel is said to have been operating. They will also rely upon this econometric analysis to arrive at a figure for the overcharge. The analysis will not seek to distinguish between the activities of the Defendant groups.

21. At paragraph 80 of the draft Re-Re-Amended Particulars of Claim the Claimants plead the overcharge in the following terms:

> "So far as concerns the overcharge, the Claimants' preliminary econometric analysis (over which privilege is not waived) has identified cartel overcharges as follows:
>
> | % | Steering Wheels | Airbags | Seat belts |
> |---|---|---|---|
> | **RFQ** | 11.3-15.2 | 8.8-12.4 | 10.4-16.1 |
> | **Amendment (2005)** | 1.9-3.2 | 2.0-4.3 | 1.6-2.5 |
> | **Amendment (2008)** | 4.3-7.3 | 5.0-10.3 | 3.4-5.4 |
> | **Amendment (2011)** | 6.9-11.2 | 6.9-13.8 | 4.7-7.3 |
>
> "

The overcharge does not distinguish between Defendants. In relation to the umbrella claim the Claimants will again be relying upon the econometric analysis of the market before and after the periods covered by the Commission decisions.

22. For ZF, Ms Ford drew our attention to a letter dated 20 September 2023 from Dr Rainer Nitsche of E.CA Economics concerning the approach they suggest should be taken. The letter states:

> "21. To determine whether the alleged conduct had any impact on the prices paid by the claimants, we intend to perform an overcharge analysis. It is common practice to rely on econometric methods for such an analysis, as this allows to account for factors other than the conduct that (co-)determine prices (such as costs). It is further common practice to rely on a "clean" benchmark, i.e. prices that are not affected by the infringing conduct under examination. There are various benchmarks we may consider and test:
>
> a. Prices charged to the Claimants before / after the infringement period;

b. Prices charged for OSS products to other OEMs during the infringement period;

c. Prices charged in other jurisdictions for OSS products during the infringement period;

d. Prices charged for comparable non-OSS products during the infringement period; and

e. Combination of the benchmarks listed, through so-called "differences-in-differences" analysis, which can, for example, track the difference in prices of the affected OSS product to a clean comparable non-OSS product (or another region) over time."

23. They prefer a Defendant-specific assessment, in line with the bespoke nature of the product. At paragraphs 33 to 35 they state:

"33. There are typically several reasons why a significant part of the analysis is Defendant-specific, including (but not limited to):

a. Scope for optimising the model to fit the data structure (e.g. different definitions of key variables by supplier, such as cost);

b. Option to include relevant supplier-specific variables (e.g. to account for a specific product mix or specific bundling strategies);

c. Ability to account for differences in the way that demand fluctuations affect the pricing decisions (e.g. suppliers with a different scope of potential customers may consider different demand indicators to steer their business); and

d. Need to account for potential differences in cost shocks (e.g. based on the location of the production plants).

34. The main potential advantage of combining data sets is the larger number of observations. However, this advantage may be largely lost when trying to account for supplier specificities. For example, if a certain variable is not available for all Defendants, the analysis cannot account for this dimension in a model that combines data of all Defendants. In such situations is it necessary to carefully consider whether benefits related to bundling analyses or pooling Defendant-specific data, outweigh the costs.

35. Thus, in general terms it is possible to say that in a situation where the data processing appears simple and not firm-specific, and where the methodological choices are likely to be common, a combined analysis may be considered right from the beginning. However, in a situation where the data processing appears complex and firm-specific, and the methodological choices likely need to consider data issues and specificities related to the operations of the Defendants, this may not be an effective choice. My current view, given my understanding of the industry and the available data, is that the situation in these Proceedings corresponds to the latter. If a Defendant-specific analysis were required (as we expect), we consider ourselves to be better positioned to do so

> than a single joint expert, and in any case more efficiently, given our understanding of the databases of the ZF Defendants".

24. It follows that the Tribunal, at trial, will be presented with an econometric analysis by the Claimants looking at pricing for each OSS product before and after March 2011. In response it will potentially have three different experts looking at the individual data sets of each of the Defendant groups for differences before and after March 2011. There may well be advantages in creating separate models for each of the data sets – that is a matter for the experts to consider – but it does not affect the fact that the Tribunal will need to reach conclusions based upon the totality of the evidence before it. It will not find the task facilitated by having one expert for the Claimants drawing conclusions based upon their analysis of the totality of the data and three separate experts for the Defendants each opining on the conclusions that can be drawn from different subsets of data. Instructing a single expert on behalf of the Defendants who can provide an opinion in relation to the totality of the data does not, of itself, give rise to a conflict between the interests of Defendant groups.

25. As to potential conflicts, Ms Ford in her submissions focused on three matters. The first was the issue of apportionment. She correctly points out that if questions of apportionment of damage arise then there may be a conflict between the rival positions of the Defendant groups. As yet there are no contribution notices and the Defendant groups have not sought to rely upon the activities of other Defendant groups in defence of all or part of their respective claims. The Claimants submit that the question of apportionment will not arise at trial. We agree that contribution and apportionment are not pleaded issues in the case and it is not proposed that they will be. For this reason this is not a matter to which we need to attach weight at this stage.

26. The second matter raised by Ms Ford arises from the Claimants' pleaded case that the cartels could be any "two or more" undertakings in a cartel (see for example paragraph 39 of the draft Re-Re-Amended Particulars of Claim above). We agree that there would be a conflict if the expert evidence is relevant to determining whether two out of the three Defendant groups are in a cartel and

the other not. In these circumstances the interests of the third will not be the same as the cartelists'.

27. As yet there is no particularised case as to why it is to be said, by the Claimants, that the cartel is between only two of the Defendant groups or for that matter which two. The issue is raised only as an unparticularised alternative case. We made clear during the course of argument that this is not satisfactory. It is not appropriate for the Claimants to throw various possibilities at the Tribunal – an unspecified two out of three – as a safety net to an otherwise defective claim. It is open to the Claimants to run an alternative case – that there was a cartel between only two of the Defendant groups – but if they are to do this they must properly particularise that case. Further they will need to confront the potential complication that if this is the position then the third Defendant group may well be in competition with this cartel, which may have an implication for the analysis of any loss. Pending particularisation of any such case (a matter to which we return to below) it is not proposed that the Claimants' economic evidence will seek to distinguish the position between Defendant groups.

28. The third matter to which Ms Ford draws our attention is the fact that the Commission decisions found distinct cartels which relate to different Defendant groups. It follows that different Defendant groups might be responsible for different umbrella effects. Whereas we recognise that this is a theoretical possibility, it is not one to which the econometric analysis is to be (or for that matter could be) directed. All that is proposed by the Claimants is that there will be a comparison of prices between the "clean" period (post March 2011) and the period during which the cartels, as found by the Commission, were in operation. There may be complexities to that analysis including: controlling for variables such as manufacturing costs; establishing the extent to which prices for one customer for a bespoke product may impact another; assessing the impact of non-cartelised competition; and the extent of any overhang from any umbrella effects beyond March 2011. None of those complexities, however, appear to raise conflicts.

29. Our conclusion is that there are no material conflicts of interest between the Defendant groups in relation to the proposed use of expert evidence in the field of competition economics.

30. We have identified the lack of particulars in the Claimants' pleaded case that the cartel may be between two (rather than three) unspecified Defendant groups. In submissions the Claimants gave the impression this was unlikely to form a major part of their case. We have therefore ordered that, after disclosure, any alternative case should be properly pleaded. This is to take place by 22 December 2023. If there is an alternative case pleaded which gives rise to a potential conflict which has an impact on expert evidence, that is a matter which will have to be addressed.

31. We have previously ordered that the service of expert reports in the field of competition economics is to be sequential with the Claimants serving their expert evidence first. This means that if any unanticipated conflicts arise there will be an opportunity to consider how those can be addressed in advance of the Defendant groups finalising their expert evidence.

32. Absent an apparent conflict of interest we are of the view that justice is best served by having a single expert shared by the Defendants. An expert with an overview of data from each of the Defendant groups will be best placed to assist the Tribunal in understanding the defects (if any) in the Claimants' econometric analysis. If each of the Defendant groups instructs its own expert then the Tribunal will potentially be faced with three different economic models, employing three different data sets. The Tribunal will not have assistance in resolving those three approaches because there will not be a single expert looking at the Defendants position in the round. This is fraught with difficulty and is likely to impact the quality of justice. This is a strong factor in favour of ordering a joint expert for the Defendants.

33. A further point made by the Defendants is that a shared expert may understand each of the Defendant groups' data sets less well than an expert dedicated to a particular Defendant group. We recognise that it is more work to understand data from three groups than from one but we have no reason to conclude that,

with appropriate assistance and communication, a proper understanding cannot be readily achieved.

34. Finally we consider the relative costs of instructing a single expert and proportionality. We are not in a position to form a view as to the relative costs of employing three experts rather than one. Plainly there may be some savings with a single expert by reason of there being one expert report to be prepared and considered, as opposed to three. That said the Defendant groups are instructing different solicitors and counsel teams each of which will be involved in the preparation of the report. In any event, given the size of the claim, we do not consider it disproportionate in terms of costs to instruct multiple experts in this case.

35. Taking these factors into consideration we are of the unanimous view that it is appropriate to order that the Defendants shall have permission to rely on one joint expert in the field of competition economics.

Justin Turner KC
Chair

Sir Iain McMillan CBE FRSE DL

Professor Anthony Neuberger

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 2 November 2023