

Insights

TRUCKS CARTEL DECISION: OVERCHARGE GETS GREEN LIGHT

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SUMMARY

In the first "trucks cartel" litigation to go to trial in the UK, the Competition Appeal Tribunal has ruled that a cartel of truck manufacturers led to a material overcharge on a UK market-wide basis. The decision is expected to have a significant influence on the numerous other claims in relation to the cartel across Europe.

THE DISPUTE

In July 2016, the European Commission (the Commission) issued a settlement decision finding that between 1997 and 2011 truck manufacturers DAF, MAN, Volvo/Renault, Daimler and Iveco participated in a cartel involving collusion on the prices of medium and heavy trucks, and the timing and passing on of costs associated with emissions technologies.

Following the Commission's decision, Royal Mail and BT filed claims against DAF in 2016 and 2017. Royal Mail and BT argued that they had paid more for trucks than they would have done but for the cartel. Royal Mail also sought to claim its costs of financing the overcharge on a compound basis, to be calculated on the basis of its weighted average cost of capital or alternatively, on the basis of its cost of debt and short-term investments. BT claimed simple interest in relation to the overcharge.

MITIGATION

DAF denied that Royal Mail and BT had suffered any overcharge and also argued that it was implausible that the cartel could have increased truck prices. In the alternative, DAF argued that any losses would have been fully mitigated by Royal Mail and BT through:

- Increased prices to their own downstream customers (supply pass-on).
- Higher prices achieved on the resale of the cartel-supplied trucks (resale pass-on).

- Lower purchase prices of products that were complementary to trucks bought from third-party manufacturers (complements defence).
- Royal Mail and BT argued that no such mitigation had occurred. In the alternative, Royal Mail argued that if supply pass-on had occurred, it would nevertheless have suffered lost profits due to resulting reduced sales volumes (loss of volume).

CAT DECISION

The CAT held in favour of Royal Mail and BT. It directed the parties to calculate the precise damages figure based on the specific findings in the judgment.

PLAUSIBILITY

The CAT rejected DAF's argument that it was implausible the cartel had any effect on the Royal Mail and BT's prices. It considered that DAF's expert's plausibility analysis had ignored some fundamental and undeniable facts. It noted that DAF's expert may have become too aligned with his client and insufficiently independent, having advised DAF for nearly a decade, including on theories of harm that assisted DAF during the Commission's investigation of the cartel in 2013. The CAT concluded that DAF's expert's views on plausibility may have increased the risk of his approach to the economic evidence being affected by confirmation bias.

DAF argued that there was no real link between the list prices, in respect of which DAF admitted collusion, and transaction prices agreed with customers. However, this argument was contradicted by DAF's own witness during cross-examination. The CAT criticised DAF for attempting to undermine this evidence from its own witness during trial and, more broadly, for its failure to put forward evidence showing how it used the information obtained from the cartel.

OVERCHARGE

The CAT found that Royal Mail and BT had suffered an overcharge. It quantified this overcharge at 5% after considering the different approaches of the experts to key modelling issues. The CAT relied on the experts' agreed approach of using market-wide data to estimate the overcharge incurred by Royal Mail and BT. It also rejected DAF's submissions based on evidence that DAF had put forward for the first time during trial that sought a "second bite at the cherry" by arguing that Royal Mail and BT would not have suffered any market-wide overcharge.

CAT DECISION ON MITIGATION

The CAT rejected all of DAF's mitigation defences. It rejected DAF's resale pass-on and complements defences due to serious unresolved issues in the expert evidence put forward by DAF and a lack of connection between the observed facts and the expert evidence.

The CAT also unanimously rejected DAF's supply pass-on defence but the panel were divided in their reasoning. The majority concluded that DAF had not established on the facts that the prices charged to Royal Mail and BT's customers would have been lower but for the overcharge. In addition, as a matter of law, they did not consider there to be the necessary proximate and direct causative link between the overcharge and the downstream prices so as to satisfy the legal test for causation (see box "Establishing causation").

The economist on the panel, Derek Ridyard, gave a dissenting opinion that both Royal Mail and BT had passed on a substantial amount of the overcharge to their downstream consumers, and that there was a sufficiently close causal connection between the overcharge and a likely supply pass-on. However, he considered that no reduction should be made to the damages award on the basis that to do so would jeopardise the principle of effectiveness as a successful claim from downstream customers would be excessively difficult or impossible.

COST OF FINANCING

The CAT rejected Royal Mail's argument that its financing costs should be calculated on the basis of its weighted average cost of capital. It held that while it is intellectually valid to use the weighted average cost of capital to measure a firm's cost of capital, this was not an actual cost incurred or paid by Royal Mail to finance the overcharge. Instead, the CAT awarded Royal Mail its financing costs based on its alternative claim of financing losses on a compound cost of debt and short-term investments basis. The CAT was firm in its preference of compound interest over simple interest, observing that this reflected what had happened in the real world and therefore corresponded to Royal Mail's actual losses. It awarded BT simple interest at Bank of England's base rate plus 2%, as BT had limited its financing losses claim to simple interest.

ESTABLISHING CAUSATION

The Competition Appeal Tribunal (CAT) held that evidence that costs, including the overcharge, were an input into Royal Mail and BT's usual planning and budgetary process was insufficient to satisfy the legal causation test. It noted that a party asserting pass-on may rely on a number of potentially relevant factors to establish a direct and proximate causative link between an overcharge and downstream pricing, including:

- Knowledge of the overcharge or the specific increase in the cost in question.
- The relative size of the overcharge against the claimants' overall costs and revenue.
- The relationship or association between what the overcharge is incurred on and the product whose prices have been increased.

- Whether there are identifiable claims by identifiable buyers from the claimants in respect of losses caused by the overcharge.

The CAT was clear that this not an exhaustive list of factors and that the factors are not themselves decisive or necessary. However, in a situation where none are present, the evidence of factual causation needs to be that much stronger than it was in this case to establish a proximate causal link.

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