



Neutral citation [2021] CAT 34

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1291/5/7/18 (T)

19 November 2021

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Before:

HODGE MALEK QC
(Chairman)

BETWEEN:

- (1) RYDER LIMITED**
(2) HILL HIRE LIMITED

Claimants

- and -

- (1) MAN SE**
(2) MAN TRUCK & BUS AG
(3) MAN TRUCK & BUS DEUTSCHLAND GMBH
(4) MAN TRUCK AND BUS UK LIMITED
(5) AB VOLVO (PUBL)
(6) VOLVO LASTVAGNAR AB
(7) VOLVO GROUP TRUCKS CENTRAL EUROPE GMBH
(8) VOLVO GROUP UK LIMITED
(9) RENAULT TRUCKS SAS
(10) DAIMLER AG
(11) MERCEDES BENZ CARS UK LIMITED
(12) STELLANTIS N.V. (FORMERLY KNOWN AS FIAT CHRYSLER
AUTOMOBILES N.V.)
(13) CNH INDUSTRIAL N.V.
(14) IVECO S.P.A.
(15) IVECO MAGIRUS AG
(16) IVECO LIMITED
(17) PACCAR INC.
(18) DAF TRUCKS N.V.
(19) DAF TRUCKS DEUTSCHLAND GMBH
(20) DAF TRUCKS LIMITED

Defendants

RULING: DISCLOSURE

A. APPLICATION

1. By an application letter from the Claimants’ solicitors, dated 21 September 2021, the Claimants, called for the purposes of this ruling “Ryder”, seek an order from the 12th to 16th Defendants (“Iveco”) that it shall provide to the Claimants a copy of an extract from Iveco’s Statcom system (“the Statcom Extract”) in unredacted form (“the Statcom Disclosure Application”). As set out below, the application has been narrowed to 9 out of the 44 columns of data within the Statcom Extract.

B. BACKGROUND

(1) Approach to disclosure in the Trucks actions

2. 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."

3. The Disclosure Ruling sets out the approach which the Tribunal has adopted in relation to the disclosure across all seven "Trucks" actions, which until last year had been case managed together. In providing this ruling, I have followed the approach set out in the Disclosure Ruling and the procedure for dealing with the various types of disclosure applications as explained by the Tribunal in *Dawsongroup Plc v DAF Trucks NV* [2021] CAT 13 at [3]-[11]. This application with the consent of the parties has been dealt with on the basis of the parties' written submissions and without a hearing. This means that the application can be dealt with in a cost-effective manner in accordance with the Tribunal's governing principles as set out in Rule 4 of the Competition Appeal Tribunal Rules 2015.
4. 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 Iveco, had carried out a single continuous infringement of Article 101 of the Treaty on the Functioning of the European Union with respect to the sale of medium and heavy trucks ("Trucks") 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, Ryder, as do the claimants in the other six Trucks claims, alleges that the purchase price for Trucks was higher due to the Infringement. The defendant entities in these and the other proceedings 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.

5. 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.”

6. 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 Ryder’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.
7. 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 Truck 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. In the context of the Statcom Extract this means that disclosure is not simply a question of producing the document, but also dealing with any queries made by the Claimants and their experts seeking to understand and use the material.

(2) Disclosure in the *Ryder* proceedings

8. On 26 November 2019, I made a disclosure order providing for disclosure by all the parties to the proceedings, including in relation to Value of Commerce and Overcharge from Iveco in the categories set out in Annex 5 to the order ("the Disclosure Order").
9. Category VoC2/O1 relates to data in relation to the sale of each new Truck sold by Iveco to any customers in the UK from 1 January 1997 to 30 September 2017. The parties subsequently agreed that Iveco would provide some disclosure relating to the pre-Infringement period (1994 to 1996).
10. The Statcom system was a system developed by Iveco Limited in the late 1980s and was used to calculate the expected net profitability of each Truck sold and to update its finance and accounting system. It was replaced by the SAP system in around 2007, at which point the Iveco Limited in-house software developer responsible for maintaining the Statcom system left Iveco Limited. The system

was not subsequently maintained. Iveco has been unable to interrogate the system itself, but was able to locate a number of historical data extracts from the Statcom system on the hard drive of two former Iveco Limited financial controllers. One of their extracts, the Statcom Extract, is the subject matter of the current application.

11. Pursuant to the Disclosure Order, Iveco's disclosure relating to disclosure category VoC2/O1, included a dataset which contained, inter alia, data from Iveco's REG system and the Statcom Extract which covers the period 1995 – 2004. Iveco used the REG system to report on invoiced and ordered vehicles, calculate sales costs, and analyse sales volumes and profitability. REG contains pricing information, costs data in the form of COGS (Cost of Goods Sold), other transaction-specific information (dates, invoice numbers, customer names) and some feature information. There is some overlap in the types of data which were maintained on the Statcom system as it covered various categories such as pricing, cost, and transactional and product information. Where there is an overlap, it appears that there are some inconsistencies in the data between what was held on the two systems.

12. There was extensive correspondence between the parties on the extent to which Iveco should provide pre-Infringement disclosure from the REG and Statcom systems. Ultimately, by consent, I made an order on 6 November 2020 requiring Iveco to disclose no later than 30 November 2020:
 - (1) the available REG data responsive to category VoC2/O1 of the Defendant Disclosure Categories for the years 1994, 1995, and 1996; and

 - (2) a copy of the 1995-2004 Statcom data extract responsive to category VoC2/O1 of the Defendant Disclosure Categories without redactions with respect to Trucks sold prior to 1997.

It was implicit in the Order that Iveco could redact material from the Statcom Extract which was irrelevant and fell outside category VoC2/O1.

13. The Statcom Extract contains 44 columns of data. As to these:
- (1) 5 columns were provided to Ryder without redactions in relation to relevant Truck sales, these were DOCNO (row 9 of the Schedule as defined below), VAN (row 18), BASERETAIL (row 20), OPTRETAIL (row 21), and TOTVCE (row 40).
 - (2) 6 columns were provided with partial redactions, these were BASEDISC (row 23), OPTIONDISC (row 24), PROGDISC (row 25), FTSDISC (row 26), DEMOSISC (row 27), and OTHERDISC (row 28).
 - (3) The remaining 33 columns were fully redacted.
 - (4) As regards the remaining 33 columns, at the time of the Statcom Disclosure Application, Iveco had not provided Ryder with a description of the contents of most of those columns.
14. Having considered the Statcom Disclosure Application, on 23 September 2021, the Tribunal wrote to the parties requiring them to take certain steps to assist it in determining the application, including preparing a schedule setting out Iveco's explanation of the 44 columns in the Statcom Extract and the parties' position in relation to the disclosure of each column ("the Schedule"). The Schedule contains 5 columns: (1) Column heading (disclosure status), (2) Iveco's description of information in the column, (3) Iveco's objections to disclosure (6 October 2021), (4) Ryder's reply (11 October 2021), (5) Iveco's response (14 October 2021).
15. The process of compiling the Schedule has been of significant assistance, both to the parties and to the Tribunal in narrowing down the issues and providing the competing positions of the parties in relation to the various categories in a useful form. The Schedule shows that for the purposes of the present application, there remained ten columns in respect of which Ryder contended that disclosure is necessary. These break down into five categories as follows:

(1) Row 19: VOLUME;

(2) Row 29: OPCOST;

(3) Row 30: VEHCOST;

(4) Row 33: COST810;

(5) Rows 34-39: TRANS_REV, LOCAL_ADJ, WARR_ACR,
TRANS_ACR, PDI_ACR and M12_ACR.

16. By letter dated 4 November 2021 to the Tribunal, Ryder's solicitors confirmed that in the light of a confirmation provided by Iveco, Ryder was no longer pursuing its application for disclosure of the Volume column (row 19).
17. In summary, Ryder's position is that disclosure of the remaining 9 columns is necessary for the fair resolution of the proceedings in that they want their expert to review such material in order to estimate the amount of the Overcharge. Iveco's position is that disclosure is not necessary, and that the information contained in these columns is unlikely to provide any assistance to either the experts or the Tribunal.

(3) Discussion

18. There has already been a considerable amount of disclosure in these proceedings and at significant cost to the parties. Not only has there been the cost for searching for and disclosing the material, but also the costs entailed in clarifying and seeking to understand the material that has been disclosed and for the experts to review the material. The data for the period covered by the Statcom Extract, namely 1995-2004, is incomplete and there are concerns as to the reliability and consistency of what has been disclosed. Whilst there is some overlap between Iveco's REG system and its Statcom system, the Statcom system does provide information and data which goes beyond the REG system. Thus, in principle there should be disclosure of the Statcom Extract and any redaction should be carried out on the basis that the material redacted is both confidential and irrelevant to the issues. This does not mean the entirety of the

Statcom Extract should be disclosed as there are columns which are manifestly irrelevant to the exercise that the experts need to undertake in estimating the Overcharge. As regards each of the 9 remaining columns, I consider disclosure should be as set out below.

(a) Row (29): OPCOST

19. Iveco has stated that the meaning of this column is unclear and it only takes one of two values: 0 or 1. Ryder's position is that it would like its expert to inspect and interrogate this data to ascertain whether there are any differences between the Trucks ascribed a value of 0 and those ascribed with a value of 1.
20. I do not consider disclosure of this column is necessary or proportionate in the circumstances. It is highly unlikely any useful conclusions can be drawn from this data given that the meaning of this column is unclear, even if it may relate to costs in some way.

(b) Row (30): VEHCOST

21. Iveco has stated that this is likely to represent the production cost of Trucks. This appears to include an inter-company mark-up on the standard factory costs in the period 1995 to 1996. The production costs of Trucks are clearly relevant and should be disclosed. However, Iveco's objection is based on the submission that such costs have already been disclosed and the Disclosure Order provides that the documents and data to be disclosed may be confined to the best available evidence about the information which is the subject matter of the relevant category. The purpose of this provision was to avoid duplication and the cost of providing the same data from multiple sources. Iveco contend that it has already disclosed the best available COGS data in that:

- (1) COGS data has been supplied from the REG system and this is likely to be the best available.
- (2) The VEHCOST and COGS values are almost identical for the period 1997 to 2007.

- (3) Iveco understands that the VEHCOST values from the Statcom Extract in the period 1995 and 1996 appear to include an inter-company mark-up on each Truck's standard factory cost, which is equivalent to COGS. Therefore, for this period, the disclosed COGS values from REG capture COGS data per Truck (i.e. actual truck production costs) more accurately than the VEHCOST values in the Statcom Extract.
22. Given that for the period 1997 to 2007 the values for COGS from the REG system and the VEHCOST values are not identical, it may well be useful for both sets of data to be disclosed. Further for the period 1995 to 1996, the inter-company mark-up in the VEHCOST column may provide valuable evidence for the experts to consider in understanding actual costs and pricing decisions. I therefore consider it necessary and proportionate for disclosure to be provided in respect of this column.

(c) Row (31): COST810

23. Iveco has stated that the meaning of this column is unclear. The values are 0 for more than 90% of Trucks and it is unclear how these values should be interpreted. Ryder's position is that it would like its expert to inspect and interrogate the data in case the entries with non-zero values represent additional material costs.
24. I do not consider disclosure of this column is necessary or proportionate in the circumstances. Disclosure will lead to speculation and additional costs which are most unlikely to lead to any evidence of value given the uncertain meaning of the column and data.

(d) Rows (34-39): TRANS_REV, LOCAL_ADJ, WARR_ACR, TRANS_ACR, PDI_ACR and MI2_ACR

25. The remaining columns in issue relate to Variable Commercial Expenses ("VCEs"), being costs that affect the price paid for a Truck. Iveco accepts that total VCE information may be useful to the experts in their modelling to determine whether there was any Overcharge. Hence Iveco has disclosed data from the TOTVCE column of the Statcom Extract, as this relates to total VCE.

The issue between the parties is whether there should be disclosure from the columns which deal with individual components which make up the total VCE.

26. Iveco has stated the meaning or likely meaning of each of these columns to be as follows:

- (1) Row (34): TRANS_REV – accrual for transport revenue.
- (2) Row (35): LOCAL_ADJ – accounting adjustment to VCE.
- (3) Row (36): WARR_ACR – accrual for standard warranties.
- (4) Row (37): TRANS_ACR – accrual for transport costs.
- (5) Row (38): PDI_ACR – accrual for pre-delivery inspection.
- (6) Row (39): M12_ACR – miscellaneous accruals.

27. Iveco contends that having disclosed the total VCE, it is unnecessary to disclose these columns being components of the total VCE in that:

- (1) The total VCE figures should be sufficient to allow Ryder's experts to control for VCE costs in their econometric modelling.
- (2) The individual extracts in these 6 columns do not together add to the sum of VCE components recorded in the TOTVCE column.
- (3) It is unlikely that an economic expert would use the apparently incomplete individual components in any overcharge modelling.
- (4) If disclosed Ryder's expert will analyse the data and lead to unnecessary and avoidable costs.

28. I consider that the data in these columns should be disclosed, even if it may give an incomplete picture of the make-up of total VCE. There is no dispute that

VCE is a cost which impacts on the price paid by customers for Trucks. Understanding how the components of VCE change over time may also be material as these changes may explain any variations in the total VCE which impact on the price paid. It may enable Ryder's expert, Dr Wu to control for any step changes in certain components that may have an effect on total VCE.

C. CONCLUSION

29. I therefore order that:

- a) Iveco give disclosure of the Statcom Extract without redacting the 7 columns identified above for relevant Truck sales. The Statcom Extract is a single document and in general parties should only redact information which is both confidential and irrelevant. The 7 columns are relevant for the reasons I have indicated. It is both necessary and proportionate for these columns to be disclosed. There is no significant cost entailed in removing redactions in a document which Iveco has already disclosed. I appreciate that there will be costs arising from the experts analysing the material and the parties dealing with any queries. I would expect the parties to act in a cooperative, proportionate and reasonable way in dealing with this material.
- b) Costs in the case. The exercise was necessary to resolve the issues between the parties in relation to the disclosure of the Statcom Extract. The parties acted in a sensible and constructive way in relation to the application and the position of neither party was fully accepted. Neither party acted in an unreasonable manner warranting an adverse costs order. This approach follows the approach taken by me in relation to Friday Applications and disclosure applications dealt with on paper.

Hodge Malek QC
Chairman

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

Date: 19 November 2021