

Insights

LEARNING FROM THE TRUCKS CARTEL JUDGMENT: MITIGATION

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SUMMARY

The Competition Appeal Tribunal's judgment in Royal Mail and BT's claim against DAF Trucks has provided welcome clarity on how the legal test for pass on should be applied. It provides helpful guidance on the factors that a defendant may rely on to establish a direct and proximate, causative link between an overcharge and downstream pricing.

It also serves as a reminder of the importance that expert evidence takes due account of the observable facts of the case.

BACKGROUND

In July 2016, the European Commission (the Commission) issued a settlement decision finding that between 1997 and 2011 five major truck manufacturers 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.

Royal Mail and BT were among a large number of claimants to bring claims in relation to the Trucks Cartel and the first and, so far, the only claimants in the UK to proceed to trial. Royal Mail and BT's claims were heard by London's Competition Appeal Tribunal ("**CAT**") in a ten week trial which ran from April to June 2022 and the CAT handed down its judgment ruling decisively in favour of the claimants in January 2023.

DAF has been granted permission to appeal aspects of the CAT's judgment on the Supply Pass-on issue (as defined below) but has not sought permission to appeal the CAT's decision on its other mitigation arguments (its "Resale Pass-on" and "Complements" arguments (defined below)).

DAF'S MITIGATION ARGUMENTS

DAF's primary position was that neither Royal Mail nor BT suffered any overcharge and that it was implausible that the trucks cartel could have increased the prices of the trucks they bought.

However DAF argued in the alternative that, even if Royal Mail and BT had suffered an overcharge, they would have fully mitigated any losses through a combination of:

1. Increasing the prices charged for their respective mail and telecoms products ("**Supply Pass-on**").
2. Achieving higher prices for trucks which they resold after usage ("**Resale Pass-on**").
3. Paying less for bodies and/or trailers bought alongside trucks ("**Complements**").

THE CLAIMANTS' POSITION

The Claimants contended that DAF had not demonstrated that any such mitigation of loss had occurred. They further contended that even if DAF could show that there was some (supply) pass-on of the increased truck costs as a matter of fact, it cannot satisfy the test for legal causation.

THE CAT'S EXPLANATION OF THE RELEVANT LEGAL PRINCIPLES

Before going on to set out its judgment rejecting DAF's mitigation arguments, the CAT took the opportunity to explain the legal principles engaged, reflecting on the important recent cases of *Sainsbury's v Mastercard* [2016] CAT 11 [2018] EWCA Civ 1536, [2020] UKSC 24 (together, "**Sainsbury's**"); *Stellantis v NTN Corporation* [2022] EWCA Civ 16 ("**Stellantis**"); *Royal Mail/BT v DAF* [2021] CAT 10 (the "**May Judgment**"), the *MIF Umbrella Proceedings (Pass On Judgment)* [2022] CAT 31.

Applying that case-law, the CAT unanimously held that in order to satisfy the test for legal causation, DAF must prove a direct and proximate causative link between the overcharge and any increase in prices by the Claimants. In that context, the CAT unanimously concluded that in order to demonstrate legal causation it was insufficient to simply rely on all costs (including increases in costs) being fed into the Claimants' or their regulators' business planning and budgetary processes. There must be something more specific than that.

Building on the principles set out in *Sainsbury's*, the *May Judgment* and *Stellantis*, the CAT (again unanimously) went on to set out a (non-exhaustive) list of potentially relevant factors which a defendant may rely on to establish the necessary direct and proximate causative link between an overcharge and downstream pricing. These are:

1. Knowledge of the overcharge or the specific increase in the cost in question;
2. The relative size of the overcharge against the Claimants' overall costs and revenue;

3. The relationship or association between what the overcharge is incurred on and the product whose prices have been increased; and/or
4. Whether there are identifiable claims by identifiable purchasers from the Claimants in respect of losses caused by the overcharge.

The CAT made clear that these factors are not intended as a rigid test for legal causation. None of the factors is decisive or necessary to establish legal causation but in a situation where none are present, the evidence of factual causation would need to be that much stronger to establish a proximate causal link.

THE CAT'S DECISION ON SUPPLY PASS-ON

Applying the relevant legal principles, the Tribunal reached a unanimous conclusion that DAF's Supply Pass-on defence should be rejected.

The judgment of the majority (comprised of Mr Justice Green and Sir Iain McMillan) was that DAF had failed to establish both:

- i. legal causation; and
- ii. that as a matter of fact the Claimants prices would have been lower in the counterfactual.

As to the matter of legal causation, the majority noted that the overcharge was "*too remote from [the Claimants'] downstream prices*" before concluding "*As a matter of law, we do 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*". In reaching its conclusion (albeit not determinative) the majority found it significant that none of the four factors noted above were engaged:

- i. the Claimants were not aware of the overcharge;
- ii. the overcharge was tiny relative to their overall cost base;
- iii. there was no direct association between truck costs and the products sold by the Claimants; and
- iv. even if it could be shown that there was an increase in prices because of an increase in costs, it would be impossible to identify which prices in relation to which specific products actually increased because of the overcharge and thus which (if any) purchasers may have suffered an overcharge.

As to the matter of factual causation, the majority carried out a detailed analysis of Claimants' respective lines of business, their costing and pricing process and the regulatory controls to which they were subject. Based on that evidence, the majority concluded, "*we do not think that, in the*

words of the Supreme Court in Sainsbury's, the Claimants have "recovered from others" the Overcharge or "transferred all or part of [their] loss to others".

Whilst the economist on the panel, Derek Ridyard, agreed with the majority that DAF's Supply Pass-on defence should not be permitted to succeed he did so for different reasons. Mr Ridyard concluded that it was likely that some Supply Pass-on had occurred. Nevertheless, he considered DAF's claim should not be permitted to succeed on the basis that *"a successful claim from downstream customers for their share of the passed on damages would be excessively difficult or impossible"*.

THE CAT'S DECISION ON RESALE PASS-ON

DAF sought to rely on an econometric analysis to demonstrate that if the price of their new trucks increased as a result of the overcharge, then the price of used trucks sold by the Claimants would also increase. DAF contended that this alleged price effect could arise because

- i. new trucks and used trucks are substitutable such that their prices are linked; and
- ii. a reduction in sales of new trucks caused by the overcharge would make trucks more scarce than they would otherwise have been and this would tend to push up their resale price.

DAF's Resale Pass-on defence was unanimously rejected by the Tribunal as there were *"too many unresolved technical and empirical questions surrounding [DAF's expert's] econometric analysis and an insufficiently clear link between the observed facts of the case and the conclusions he draws"*. The Tribunal noted this impression was reinforced by an *"obvious conflict"* between the descriptions of used truck sales in DAF's factual witness evidence and the analysis of its expert economist. A DAF factual witness had stated that there was a *"limited resale market"* for Royal Mail's trucks and had noted that BT's trucks were *"usually scrapped"* at the end of their long life of being used by BT.

THE CAT'S DECISION ON COMPLEMENTS

DAF sought to rely on a simulation model to argue that the price of bodies and trailers would have been reduced as a result of any overcharge. This model started from a purely theoretical set of equations that purported to describe how suppliers of trucks and trailers/bodies interacted in a competitive process. It was built upon a number of assumptions made by DAF's expert in respect of the different markets. Finally, DAF's expert sought to *"calibrate"* the model to make it consistent with the partial data on those markets that was available.

The Claimants argued that the Defendant's model was simply incapable of proving DAF's case because it relied so heavily on arbitrary theoretical assumptions and contained so little evidence on how the market actually operated.

The CAT reached a unanimous decision firmly rejecting DAF's complements defence. Again, in reaching its decision the Tribunal cited deficiencies in DAF's expert evidence and its lack of grounding in the facts of the case. The Tribunal remarked on the fact that DAF had "*adduced no evidence as to whether it has observed that price changes in trucks gives rise to price changes in trailers/bodies*". It explained that "*[i]f there was such an effect, DAF would surely have known this and would have needed to factor it in when negotiating with its customers.*" The Tribunal also commented that DAF's appointed expert had not made "*any attempt to sense check many of the key inputs and outputs*" of the model that he relied upon. The Tribunal had "*serious concerns about the inputs to the model on trailer/body suppliers' margins which was accepted to be a critical part of the analysis*".

The Tribunal concluded "*that DAF has come nowhere near to establishing on the facts that there was a Complements effect in this case*" and went on to say that "*this should have been obvious to DAF and Professor Neven when considering whether to pursue this mitigation defence.*"

CONCLUSION

The judgment provides welcome clarity on the practical application of the principle of legal causation in competition claims.

The judgment also serves as a reminder of the difficulties which may arise where a party's factual and expert evidence is not aligned.

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