Neutral citation [2024] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: As set out in Annex 1 to this Judgment

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

9 January 2024

Before:

SIR MARCUS SMITH
(President)
THE HONOURABLE LORD ERICHT
THE HONOURABLE MR JUSTICE HUDDLESTON

Sitting as a Tribunal in the United Kingdom

IN THE MATTER OF:

THE TRUCKS SECOND WAVE PROCEEDINGS

PARTIES TO THIS JUDGMENT:

(1) **THE ARLA CLAIMANTS** (as set out in Annex 2 to this Judgment).

(2) **THE EDWIN COE CLAIMANTS** (as set out in Annex 2 to this Judgment).

(3) **THE ASDA CLAIMANTS** (as set out in Annex 2 to this Judgment).

(4) **THE DS SMITH CLAIMANTS** (as set out in Annex 2 to this Judgment).

(5) **THE ADUR CLAIMANTS** (as set out in Annex 2 to this Judgment).

(6) **THE BOOTS CLAIMANTS** (as set out in Annex 2 to this Judgment).

(7) **THE HAUSFELD CLAIMANTS** (as set out in Annex 2 to this Judgment).

(8) **THE BCLP CLAIMANTS** (as set out in Annex 2 to this Judgment).

(9) **THE MORRISONS CLAIMANTS** (as set out in Annex 2 to this Judgment).

(10) **THE NORTHERN IRISH PLAINTIFFS** (as set out in Annex 2 to this Judgment).

(11) **THE SCOTTISH PURSUERS** (as set out in Annex 2 to this Judgment).

(12) **THE DEFENDANTS** (as set out in Annex 2 to this Judgment).

Heard at the Court of Session in Edinburgh on 19 and 20 October 2023, and remotely (at locations in England and Wales, Scotland and Northern Ireland) on 14 December 2023

RULING (FUTURE CONDUCT OF THE PROCEEDINGS)

APPEARANCES

Mr Bibek Mukherjee (instructed by Walker Morris LLP) appeared on behalf of the Arla Claimants.

Mr Alan Bates (instructed by Edwin Coe LLP) appeared on behalf of the Edwin Coe Claimants.

Ms Anneli Howard KC and Mr Ciar McAndrew (instructed by Mishcon de Reya LLP) appeared on behalf of the Asda Claimants.

Ms Jessica Boyd KC (instructed by Fieldfisher LLP) appeared on behalf of the DS Smith Claimants.

Mr Thomas De La Mare KC and Daniel Cashman (instructed by Fieldfisher LLP) appeared on behalf of the Adur Claimants.

Mr Philip Moser KC (instructed by Fieldfisher LLP) appeared on behalf of the Boots Claimants.

Mr Aqeel Kadri (instructed by Hausfeld & Co. LLP) appeared on behalf of the Hausfeld Claimants.

Mr Ben Lask KC (instructed by Bryan Cave Leighton Paisner LLP) on behalf of the BCLP Claimants.

Mr Alan Maclean KC and Ms Emily Neill (instructed by Arnold & Porter Kaye Scholer LLP) on behalf of the Morrisons Supermarkets Claimants.

Mr Frank O'Donoghue KC and Ms Ashleigh Jones (instructed by Comerton & Hill Solicitors Limited) on behalf of the Northern Irish Plaintiffs.

Mr Gerry Moynihan KC (instructed by Anderson Strathern) appeared on behalf of the Scottish Pursuers.

Mr Rob Williams KC (instructed by Travers Smith LLP) appeared on behalf of the DAF Defendants.

Mr Brendan McGurk (instructed by Slaughter and May LLP) appeared on behalf of the MAN Defendants.

Ms Sarah Abram KC (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Volvo/Renault Defendants.

Mr Ben Rayment and Ms Alexandra Littlewood (instructed by Macfarlanes LLP) appeared on behalf of the Daimler Defendants.

Mr Tony Singla KC and Mr Andrew McIntyre (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Iveco Defendants.

Mr Brian Kennelly KC and Mr Rayan Fakhoury (instructed by Allen & Overy LLP) appeared on behalf of the Scania Defendants.

1. By its decision of 19 July 2016 in Case AT.39824 – Trucks (the **Settlement Decision**), the European Commission (the **Commission**) determined that five truck manufacturers – DAF, MAN, Daimler, Iveco and Volvo/Renault (the **Cartelists**) had carried out a single and continuous infringement 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**) between 1997 and 2011 (the **Cartel**).

2. This ruling is dated 9 January 2024, and is therefore written over 10 years after the Cartel ended; over 20 years after the Cartel began; and at least five years after the Settlement Decision. Unsurprisingly, given the nature of the Cartel (which is not considered further in this ruling), a large number of private "follow-on" actions have been commenced in multiple jurisdictions. The volume of litigation has been vast, and is on-going. It raises quite fundamental questions of case management for the courts and tribunals across Europe, including those in the United Kingdom, and including this Tribunal in particular.

3. The litigation before this Tribunal has been managed in two "waves". **Wave 1** comprises three cases, which we will refer to as **Trial 1**, **Trial 2** and **Trial 3** respectively. All other cases fall within the second wave of cases – **Wave 2**. Unlike the cases comprising Wave 1, the cases within Wave 2 are multi-jurisdictional within the United Kingdom, emanating from courts and tribunals in England and Wales, Scotland and Northern Ireland and transferred by those courts and tribunals into this Tribunal, as well cases originating in this Tribunal. The Wave 1 cases, by contrast, were all cases where the jurisdiction was England and Wales.

4. Trial 1 of Wave 1 (*Royal Mail Group Limited v. DAF Trucks Limited*, [2023] CAT 6) was heard by a tribunal comprising Michael Green J (Chair), Sir Iain McMillan and Derek Ridyard. Judgment was handed down on 7 February 2023, after a hearing taking place in May and June 2022. Aspects of the decision are on appeal to the Court of Appeal. We need say no more about Trial 1 save that the hearing was obviously substantial, and the judgment correspondingly weighty (running to some 300 pages). Trials 2 and 3 were scheduled to be heard

in 2023 and 2024 respectively. Trial 2 settled in early 2023, and Trial 3 has recently settled. No substantive hearing, in either case, has ever taken place. It is important to note that both Trial 2 and Trial 3 would have been massive exercises in terms of resource and time commitment: Trial 2 had a maximal time estimate of 18 weeks, and Trial 3 a maximal time estimate of 24 weeks.

5. Wave 1 was managed by a tribunal comprising three Chairs: the former President of the Tribunal, Sir Peter Roth P; Fancourt J; and Hodge Malek, KC (formerly QC). The Tribunal took the view – after hearing from the parties involved – that the Wave 1 proceedings were best managed sequentially, as "lead" cases, so that the resolution of these lead cases might inform the negotiated outcomes of later cases. That is one, very common, way of resolving multiple cases involving the same or similar issues, and we will refer to as the **Sequential Approach**. The Sequential Approach has many advantages: cases – even if large, as all the Wave 1 cases were – can be managed using "traditional" case management tools; the cases, as lead cases, can inform later cases in the sequence; and both legal certainty and a settlement environment is promoted. Of course, there are downsides, also: cases at the "end of the queue" must await many years to achieve a substantive hearing, which is a denial of justice, particularly in the case of a long-standing cartel; some "lead" cases settle, which means that their ability to inform future outcomes is diminished (as was the case with Trials 2 and 3); and, where issues of fact predominate over issues of law, even cases which fight to a substantive outcome (like Trial 1) may not be as predictively informative as might be hoped.

6. The alternative to the Sequential Approach is the **Issues-Based Approach**, which involves trying important (case settling) issues arising out of the generality of the litigation in one go, across all cases. The appeal is obvious: common issues are resolved, in one go, against all involved parties. The problems are also obvious: managing cases on an Issues-Based Approach involves case management questions an order of magnitude harder than arise in the Sequential Approach, not least because the efficient case management of the litigation must cede priority to a <u>fair</u> process, where all interested parties are given a voice, not merely in relation to issues that are exactly the same but also

(and in particular) those issues where there may not be complete common ground between parties otherwise making common cause.

7. It would be invidious and pointless to try to articulate which approach – the Sequential Approach or the Issued-Based Approach – is "better". As we have noted, each has benefits and disbenefits. Furthermore, evaluation of the success of each approach is elusive, even impossible. Was Wave 1 a success – because Trial 1 fought, Trials 2 and 3 settled, but leaving the Wave 2 litigation substantially intact – or a failure? Failure or success can really only be judged by asking: What would have happened, had Wave 1 been litigated using an Issues-Based Approach? The answer to that is, of course, unknown: all one can say is that, in this counter-factual case-management hypothetical world, the success of the Issues-Based Approach can in no way be guaranteed. An indication of the difficulties that arise can be discerned by a consideration of the various interlocutory judgments published by a differently constituted tribunal in the interchange fee litigation (which is being managed on an Issues-Based Approach in this Tribunal).

8. With the settlement of Trial 3, and the consequent conclusion of Wave 1, it was necessary to consider how the (many) Wave 2 cases might be case managed. Because Wave 2 comprises cases emanating from England and Wales, Scotland and Northern Ireland, an appropriate "three Chair" tribunal was appointed, comprising Sir Marcus Smith P (England and Wales), Lord Ericht (Scotland) and Huddleston J (Northern Ireland). Because the bulk of the cases (simply in terms of volume, and disregarding the number of trucks in issue in each case) emanated from Scotland, it was appropriate to hold the first Wave 2 case management conference in person in Edinburgh. That hearing took place over two days (19 and 20 October 2023). That hearing was highly productive, in terms of enabling the Tribunal fully to understand the complexity of the litigation; and the interests and concerns of the many parties represented before it.

9. The Tribunal came to Scotland largely agnostic as to whether Wave 2 could best be tried using the Sequential Approach or the Issues-Based Approach. What became very clear, very quickly, was that the Claimants generally favoured an

Issues-Based Approach provided that the first issue to be tried was the overcharge that the Cartel had (allegedly) caused. If we may respectfully say so, it is obvious that overcharge is an issue that needs to be dealt with early on in any follow-on litigation involving a cartel. It is a critical issue to the question of loss and damage, and must rank high in any running order of issues in an Issues-Based Approach. The point made by the Claimants, with considerable force, was that there would be a denial of justice if the Sequential Approach resulted in claims taking years to come to court (as would be inevitable).

10. To their very considerable credit, the Cartelists accepted the force of the Claimants' point, and accepted that a Sequential Approach was – at least for Wave 2 – not appropriate. However, the Cartelists contended that whilst overcharge had to be tried first, it needed to be tried together with the question of pass-on (as well as the related question of value of commerce). These issues – we will, for convenience, from now on only refer to "overcharge" and "pass-on" – needed to be tried together, not only because they were intrinsically linked, but also because it would be folly (in terms of the incentivisation of settlement) to try overcharge independently of pass-on. For their part, the Claimants accepted the force of this point, but identified significant concerns in terms of the practicability of trying pass-on and overcharge together as "global" issues in the Wave 2 litigation. The Tribunal was alive to these concerns, and sought to at least understand them by listing a further hearing (remote) on 14 December 2023, at which these concerns could be articulated by the various economist experts retained by the parties. In order to assist the experts to frame the difficulties in this approach, the Tribunal framed (overnight) a provisional statement for the management of Wave 2 expressed in the following terms:

"1. The issues to determined at the First Wave 2 Trial (the **Trial**) shall be:

(1) Overcharge in all jurisdictions referenced in the pleadings.

(2) Pass-on in respect of that overcharge at all levels of the supply chain.

The issues identified in this paragraph are referred to as the **Issues**.

2. The parties shall, by 4:00pm on 31 July 2024, set out their positive cases in respect of the Issues. Such positive cases shall be set out by way of:

   (1) Position statements stating the parties' cases; and

   (2) The written evidence of fact and expert opinion relied upon in support of the same.

3. The parties shall, by 4:00pm on 31 July 2024 provide disclosure of documents upon which they rely in support of their said cases and any known adverse documents in respect thereof, in each case insofar as such documents have not already been disclosed.

4. The parties shall, by 31 October 2023, identify by name each expert economist on whom they will rely to lead the process of framing positive cases (the **Lead Economic Expert**). Lead Economic Experts are appointed on the basis that:

   (1) They may be supplemented by other experts, including expert economists, provided the consent of the Tribunal is obtained to that appointment.

   (2) They may, by order of the Tribunal, be replaced.

5. The Lead Economic Expert may, as advised and from time to time between 31 October 2023 and 31 May 2024, put information requests to one or more of the other Lead Economic Experts (**Data Requests**). Data Requests shall be responded to expeditiously. If (i) there is no expeditious response or (ii) that response is negative (a **Negative Response**), the Lead Economic Expert shall cause the Negative Response to be referred to the Tribunal, which will make such order as it considers appropriate.

6. Paragraph 5 is without prejudice to any other application any party may make, including as to disclosure.

7. The parties may, by no later than 30 September 2024, request from the other more information concerning the positive cases set out pursuant to paragraph 2 above including by way of requests for disclosure and inspection of documents. Such requests must be made in writing and must concern matters reasonably necessary for the requesting party to understand the case of the other and/or to advance their own case.

8. If a party fails to respond to a request within a reasonable period or declines to provide the answer and/or disclosure and inspection requested, the requesting party may make an application to the Tribunal for directions. The Tribunal will make such order as it considers appropriate.

9. The Parties shall, by 4:00pm on 31 January 2025, set out their responsive cases in respect of the positive cases set out pursuant to paragraph 2 above. Such responsive cases shall be set out by way of:

(1) Responsive position statements stating the parties' responsive cases; and

(2) The written evidence of fact and expert opinion relied upon in support of the same.

10. There shall be an eight-week trial in the period May to July 2025. The precise issues to be heard and adjudicated upon shall be determined at a case management conference to be listed in early October 2024."

11. The foregoing was explicitly intended as a provisional statement of an intended approach precisely because it was important to provide the Lead Economic Experts with a clear indication of what was in the Tribunal's mind, so as to enable them to "push-back" in relation to that approach. In that way, problems (in particular, fundamental issues of case management) could be identified and the approach either modified or abandoned in light of those problems.

12. The hearing on 14 December 2023 was a full one (it started early, and ran the entire day) and we are enormously grateful to both the legal teams and to the Lead Economic Experts who addressed us (both in writing and orally). We do not propose to set out in any great detail these written and oral submissions, save to say that they were many in number (in excess of 15 written legal submissions, and about the same in number from the economist experts) and extremely helpful to our consideration.

13. In the remaining paragraphs of this ruling we set out, in light of the representations we have heard, how we will deal with the Wave 2 litigation. It goes without saying that the detail of what we say will need to be embedded in a number of orders and protocols, which we describe during the course of our consideration below. Nevertheless, accepting that it is "high level", the broad outlines of how the Wave 2 litigation is to be tried is set out below; and we expect all parties to make dispositions (in terms of the constitution of their legal teams and the work flows by those teams) accordingly. We are in no doubt that what is set out below is challenging; but we are also confident – particularly in

light of the submissions we have heard, and the evidence we have received – that it is achievable. We are, of course, entirely receptive to detailed suggestions as to how the litigation is to be managed, and will take steps to ensure that such suggestions are appropriately encouraged. We are under no illusions that the expeditious trial of the Wave 2 litigation is an enormous and hugely difficult undertaking simply in terms of procedure, leaving altogether to one side the very important and difficult substantive questions that arise.

14. We address the trial management approach to Wave 2 in the following sub-paragraphs:

(1) *An Issues-Based Approach.* It is clear that whilst significant difficulties in terms of trial management arise, an Issues-Based Approach was favoured by either all or else the vast majority of the parties before us. Of course, whilst the view of the parties will have significant bearing on the course adopted by the Tribunal, directing such an approach is ultimately the responsibility of and a matter for the Tribunal, not the parties. In this case, we are in no doubt that an Issues-Based Approach is appropriate. It resolves – provided they are correctly selected – a number of key issues early, and across all litigating parties. It avoids the problem of the Sequential Approach of parties at the end of the queue waiting years for their day in court.

(2) *First issues to be determined by an Issues-Based Approach.* We consider that the issues to be determined first are overcharge, value of commerce and pass-on, all broadly conceived and all to be prepared for together. As we have noted, there is (particularly in the markets here under consideration) very significant overlap and inter-connection between these issues, such that it would be wasteful of time and money and run the risk of inconsistent outcomes to seek to parse these issues more narrowly. Accordingly, we make clear that we want these issues considered across all relevant jurisdictions and at all levels of the market. We are in no doubt that this will require an early, and careful, application by the parties of the "broad brush" or "broad axe" so favoured by judges when speaking of the resolution of factual issues in

competition cases. The broad brush or broad axe approach really only works if it is addressed, and embedded in the preparation for trial, at an early stage. In the case of Wave 2, issues of overcharge and pass-on arise in the context of a number of jurisdictions (the total number of jurisdictions involved exceeds 20). In the case of some of these jurisdictions, the number of truck sales was so small that the costs of anything but the most light-touch examination by the parties would exceed the value at risk by a substantial margin. Whilst there is considerable temptation in "parking" these issues to the end, in the hope that they will go away, that temptation is imprudent and to be resisted. All it does is leave cost intense and inefficient questions to the end of the process. If they are going to be resolved in a light-touch way, either by the use of proxies or settlement, then the parties need to be addressing the matter now (when it arises, relatedly, in jurisdictions where significant value is at risk) and not leaving it for later consideration. In short, a "stove-piping" approach is to be deprecated, and we make clear that we regard the issues of overcharge, value of commerce and pass-on as broadly conceived and will be minded to include subsidiary issues, rather than exclude them, for precisely the reasons we have given.

(3) *An expert-led approach.* There will be no disclosure in this case. We think it is important to begin with this, stark, statement, to bring home, both to ourselves, and to the parties, that an approach based upon the traditional sequence of **(i)** pleadings, **(ii)** disclosure, **(iii)** factual evidence, **(iv)** expert reports, **(v)** written submissions and **(vi)** trial will not work and is explicitly not being adopted in the management of the Wave 2 litigation. That does not mean, of course, that information will not be disclosed by the Claimants to the Defendants and by the Defendants to the Claimants. To the contrary, such information flows will be vital to the proper articulation of the parties' cases. We see the process working in the following way:

(i) The issues that we have identified for first resolution – over-charge, value of commerce, pass-on (defined in paragraph 10 as the "Issues") are all Issues where the expert economists must

take the lead. Of course, no-one is suggesting that the answer to these issues resides in the minds of the Lead Economic Expert on each side. That would be an absurd proposition, and no-one has advanced it. However, it is true to say that the nature of the material that needs to be assembled, in order to make good a case in relation to the Issues, is a matter for the Lead Economic Expert on each side.

(ii) Accordingly, in respect of each of the Issues, the Lead Economic Expert on each side will be tasked with putting together a **Positive Case** in relation to the Issues by a certain point in time. That Positive Case will comprise all of the material on which that party relies in order to make good their case on the Issues at trial. The parties should all proceed on the basis that further evidence intended to supplement the Positive Case after it has been submitted will not be admitted without very good reason.

(iii) The Positive Case will almost certainly involve a detailed and lengthy expert opinion from the Lead Economic Expert. But there will be far more to the Positive Case than that. The Lead Economic Expert will need information (by which we mean data, documentary evidence, deposition evidence) from the other parties to the litigation. The Tribunal will lend every assistance to the Lead Economic Expert in obtaining this information (which is a term we define extremely broadly). In our provisional statement, we referred to these requests as "Data Requests" and – provided it is understood that "Data" is the equivalent of "information" and that that term is broadly conceived, then that label will suffice.

(iv) We do not propose to articulate this process in any greater detail in this ruling, save to make the following extremely general points: (i) Data Requests are made as between parties to the Wave 2 litigation. Requests for disclosure from genuine third parties will be afforded the usual protections and – for that

reason, if no other – must be made early; (ii) We expect Data Requests to be justified by the Lead Economic Expert making the request to the Lead Economic Expert receiving it. We expect that process initially to run informally, and there should be regular and frequently used lines of communication between the various experts involved. It is likely that some Data Requests are so obvious, that little by way of justification will be required. Equally, some Data Requests will be so straightforward to fulfil that little justification will be required. It is those Data Requests that are of marginal utility but which entail significant cost that we expect will trouble the Tribunal and – unless such issues can be resolved by agreement – we expect the parties to raise these issues with the Tribunal promptly so that they can be resolved without delay; (iii) The Tribunal is perfectly prepared to be innovative in terms of how Data Requests are fulfilled. The emphasis will be on providing information that will enable the Lead Economic Expert to fulfil their responsibilities. It may be that documentary disclosure will be the best and most effective way of resolving Data Requests, but we rather doubt it. We suspect – without prejudging any specific case – that more often schedules of data will be better and more effective, provided always the manner in which such data has been assembled is capable of audit so that propensity to error and measurement difficulties can be defined. It may well be that the hitherto under-used deposition process available to the parties before the Tribunal could, with profit, be deployed. Where one party requires information from a specific person employed by another party, then "oral discovery" – a deposition under oath – may be the best way to obtain the necessary information efficiently and effectively.

(v) As we have noted, Positive Cases will be filed – in their entirety – on a given date. We have no doubt that parts of those Positive Cases will be ready for service before other parts, but we do not

expect the parties to "drip-feed" their Positive Cases into the process. A complete Positive Case of a single party will be filed on a single date, to be defined.

(vi) Positive Cases will be followed by "negative" or "responsive" cases. We prefer the term **Negative Case** because it captures the process that we intend. Negative Cases will be compiled in exactly the same way as Positive Cases, but will not be permitted to supplement a party's already served Positive Case but to carry out an essentially destructive exercise, intended to show why one party's Positive Case is wrong, overstated, misconceived or not to be relied upon for some other reason.

(vii) In this way, the Tribunal will – at the end of the process – be presented with two or more cases, fully-fleshed out with evidence, by way of which (at a trial) it can resolve the Issues. We doubt whether **Reply Cases** will be needed (but are open to the possibility: that is a matter for later). We do consider that the trial of the Issues will need to be very carefully structured so that the needful witnesses are timetabled for appearance in an order that will enable Positive and Negative Cases to be tested and resolved. The detail, of course, is for much later on.

(viii) We note that our provisional statement referred in paragraph 3 to the provision of "known adverse documents" as part of the Positive Case of each party. We consider this to be an error, in light of the overall process defined. Adverse documents will be omitted from Positive Statements at the producing party's peril, for they will surely be uncovered during the phase when Negative Cases are compiled. We therefore regard this requirement as entirely redundant.

(4) *"Lead" Claimants and Defendant representation.* As is clear from this ruling, there are very many parties involved in the Wave 2 litigation, and the potential for every hearing to be over-populated by parties, lawyers

and economists is a real concern. It is a concern not, primarily, because of cost (although that is obviously an important consideration), but because of fairness. It is quite obvious that whilst the Issues as we have defined them are common to the Wave 2 proceedings, there are nuances where different parties (in particular, different claimants) will have materially different stances. It is imperative – on grounds of fairness, not efficiency – that these different stances be articulated and incorporated into the process and not disregarded. As regards this aspect of the Wave 2 litigation, the Tribunal is enormously dependent on the parties articulating their approach to the litigation clearly and bringing any problems early to the Tribunal to be resolved. What follows is no more than a broad articulation of the matters that the parties need to consider:

(i) Beginning with the Cartelists – the Defendants to the Wave 2 proceedings – it is obvious that they will each need to be represented by a separate – and no doubt rather substantial – team. That is understood. However, we expect the Defendants to co-operate *inter se* and to make – in procedural terms – the Claimants' job as easy as possible. For example, it may very well be more efficient for Claimant Data Requests to be routed to a single person on the Defendant side, for that Data Request then to be disseminated across the Defendants by the Defendants themselves. We encourage the Defendants to articulate – for the Tribunal's benefit as for the Claimants' – a protocol for the efficient general conduct of this litigation (the **Defendant Protocol**); and we should make clear that whilst we expect – indeed, encourage – aggressive litigation on substantive matters, we also expect a high degree of co-operation on the procedural means by way of which the Wave 2 litigation is brought to trial.

(ii) The Defendant Protocol will be straightforward compared to the equivalent on the Claimant side, the **Claimant Protocol**. We were, during the course of the hearing on the 14 December 2023, hugely encouraged by the careful articulation of the approach intended by the Claimants by Mr Turner, KC, who spoke for all

on this matter, and we are confident that a Claimant Protocol can be and will be articulated in short order. The Claimant Protocol will need to deal with the following matters: (i) Identification of lead Claimants or – perhaps more importantly – lead Claimant lawyers and economists. It is absolutely critical that there be articulated leadership amongst the Claimants, so that the Tribunal can rely on one or perhaps several firms properly to conduct the Wave 2 litigation. Obviously, the identification of lead Claimants is a matter for the claimants, and we do not want to be unduly prescriptive. But the Tribunal is entitled to have a clear understanding of who is running the litigation on the part of the Claimants; (ii) The arrangements between the Claimants need to be sufficiently robust so as to be able to continue, notwithstanding settlements being reached between some Defendants and some Claimants. Experience has shown – not least in this litigation – that such settlements are relatively frequent, and they are to be welcomed. But it would be unfortunate if the settlement with a substantial number of Claimants resulted in a derailment in terms of representation of the remaining Claimants, who do not settle. We expect this to be addressed, but how it is addressed is a matter for the Claimants; (iii) The purpose of lead Claimants – and lead lawyers and economists – is that they do the "heavy lifting" in terms of the common issues. This is both efficient and fair. But, to the extent that divergent views exist in relation to Issues that are otherwise common, the Tribunal expects the Claimant Protocol to ensure efficient dissemination of information to all claimants or their lawyers, so that these Claimants can consider whether – and to what extent – they need to involve themselves individually in the process. The Tribunal is entirely amenable to such "variable geometry", and considers it necessary so that all Claimants are fairly represented; (iv) The Claimant Protocol will have to deal with Data Requests emanating from the Defendants, so that these can be responded to swiftly and efficiently.

(5) *Stays of claims.* In light of the foregoing, we expect many Claimants to adopt a position that will be familiar to those involved in the interchange fee litigation, namely that of the stay of a claim. As a Tribunal, we are prepared to endorse stays of proceedings in regard to specific Claimants provided that it is understood that:

(i) Such stays involve an explicit acceptance that the Tribunal's determination of the Issues binds them.

(ii) Such stays do not absolve the Claimant from being obliged to respond to Data Requests, although (to the extent possible) such Data Requests ought to be dealt with by "active" Claimants.

(iii) Such stays can – all other things being equal – be prospectively lifted so as to enable participation in specific parts of the Wave 2 litigation.

We expect Claimants to fall into one of three classes: (i) lead Claimants, centrally involved in the conduct of the litigation; (ii) stayed Claimants (sufficiently described above); and (iii) active, but not lead, Claimants, whose role in the Wave 2 litigation is clearly understood and defined by the Claimants as a group, but whose role is sufficiently active for a stay to be inappropriate. We regard the handling of such active Claimants as a key aspect of the Claimant Protocol. We do not expect there to be any Claimant or group of Claimants falling outside the three classes we have defined, and if there are any such Claimants, we expect them to be identified in short order, so that their position can be regularised.

(6) *Jurisdiction and the constitution of the tribunal(s).* As we have described (see paragraph 8) the Tribunal has been constituted as a "three Chair" tribunal, with representation from all involved jurisdictions. We are anxious to preserve that diversity of representation; but are very conscious of the fact that a tribunal so constituted involves no economist. For pure case management questions (such as those we are presently considering) that is not a problem: but it will be a problem as

soon as we begin to grapple with the substance of the Issues. Relatedly, different parties (and here, significantly, there was no alignment amongst the claimant and defendant classes) pressed for an England and Wales or a Scottish designated jurisdiction pursuant to Rule 18 of the Tribunal Rules 2015. We will not set them out, but accept that there are cogent reasons in favour of both an England and Wales and a Scottish designated jurisdiction. We consider that a solution to both problems (constitution and forum) exists. We put it forward with some trepidation at the hearing on 14 December 2023, and were grateful for the parties' positive response. We are minded to proceed in the following way:

(i) The President will constitute two tribunals, comprising: **Tribunal A**, the President, Lord Ericht and an economist (ideally drawn from Scotland); **Tribunal B**, the President, Huddleston J and a different economist (ideally drawn from another part of the United Kingdom).

(ii) Tribunal A would have allocated to it all Scottish cases, and a significant number of England and Wales cases, including in particular at least one lead Claimant. Tribunal B would have allocated to it all of the Northern Ireland cases, and all remaining cases.

(iii) Tribunals A and B would sit together, jointly hearing all evidence on points of substance. Procedural hearings would be constituted in a manner appropriate to the matters in issue. Tribunals A and B would operate as independently constituted tribunals, but would (as occurred in the "cover price" appeals that occupied the Tribunal in the years 2009 and following) co-operate to the extent possible consistent with judicial independence. The "cover price" appeals, although very different from the present proceedings, constitute a helpful guide. In one of those cases, *Kier v. OFT*, [2011] CAT 3 at [6], the Tribunal noted:

> "In the light of submissions provided to the Tribunal at a joint CMC held in January 2010 the Tribunal decided that, although there were certain common themes in the penalty appeals, it was not appropriate to determine those separately as preliminary issues, but rather to deal with them at the same time as hearing each appeal as a whole. Separate oral hearings in respect of each appeal were listed. For logistical reasons the penalty appeals were allocated between three panels of the Tribunal. The desire on the part of some of the appellants to intervene in other penalty appeals where common issues were perceived to arise was satisfied by permitting the parties to make brief post-hearing written observations on any relevant matter contained in the transcripts of the oral hearings in appeals other than their own. Any such observations were ordered to be provided to the Tribunal by 10 September 2010."

This provides one example of how common issues arising out of separate proceedings can be managed – and have been managed by the Tribunal over the years.

(iv) Although Tribunal A would designate its forum as Scotland and Tribunal B its forum as England and Wales, both tribunals would take full advantage of the flexibility built into Rule 18 (particularly Rules 18(1) and 18(2)) to ensure that specific "parts" of proceedings were allocated to the appropriate jurisdiction. That flexibility can also extend to the appeal route (see, for example, *Merricks* v *Mastercard Incorporated*, [2023] CAT 15) and the consideration of costs. In no sense would this be a "one size – or one forum – fits all" approach. (We recognise that Northern Ireland is not explicitly catered for in this regime. Although it would be possible to constitute a third tribunal, we consider (given the limited number of cases emanating from Northern Ireland) this to be disproportionate. However, there is nothing to prevent either Tribunal A or Tribunal B from designating Northern Ireland as the forum for "any part" of the proceedings before that tribunal.) Obviously, questions of forum would have to be raised by the Tribunal for consideration and submission by the parties in good time: but there is no good reason why the matter should finally be determined at the outset,

and a number of excellent reasons why this would be a very bad idea in the present context.

(v) We say nothing about the geographic location of specific hearings (whatever the forum selected). That is a matter to be considered instance-by-instance. We would only note that we consider that remote hearings will be indispensable as a means of avoiding cost and enabling access to the tribunal(s).

(7) *Timing.* The 31 July 2024 date for the filing of Positive Cases was uniformly considered unrealistic by the parties, and we understand that stance, which was articulated respectfully and constructively by the parties. We propose to direct a date at the end of October 2024 for the filing of Positive Cases, but we make clear now that we would be amenable to an extension to the end of 2024 provided the reasons for that extension were articulated, and the application made before the end of September 2024. On that basis, Negative Cases would be filed by the end of May 2025, with the prospect of a trial at the end of 2025 (say November and December 2025, and January 2026). We do not consider that more than three months can properly be allocated to the trial of the Issues, and the parties should proceed on the basis that the Positive and Negative Cases they adduce will have to be tried over 12 "commercial court" weeks (i.e. with the tribunal(s) sitting four days a week, and not five).

(8) *Case management in 2024 and 2025.* It is clear that the Wave 2 litigation will require careful and intense case management from the tribunal(s). We propose to list, once every three weeks, an informal case management hearing, to take place remotely, at which problems can be articulated and the tribunal(s)' views ascertained. We do not expect significant applications (for instance, a strike out) to be moved on these occasions, but we do expect these hearings to be used to maintain significant forward movement in terms of progressing the Wave 2 litigation. We consider that at such hearings, the parties should be represented by junior counsel and/or an economist able to speak to the

economist lead approach that underlies the entirety of this Wave 2 litigation.

15. This ruling is unanimous: but it will need significant further articulation in (i) the Defendant Protocol, (ii) the Claimant Protocol and (iii) an order of the tribunal(s). However, we expect that the parties have been provided with sufficient guidance in this ruling to take very significant steps to proceed to trial; and to the extent there are material queries that need immediate resolution, we expect them to be raised by the parties in short order.

Sir Marcus Smith
President

The Hon. Lord Ericht

The Hon. Mr Justice Ian Huddleston

Charles Dhanowa, OBE, KC (Hon)
Registrar

Date: 9 January 2024

ANNEX 1: CASES INCLUDED IN THE SECOND WAVE TRUCKS PROCEEDINGS

Case Number	Case Name
Cases in England	
1296/5/7/18	Arla Foods AMBA & Others v Stellantis N.V. & Another
1338/5/7/20 (T)	Adnams PLC & Others v DAF Trucks Limited & Others
1343/5/7/20 (T)	DS Smith Paper Limited & Others v MAN SE & Others
1355/5/7/20 (T)	Hertz Autovermietung GmbH & Others v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) & Others
1356/5/7/20 (T)	Balfour Beatty Group Limited & Others v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) & Others
1358/5/7/20 (T)	Zamenhof Exploitation & Others v Fiat Chrysler Automobiles N.V. & Others
1360/5/7/20 (T)	BFS Group Limited & Another v DAF Trucks Limited & Others
1361/5/7/20 (T)	Enterprise Rent-a-Car UK Limited v DAF Trucks Limited & Others
1362/5/7/20 (T)	ABF Grain Products Limited & Others v DAF Trucks Limited & Others
1368/5/7/20 (T)	LafargeHolcim Limited & Others v Aktiebolaget Volvo (Publ) & Others
1371/5/7/20 (T)	The BOC Group Limited & Others v Stellantis N.V. & Others
1372/5/7/20 (T)	GIST Limited & Others v Stellantis N.V. & Others
1417/5/7/21 (T)	Dan Ryan Truck Rental Limited & Others v DAF Trucks Limited & Others
1420/5/7/21 (T)	A to Z Catering Supplies Limited & Others v DAF Trucks Limited & Others
1431/5/7/22 (T)	Adur District Council & Others v TRATON SE & Others
1521/5/7/22 (T)	Wm Morrison Supermarkets PLC & Others v Volvo Group UK Limited & Others
1578/5/7/23 (T)	Asda & Others v AB Volvo & Others
1594/5/7/23 (T)	GAP Group Limited and Another v DAF Trucks Limited and Others
1610/5/7/23 (T)	Rowleys of Northwich Limited and others v DAF Trucks Limited and others
1607/5/7/23 (T)	Wincanton Holdings Limited and another v DAF Trucks Limited and others
1608/5/7/23 (T)	Adnams PLC and others v DAF Trucks Limited and others
1609/5/7/23 (T)	SP0117 Limited (as Assignee) and another v DAF Trucks Limited and others
1616/5/7/23 (T)	Boots & Others v. Traton & Others
Cases in Northern Ireland	
1536/5/7/22 (T)	C Faulkner & Sons v Aktiebolaget Volvo (Publ)
18/78144	JH Irwin & Son (Fuels) Limited -v- AB Volvo
20/22730	McHugh's Oil Limited -v- AB Volvo
18/33243	Niall McCann trading as NMC Haulage -v- AB Volvo
20/41004	Cynthia Beattie t/a Beattie Transport -v- AB Volvo
20/58996	J.C. Campbell (N.I.) Limited –v- DAF Trucks N.V.

20/58997	Gibson Bros Limited –v- DAF Trucks N.V.
20/58985	Joseph Walls Ltd –v- DAF Trucks NV
20/58980	M.G. Oils Limited–v- DAF Trucks NV
20/58992	J.K.C. Specialist Cars Limited–v- DAF Trucks NV
20/58976	G.P. Marketing Limited trading as Patterson Oil –v- DAF Trucks NV
22/53690	Cynthia Beattie t/a Beattie Transport –v- DAF Trucks NV
20/58991	J.H. Irwin & Son (Fuels) Limited –v- DAF Trucks NV
18/33233	Trevor Leckey t/a Stoneyford Concrete –v- DAF Trucks NV
20/58982	Derek O'Reilly t/a O'Reilly's The Sweet People -v- Daimler AG
20/58998	Patrick Megoran -v- Daimler AG
20/58974	Stephen Pollard -v- Daimler AG
21/05481	John Rodgers Limited -v- Daimler AG
20/58984	Andrew Ingredients Ltd -v- Daimler AG
18/78073	Kieran Quinn t/a Pomeroy Haulage -v- Daimler AG
20/58977	J.C. Campbell (N.I.) Limited -v- Daimler AG
22/53682	Cynthia Beattie t/a Beattie Transport -v- Daimler AG
20/58987	R Magowan & Son Limited -v- Iveco S.P.A
21/48587	C. Russell Auto Sales Ltd -v- Iveco S.P.A
20/58990	Kennedy & Morrison Limited -v- Iveco S.P.A
20/58994	Niall McCann t/a NMC Haulage -v- Iveco S.P.A
21/05466	John Rodgers Limited -v- Iveco S.P.A
18/78144	JH Irwin & Son (Fuels) Limited -v- AB Volvo
20/22730	McHugh's Oil Limited -v- AB Volvo
18/33243	Niall McCann trading as NMC Haulage -v- AB Volvo
20/41004	Cynthia Beattie t/a Beattie Transport -v- AB Volvo
20/58996	J.C. Campbell (N.I.) Limited –v- DAF Trucks N.V.
Cases in Scotland	
1538/5/7/22 (T)	Clackmannanshire Council v VFS Financial Services Ltd & Others
1539/5/7/22 (T)	Angus Council v VFS Financial Services Limited & Others
1540/5/7/22 (T)	East Ayrshire Council v VFS Financial Services Ltd & Others
1541/5/7/22 (T)	The City of Edinburgh Council v VFS Financial Services Ltd
1542/5/7/22 (T)	East Lothian Council v VFS Financial Services Ltd & Others
1543/5/7/22 (T)	East Dunbartonshire Council v VFS Financial Services Limited
1544/5/7/22 (T)	Fife Council v VFS Financial Services Ltd & Others
1545/5/7/22 (T)	Midlothian Council v VFS Financial Services Ltd & Others
1546/5/7/22 (T)	Glasgow City Council v VFS Financial Services Ltd & Others
1547/5/7/22 (T)	Dundee City Council v VFS Financial Services Ltd & Others
1548/5/7/22 (T)	Scottish Water v VFS Financial Services Limited & Others
1549/5/7/22 (T)	West Lothian Council v VFS Financial Services Ltd & Others
1550/5/7/22 (T)	Perth & Kinross Council v VFS Financial Services Limited

1551/5/7/22 (T)	Stirling Council v VFS Financial Services Limited & Others
1552/5/7/22 (T)	Renfrewshire Council v VFS Financial Services Ltd & Others
1553/5/7/22 (T)	South Ayrshire Council V VFS & Others
1554/5/7/22 (T)	The North Ayrshire Council v VFS Financial Services Limited
1555/5/7/22 (T)	Western Isles Council v VFS Financial Services & Others
1556/5/7/22 (T)	West Dunbartonshire Council v VFS Financial Services
1557/5/7/22 (T)	North Lanarkshire Council v VFS Financial Services Ltd
1558/5/7/22 (T)	Scottish Borders Council v VFS Financial Services Limited
1559/5/7/22 (T)	Dundee CC & Others t/a Tayside Contracts v VFS FS Ltd & Others
1560/5/7/22 (T)	Aberdeenshire Council v VFS Financial Services Ltd & Others
1561/5/7/22 (T)	Argyll and Bute Council v VFS Financial Services Limted
1562/5/7/22 (T)	East Renfrewshire Councill v VFS Financial Services Limited
1563/5/7/22 (T)	South Lanarkshire Council v VFS Financial Services Limited
1564/5/7/22 (T)	Grahams The Family Dairy (Processing Ltd) v CNH Industrial
1565/5/7/22 (T)	Grahams The Family Diary Ltd v CNH Industrial N.V.
1566/5/7/22 (T)	Graham's Dairies Limited v CNH Industrial N.V

ANNEX 2: OVERVIEW OF THE PARTIES

Definition	Description
The Arla Claimants	The Claimants in Case No: 1296/5/7/18
The Edwin Coe Claimants	The Claimants in Case Nos: 1338/5/7/20 (T), 1417/5/7/21 (T), 1420/5/7/21 (T) and 1594/5/7/23 (T).
The Asda Claimants	The Claimants in Case No: 1578/5/7/23 (T).
The DS Smith Claimants	The Claimants in Case No: 1343/5/7/20 (T).
The Adur Claimants	The Claimants in Case No: 1431/5/7/22 (T).
The Boots Claimants	The Claimants in Case No: 1616/5/7/23 (T).
The Hausfeld Claimants	The Claimants in Case Nos: 1355/5/7/20 (T), 1356/5/7/20 (T), 1358/5/7/20 (T), 1371/5/7/20 (T) and 1372/5/7/20 (T).
The BCLP Claimants	The Claimants in Case Nos: 1360/5/7/20 (T), 1361/5/7/20 (T) and 1362/5/7/20 (T)
The Morrisons Claimants	The Claimants in Case No: 1521/5/7/22 (T)
The Northern Irish Plaintiffs	The Plaintiffs in cases filed in Northern Ireland as set out in Annex 1.
The Scottish Pursuers	The Pursuers in cases filed in Scotland as set out in Annex 1.
The Defendants	The Defendant Manufacturing Groups of DAF, MAN, Iveco, Volvo/Renault, Daimler and Scania in relation to the cases filed in England and Wales.