

## IN IT FOR THE LONG HAUL: LESSONS TO BE LEARNT FROM *ROYAL MAIL GROUP LTD V DAF TRUCKS LTD*.

### In a nutshell

The Court of Appeal (the “Court”) recently dismissed an appeal brought by truck manufacturers, DAF Trucks Limited and others (together “**DAF**”), against follow-on damages awarded by the Competition Appeal Tribunal (the “**CAT**”) to Royal Mail Group Limited (“**Royal Mail**”) and companies in the BT Group (“**BT**”) (together, the “**Claimants**”) in relation to an Article 101 TFEU infringement finding of the European Commission.

In broad terms, the CAT had determined that the collusion between DAF and four other truck manufacturers had caused a 5% increase in prices charged to the Claimants. The CAT dismissed DAF’s arguments that, to the extent that there was an overcharge at all, this was mitigated or otherwise offset by the Claimants’ passing on any such overcharge in the form of higher prices. DAF was granted permission to appeal the CAT’s decision.

In dismissing DAF’s appeal, the Court endorsed the CAT’s “*broad axe*” analysis of the overcharge, particularly in circumstances where DAF had adduced no evidence as to how the cartel operated, what impact it had on pricing, and what benefits it had derived from its participation. The Court also offered important guidance for the CAT as it tackles similar cases going forward, providing suggestions as to:

- How defendants should approach disclosure relating to the operation of a cartel;
- The role of experts when providing their evidence on a cartel; and
- The duty of experts to the court.

### The background

This case stems from a determination of the European Commission in 2016 that DAF, together with MAN, Daimler, Iveco, and Volvo/Renault, had colluded on truck pricing arrangements, thereby participating in a cartel that was illegal by object and an infringement of Article 101 TFEU. Royal Mail and BT, each of whom purchased or leased large volumes of trucks from DAF, issued follow-on claims for damages in respect of the overcharge caused by way of this infringement. Those claims were heard before the CAT, in a trial concerned only with issues of causation and quantum of damage, including mitigation.

The CAT found that, in order to establish causation, the Claimants needed to show on the balance of probabilities that they suffered some monetary harm as a result of the infringement. On the balance of probabilities, the CAT found that the evidence pointed to the existence of an overcharge and agreed that DAF’s infringement had caused loss to each of the Claimants by way of this overcharge. The CAT noted that there are clear

reasons for expecting that a concerted attempt by all the major European truck suppliers to restrict price competition over a 14-year period would to some extent succeed in materially affecting transaction prices, and that there was a complete lack of evidence put forward by DAF as to why the information was shared, if not for financial gain. In addition, given that the Commission had determined the infringement was by object, that in itself means the cartel was very likely to have had negative effects on transaction prices.

Considering quantum, the CAT assessed the overcharge to be 5% for each party, taking a “*broad axe*” approach and finding that the overcharge sat somewhere between the two models put forward by the respective experts of DAF and the Claimants. The CAT noted that the parties’ experts had provided diametrically opposed positions which aligned with their respective parties’ positions and so to attempt to analyse their respective positions via a mathematical exercise would ultimately be unhelpful. However, since the Claimants had demonstrated causation the CAT held that they had a right to damages. In light of the expert evidence, the CAT determined that such overcharge should be applied to each Claimant’s value of commerce, over the whole of the relevant period.

In terms of mitigation, DAF contended that even if it were true that there had been an overcharge to the Claimants, this would only have led to an increase in the price of used trucks sold on by the Claimants, and that benefit should therefore be offset against the overcharge. Similarly, DAF contended that there was also a pass on of the overcharge to the Claimants’ customers, for example by increases in prices of postage stamps for Royal Mail or phone line rentals for BT, which again should be offset against any overcharge assessment. DAF also noted that, in the case of an overcharge, the prices of bodies and trailers manufactured by third parties would have decreased, creating further savings for the Claimants which should also be offset. The CAT did not accept any of these mitigation defences, holding that DAF had not substantiated its claims, due to deficient data provided, the absence of factual underpinnings, and the simplification of assumptions made.

## **The Appeal**

DAF appealed the CAT’s decision on the basis that: (1) the CAT placed irrational reliance on the Claimant’s expert methodology and failed to assess whether the burden of proof in relation to the quantum of loss had been discharged; (2) the CAT erred in concluding that there was an insufficient direct causative link between any overcharge and onward prices; (3) the CAT was wrong to interpret the determination of the European Commission as including truck bodies within the scope of the infringement; and (4) the decision reached regarding compound interest was irrational and unsupported by evidence.

The Court held that, in its consideration of whether there had been an overcharge, the CAT clearly addressed the question of whether the Claimants had established overcharge on the balance of probabilities. In light of DAF’s failure to adduce any evidence of the cartel’s operation, which may have shed light on the benefits derived from participation in the cartel if not, as DAF contended, for financial gain, the Court

found that the CAT was entitled to conclude that there was an overcharge, as a result of which the Claimants suffered significant financial loss. The Court found that the CAT had then appropriately quantified damages – in circumstances where an evidential gap had been left by a failure on DAF to disclose potentially inculpatory material, there could be no complaint when the CAT plugged that evidential gap by wielding the “*broad axe*”, which was an entirely appropriate course of action in the circumstances.

In terms of the pass-on defences, the Court agreed with the CAT that DAF would only succeed on such argument if it could prove that there was a direct and proximate causative link between the overcharge and any downstream increase in prices by the Claimants. In circumstances where the overcharge had arisen as a consequence of a secret cartel, the Claimants would not have been aware of the overcharge, or its size, in order to be able to pass it on downstream to their own customers. Further, there has been no identifiable claims from those to whom DAF alleged the overcharge had been passed. In absence of these factors, the Court concluded that in order to establish a link between the overcharge and downstream increases, much stronger evidence of factual causation would be required – which was not presented in this case. The Court agreed with the CAT that the pass-on defences should fail.

The Court also agreed with the CAT’s decision regarding the scope of the infringement, which it determined included truck bodies, and found that the CAT appropriately evaluated the claim for compound evidence.

## Trucking along...

Interestingly, the Court (per LJ Green) identified that this case “*presents issues the CAT will no doubt grapple with again*” and went as far as to suggest some case management steps that the CAT might take in future, similar cases. Notably, the Court identified that non-disclosure of evidence relating to the operations of the cartel, together with an excessive reliance on expert evidence, and the lack of willingness on the part of the experts to moderate their opinions, all contributed to a significant difference of opinion as to the level of overcharge, and led to the use of the “*broad axe*” of the CAT to fill gaps left in the evidence.

The Court suggested that the following steps might be taken to avoid this difficulty becoming “*an embedded feature*” of this type of litigation:

- The CAT might consider requiring the defendant to identify early on whether disclosure of the operation of the cartel is to be given and, if not, why not. The CAT could then consider whether to compel such disclosure, or at least make clear that failure to disclose might lead to the drawing of adverse inferences.
- In relation to experts, the CAT might benefit from requiring experts to explain whether they had sight of internal documentation regarding the operation of the cartel and, if so, what was provided and how this ultimately featured in the expert analysis. If such material was not sought, it could be beneficial to seek an explanation from the expert as to why, as well as ensuring that all instructions given to the expert are transparent.

- The CAT might wish to confirm that all experts fully understand their duty to the CAT, and respect what this entails – which ultimately is a duty of cooperation, including full and frank disclosure of anything impacting upon their objectivity or independence. This also encompasses the duty to adjust opinions in light of further evidence.

This case highlights the importance of grappling with underlying facts and expert evidence, whilst also providing a key reminder as to the role of experts and their duties to the court. Together with the underlying judgment of the CAT, this case sets a framework for analysis of pass-on and mitigation defences in collective actions, and spotlights the CAT's ability to wield the "*broad axe*" in its assessment of damages, particularly in the absence of evidence. No doubt the CAT will note these points with interest as it continues to deal with a high volume of similar cases.

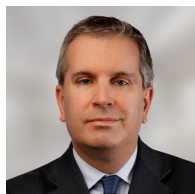
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