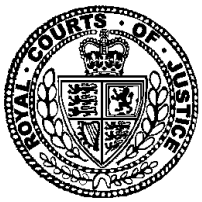

Neutral Citation Number: **[2020] EWHC 1802 (Comm)**

Case No: CL-2018-000572

**IN THE HIGH COURT OF JUSTICE**
**BUSIESS AND PROPERTY CPURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 May 2020

**Before** :

**The Hon. Mr Justice Bryan**

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**Between :**

| | |
|---|---|
| **Daimler AG** | **Claimant** |
| **- and -** | |
| **MOL (Europe Africa) Ltd and Ors** | **Defendant** |

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**Brian Kennelly QC and Philip Woolfe** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**
**Josh Holmes QC and Will Hooper** (instructed by **Travers Smith LLP**) for the **Third to Seventh Defendants**
**Sarah Abram** (instructed by Wilmer Cutler Pickering Hale & Dorr LLP) for the **Twelfth Defendant**

Hearing dates: **5th May 2020**

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# APPROVED JUDGMENT

**MR JUSTICE BRYAN:**

## A. INTRODUCTION.

### A(1) Applications

1. The parties appear before me today on the second case management conference which is largely concerned with the disclosure to be given in relation to quantum both in relation to the remaining Defendants and in relation to the Claimant, although further directions are also sought in relation to various further steps to be taken in the action between now and the trial.

2. The detailed background to this matter is set out in my Judgment of 22 November 2019 in which, amongst other matters, I made a reference to the Court of Justice of the European Union ("CJEU") in relation to certain of the issues arising in the action which is reported at [2019] EWHC 3197 (Comm).

3. Since then, the parties appeared before me at the first case management conference ("CMC") on 11 February 2020 at which I refused the Defendants' application for a split trial and gave various directions in relation to disclosure, expert evidence and timetabling directions to trial. My judgment addressing matters of the first CMC is reported at [2020] EWHC 525 (Comm).

### A(2) The Background Facts

4. The Claimant (Daimler), represented by Brian Kennelly QC and Philip Woolfe, is a company that manufactures and distributes passenger cars, vans trucks and buses. It also purchases international shipping services for roll on roll off cargo (RoRo services). The Defendants are companies which provide inter alia RoRo services.

5. Following several settlements, the remaining Defendants are the Third to Seventh Defendants (the "WWL Defendants"), represented by Josh Holmes QC and William Hooper. In this regard, since the first CMC, the 11th Defendant (NYKE), settled with Daimler. Even more recently, yesterday, and a week after receipt of skeleton arguments and the associated preparations for this hearing in the interim, I was informed that the 12th Defendant (CSAV) has reached an agreement in principle with Daimler and in consequence the various applications between Daimler and CSAV are not pursued before me today, although there remains both witness evidence and expert evidence before me served on behalf of CSAV together with CSAV's skeleton argument which addresses many of the disclosure issues that arise.

6. In addition, CSAV and WWL had sought disclosure of the settlement agreements between Daimler and the various Defendants that have to date settled with Daimler. This disclosure, at least at the present time, is resisted by Daimler and by the Defendants who have settled with Daimler, some of whom intended to appear at this CMC to resist the same. The arguments for the Defendants were to have been led by CSAV. Following CSAV's settlement in principle with Daimler it has been agreed that WWL's application for provision of the settlement agreements will not be pursued at this time in circumstances where Daimler accepts that it is likely that some disclosure will be appropriate at a later stage in the proceedings. In the meantime, WWL reserves its rights in that regard.

7. Following the first CMC the parties' economic experts were required to meet to discuss methodology, data, documents and information required for their analysis (the "Joint Expert Meeting") pursuant to paragraph 13(a) of the first CMC Order.

8. It was agreed that the Joint Expert Meeting would take place on 20 March 2020. The three experts are Robin Noble (for Daimler), Dr Raphaël De Coninck (for WWL) and Dr Lorenzo Coppi (for CSAV).

9. Following the Joint Expert Meeting the parties' economic experts set out their positions in the Joint Expert Statement on Methodology and Disclosure Requirements dated 28 March 2020 ("the JES").

10. Whilst there was much agreement between the experts as to the disclosure they required, a number of differences of opinion remained. In due course this led to requests for disclosure in correspondence and in application notices in advance of the second CMC and for consideration at the CMC.

11. The disclosure sought was supported by lengthy witness statements and responsive witness statements from the experts and also from the respective parties' instructing solicitors.

12. The volume of evidence was substantial but ultimately has assisted at least to some extent in narrowing the issues. I have had careful regard to all that material.

13. In addition, even more recently, yesterday and indeed this morning, as often happens in relation to such matters, there has been further correspondence between the parties including a further narrowing of the issues.

14. This has led to some further agreement as to what will be disclosed as well as refinement of the documentation that is still sought. However, notwithstanding the dialogue between the parties that has continued up to the moment of this second CMC, a number of categories of disclosure remain in dispute, or at least remain for discussion, and so arise for consideration at this CMC.

15. In due course I will address each category of documents in turn immediately after the parties have made their oral submissions to me on that category. Realistically that is the only way in which it will be possible to deal with the issues that arise on disclosure and the timetabling issues that arise in a manner which is comprehensible and which also can be dealt with within the one-day hearing.

16. However, before doing so I will first set out the background to the action and the applicable principles in relation to disclosure.

17. Daimler claims damages to compensate it for loss that it allegedly suffered as a result of the various Defendants' participation in what it says was a serious price fixing and market sharing cartel relating to the provision of RoRo services said to be contrary to EU/EEA competition law and alleged infringements of Article 101 TFEU and Article 53 EEA.

18. The alleged infringements comprise agreements between the Defendants allegedly restricting competition to supply international shipping services for roll on roll off cargo (the alleged unlawful agreements).

## A(3) The EC Settlement Decision

19. In 2018 the European Commission (the "EC") published a decision in Case AT.40009 Maritime Car Carriers on 21 February 2018 (the "EC Settlement Decision") which found that certain undertakings involved in the provision of RoRo services had infringed EU/EEA competition law (Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") and Article 53(1) of the Agreement on the European Economic Area ("EEA") and imposed fines and other sanctions in respect of that breach.

## A(4) The nature of the wrongdoing

20. The EC found amongst other things that "the parties applied the rule of respect as a guiding principle for their practices" on various routes worldwide, including the EEA; that there was "an overall scheme pursuing a single anti-competitive object and single anti-competitive aim of restricting price competition" that this was "structured around the "rule of respect" involving" a combination of multi-lateral and bi-lateral contracts" and the parties "knowingly substituted the risks of competition between them for a practical cooperation"; such "behaviour" [having] all the characteristics of an "agreement" and/or "concerted practice" within the meaning of Article 101 of the TFEU and Article 53(1) of the EEA.

21. The EC Settlement Decision was addressed to various entities within WWL and NYK, CSAV amongst others who settled the investigation by admitting to participating in unlawful cartel conduct.

22. The conduct admitted was a single and continuous infringement of EU/EEA law from 18 October 2006 to 6 September 2012 (24 May 2012 for MOL, the day on which MOL applied for immunity).

23. The EC Settlement Decision in that regard is deemed the start date for the infringement of 18 October 2006. Prior to that date tramp vessel services were expressly excluded from the scope of the EU/EEA competition rules (Regulation (EEC) 4056/86, Article 1(2)). By choosing that start date the EC did not need to examine whether the RoRo services covered by the EC Settlement Decision date were tramp shipping services or not. An issue in the present action is whether the RoRo services were tramp shipping services. It was stated therefore that: "…*In order to reflect this jurisdictional change and for the purposes of the present decision, the conduct is deemed to have started for all parties on 18 October 2006*" (final sentence of recital 42, EC Settlement Decision).

## A(5) Daimler's claims

24. Daimler alleges that there were unlawful agreements and/or concerted practices in place which had as their object or effect the prevention, restriction or distortion of competition for RoRo services for various places, including the EEA by (i) coordinating prices for RoRo services, (ii) rigging bids for RoRo services, (iii) allocating customers for RoRo services, (iv) restricting capacity for RoRo services, and (v) sharing commercially sensitive pricing information regarding RoRo services.

25. Daimler claims that these alleged unlawful agreements encompassed RoRo services on various routes around the world including but not limited to routes between ports in the EU/EEA. A proportion of Daimler's claim relates to RoRo services between non-EEA ports, (e.g. shipping cars from Tokyo to Sydney) ("non-EEA services"). Daimler also says that these alleged unlawful arrangements were in place from at least February 1997 to at least 7 September 2012 (the "alleged relevant period").

26. Daimler claims damages in respect of RoRo services which Daimler and its relevant subsidiaries purchased during the alleged relevant period. There are two primary heads of loss presently claimed , namely: (1) overcharge losses estimated by Daimler at US$187 million or above and, (2) loss of profit/increased borrowing costs estimated by Daimler also at US$187 million or above. The total of the claim (including interest) is in excess of US$374 million.

27. There are two aspects of the overcharge losses:

    a. follow-on damages: damages flowing from the period and geographical scope identified by the EC Settlement Decision for which liability is not disputed. The volume of commerce relating to this period amounts to US$921 million, approximately 54% of the total volume of commerce in these proceedings; and

    b. stand-alone damages: damages flowing from other periods and geographical scopes for which liability is disputed. The volume of commerce relating to this period is approximately 46% of the total volume of commerce in these proceedings.

28. In seeking to establish the Defendants' participation in the price fixing cartel and the start date of the cartel, Daimler relies on, amongst other matters:

    a. The EC Settlement Decision. It is common ground on the pleadings between the parties that there were such unlawful arrangements insofar as found in the operative part of the EC Settlement Decision.

    b. Various foreign regulatory materials, namely other decisions of criminal and competition authorities around the world, that Daimler alleges establish or evidence the unlawful cartel conduct. In particular, admissions made by particular entities or Defendants in the context of those proceedings or investigations, for example in the United States, where Defendants or other entities in their corporate groups entered into plea agreements, pleading guilty to criminal cartel offences and accepted fines in excess of US$167 million.

    c. In the case of WWL Undertakings, the admitted infringements dated back to as far as respectively 1999.

    d. Daimler wishes to rely on evidence of the effect that the cartel had on prices for RoRo services in order to establish, amongst other matters, the geographical and temporal extent of the alleged cartel conduct. WWL alleges that the cartel's purported effect on those prices is irrelevant on the question of whether they are liable in damages to Daimler.

## A(6) The defences

29. WWL denies liability and joins issues on the quantum of the claim. Their contentions can be summarised as follows:

    a. The court has no jurisdiction to apply EU/EEA competition law to the conduct complained of insofar as it occurred prior to 18 October 2006 and related to international tramp vessel services within the meaning of Regulation 4056/86. It is said that the services provided to Daimler were international tramp services.

    b. The court has no jurisdiction to apply EU/EEA competition law to the conduct complained of insofar as it occurred before 18 October 2006 and concerned RoRo services between ports outside the EEA.

    c. The conduct complained of falls outside the territorial scope of EU/EEA competition law insofar adds it concerns (i) RoRo services provided on routes that commence and terminate outside the EEA or (ii) such services provided on such routes that were procured and paid for by entities domiciled outside the EEA.

    d. The alleged unlawful arrangements did not extend beyond the infringement admitted in the EC Settlement Decision.

    e. The claims are subject to German law in respect of damage which occurred on or before 11 January 2009 and are time barred under German law in respect of part of that period, this consists of claims arising (a) prior to January 2002 for all claims or (b) prior to 12 October 2006 for claims concerning the subject matter of the EC Settlement Decision or (c) prior to 2007/2008 for any claims outside the temporal or geographical scope of the EC Settlement Decision.

    f. The claim is time barred pursuant to sections 2 and 9 in the Limitation Act 1980, to the extent that English law applies, insofar as it relates to the period before 30 August 2012.

    g. Lastly, Daimler has not suffered recoverable loss, including on the ground that any overcharge losses have been passed on to customers of Daimler's business.

30. The issues between the parties are further set out in the agreed list of issues to which I have had regard.

## A(7) Procedural history

31. Daimler's claim was issued on 1 August 2018 and there was some delay while CSAV were served. Most of the Defendants are no longer parties to this action, having settled their claims with Daimler, leaving the WWL entities as Defendants going forward.

32. On 14 and 15 November 2019 I heard the applications of WWL, NYKE and CSAV seeking variously, in relation to part of the claim, summary judgment or a reference to the CJEU and a stay of that part of the proceedings.

33. In this regard:

a. I refused to strike out or have summarily dismissed the part of Daimler's claim which is based on international maritime services provided by the Defendants exclusively between the ports located outside the EU/EEA during the period prior to 18 October 2006.

b. I made a preliminary reference for a preliminary ruling to the CJEU under Article 267 TFEU. The questions referred were as follows:

*"Does a national court have jurisdiction to determine a claim for damages under Article 85 EEC/Article 81 EC where the conduct complained of involved the provision of international maritime services exclusively between non-EEC/EC ports in the period prior to 1 May 2004 and the national court was not a relevant authority in a Member State for the purposes of article 88 EEC/Article 84 EC?*

*If question 1 is answered in the negative, does a national court have jurisdiction to determine such a claim in respect of the provision of international maritime services exclusively between non-EEC/EC ports in the period between 1 May 2004 and 18 October 2006?"*

34. At the subsequent first CMC there was an application for a split trial of liability and quantum by WWL, NYKE and CSAV. I refused that application for the reasons given in my judgment on the first CMC and gave directions for trial, including in relation to liability disclosure. The present second CMC was fixed to deal with further disclosure issues arising including quantum disclosure and the remaining outstanding directions to trial.

## B. APPLICABLE PRINCIPLES FOR DISCLOSURE IN COMPETITION CASES

35. Practice Direction 31C governs disclosure and inspection in competition claims such as the present; see 31C PD1.1(b); Competition Act 1998, Schedule 8A, paragraphs 2(2) and 2(3).

36. Practice Direction 31C paragraph 1.1 provides that the court:

> *"... may only permit disclosure or inspection that is* proportionate*."* (emphasis added)

37. Paragraph 1.6 of Practice Direction 31C requires the court to have regard to the list of factors set out in Article 5(3) of Directive 2014/104/EU ("the Damages Directive").

38. These comprise:

> *"...(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; [and]*
> *(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; [and]*

*(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information."*

39. Consideration of proportionality is also enshrined in CPR 31.5(vii) which underlies the "*need to limit disclosure to that which is necessary to deal with the case justly*" having regard to the overriding objective.

40. Further, although not applicable to competition claims, Practice Direction 51U ("a disclosure pilot") is designed to ensure that a proportionate approach is taken. See, for example, 51U Practice Direction 2.4, 51U Practice Direction 6.4 which emphasises in particular the need for the court to take into account:

*"(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;*
*(4) the number of documents involved;*
*(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any cost estimates); [and] ...*
*(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."*

41. The same considerations of proportionality which apply to the present proceedings under Practice Direction 31C and CPR rule 31.5(vii) apply also to competition claims before the Competition Appeal Tribunal ("CAT").

42. Following analysis of the CAT rules and CAT disclosure Practice Direction (which incorporates the Damages Directive), the relevant CPR and Practice Direction 51U, the CAT distilled a series of principles in *Ryder Limited v Man SE* [2020] CAT 3 ("The Trucks Cases"), which it is common ground are applicable to this case.

43. The CAT noted at paragraph 35(7):

*"Disclosure will only be ordered and the order will be framed to ensure that it is limited to what is reasonably necessary and proportionate bearing in mind a number of aspects, the most important of which are:*
*(a) the nature of the proceedings and the issues at stake;*
*(b) the manner in which the party bearing the burden of proof is likely to advance its case on those issues;*
*(c) the cost and burden of providing such disclosure;*
*(d) whether the information sought can be obtained by alternative means or be admitted; and*
*(e) the specific factors listed in r. 4(2)(c) [CPR rule 1.1(2)(c)]."*

44. In addition it was common ground that the court should consider (a) the scope of disclosure sought so as to prevent nonspecific searches for documents which are unlikely to be of relevance, pursuant to Article 5.3 of the Damages Directive, which must be taken into account

per 31C Practice Direction paragraph 1.6, and (b) the whole likelihood of documents existing (pursuant to 51U Practice Direction 6.4(3), which is informative if not strictly applicable).

45. In the Trucks Case, the CAT explained its approach to disclosure at paragraph 40:

> *"...(1) The initial burden of proof is on the Claimants to satisfy the Tribunal on the balance of probabilities that the Infringement had an effect on prices.*
> *(2) If that hurdle is passed, the Tribunal will seek to arrive at a reasonable estimate of what the effect might have been and what any pass-on (within the relevant legal principles) might have been, again on the balance of probabilities.*
> *(3) A reasonable estimate in this context means an estimate that is arrived at in a proportionate manner. We recognise of course that these are very large damages claims. However, any estimate will still be reached through averages, extrapolations and aggregates. It does not mean that every logical avenue that might be relevant can be explored, or that all data which is arguably relevant must be provided. As observed by Birss J in Vodafone v Infineon AG [2017] EWHC 1383 (Ch) at [31]:*
>
> > *"'While of course more [disclosure] can be better ... it is relevant to ask how much more would it be and how much better would it make the result.'*
>
> *The decision as to what disclosure to order is appropriate is informed by the views of the economic experts but it is not determined by what data they would like to have or what method they would like to use. It is for the Tribunal to decide.*
> *(4) In reaching that decision, the Tribunal has regard to the principles of effectiveness, that cases should not be unreasonably difficult to bring, and of proportionality as set out in rule 60(2) [which provides that disclosure be limited to what is necessary to deal with the case justly] read with the governing principles in rule 4 [equivalent to the overriding objective] and also the Disclosure PD [which mirrors insofar as relevant Practice Direction 31C.]*
> *(5) It is not therefore simply a question of relevance, as some of the skeleton arguments we received seem to suggest. Disclosure will only be ordered in relation to a specific category of documents if the Tribunal is satisfied <u>the documents sought are relevant and that disclosure would be necessary and proportionate.</u> The Tribunal will not make an order merely because it determines that the documents are relevant to the issues.*
> *(6) These actions seek damages for loss on many hundreds of transactions, involving a very large number of vehicles, carried out over an extensive period, and in some of the cases by a very large number of claimants. Further, the Infringement involved contacts and communications between the participants over a 14-year period, with different involvement on the particular occasions. The approach to proof of causation and quantification, both as regards any overcharge and as regards pass-on, will therefore be very different from that which can apply where the claim is for loss on one or two very large transactions concluded following extensive negotiation: cp. BritNed Development Ltd v ABB AB [2018] EWHC 2913 (Ch). It is unlikely to be realistic in these cases for the issues to be approached by examining each price charged for each transaction subject to the claim and seeking to ascertain how any antecedent exchange of information or coordination between the OEMs may have influenced that price (whether directly or by reference to a gross price). Similarly, as regards pass-on, it would appear to be disproportionate even if it were possible to consider the resale or disposal of each truck that is subject to the claim. Accordingly,*

*it is important to establish how in practice the issues at trial will be approached, and to do so before and not after vast time, effort and expense is devoted to yet further disclosure." (emphasis added)*

46. Each of the parties emphasised different aspects of the passages that I have identified above. I have borne in mind and applied all these principles when considering the disclosure applications which are before me today.

## C. THE DISCLOSURE APPLICATIONS

### C(1) Quantum and effects disclosure: an overview

47. Before turning to the specific applications before me it may assist to identify, by way of overview only, what the disclosure currently sought in very general terms goes to. It goes primarily to determining what quantum of loss was caused to Daimler by the infringing or alleged infringing conduct.

48. The two central issues on quantum which will need to be determined at trial are:

    a. Overcharge: whether Daimler paid more for the RoRo services that it procured from the Defendants than it would have paid absent the infringement and, if so, by how much; and

    b. Pass-on: whether Daimler passed on some or all of any such overcharge to its downstream customers and, if so, how much.

49. The analysis of these issues will, to a large extent at least, turn on economic expert evidence having regard to the available documentary material. As already noted and as ordered at the first CMC the experts have met to discuss the documents what information they'll need and have prepared a Joint Statement, the JES that I have already referred to, setting out their respective positions.

50. The experts agree that overcharge and pass-on should each be assessed by means of an econometric analysis of data.

    (1) In the case of overcharge, two steps are involved.

        (a) The first stage is to arrive at a percentage estimate of overcharge. The experts all plan to use a temporal comparison, which compares (i) prices charged for RoRo services during the infringement period with (ii) those charged during a clean period or clean periods (as proxy for the prices that would have prevailed absent infringement). Regression modelling will seek to control the effects of other variables (known as "control variables") besides the infringing conduct, which may also explain changes in price over time, e.g. changes in the cost of providing RoRo services or in the conditions of supply or demand.

        (b) The second stage is to quantify any overcharge found in monetary terms. This is done by applying the overcharge percentage to the total value of sales made to Daimler (often

referred to as the "value of commerce" or "VoC") by each Defendant during the infringement period.

(2) In the case of pass-on the experts likewise agree that econometric analysis should be used to assess the likely effect of the overcharge on the Claimant's ultimate vehicle price, again controlling for other factors involve affecting that price.

51. In each case the main input for the modelling will be quantitative data and the parties have therefore each focused on identifying what relevant data sets they hold.

52. In broad summary, the types of data that are used are as follows.
(1) In the case of overcharge (i): data about the prices charged by each Defendant to Daimler; (ii) data relevant to control variables, e.g costs data; and (iii) data on each Defendant's sales to Daimler to determine the VoC.

(2) In the case of pass-on: (i) vehicle price data, (ii) RoRo prices , and (iii) data relating to Daimler's costs, in particular variable costs more generally.

53. Some of these categories of documents may be held by Daimler or the Defendants, for example, RoRo pricing and sales data. Other categories either will or may be held, if at all, by only one side, e.g. cost data and Daimler's downstream price data.

54. However, Daimler also submits that some at least of its disclosure requests at this hearing also go to "effects" in the sense that they are needed for a data-driven analysis of whether there was infringing conduct during the period pre-dating the Commission's Decision. It is common ground that, where available, the best evidence to establish an infringement is documentary material showing the existence of infringing contacts between carriers in relation to which WWL is in the process of making very substantial disclosure.

55. However, Daimler also wish to use an economic analysis where there is a lack of other evidence of infringing conduct. The appropriateness and utility of such an analysis is in issue between the parties.

56. Against that high-level backdrop to the quantum and effects disclosure, I will now turn to the specific category of disclosure where it has not been possible to reach agreement between the parties.

## C(2) Disclosure of best available evidence and disclosure from electronic databases

57. The first issue that arises is in relation to, if I can describe it as such, the ground rules as to what documents are to be disclosed and also whether or not they are to be accompanied by any explanation in terms of an electronic database. Firstly, what is common ground is as follows and this will be recorded in the order:

*"The data, documents and information to be disclosed pursuant to this order (a) may be confined to the best available evidence about the information which is the subject matter of the listed categories, which may be in the form of electronic databases or other electronic sources, save where (i) the disclosing party does not in fact keep any documents in respect*

*of that subject matter in electronic form, or (ii) although it does keep data, documents and information in respect of that subject matter in electronic form, the relevant information in the electronic form is unreliable in view of the way in which it was collected, or (iii) the best available evidence falls instead to be obtained from physical documents or a combination of physical documents and electronic databases or other electronic sources. In each case, the disclosing party should explain why the evidence it is providing is the "best available evidence", and why further disclosure is not proportionate, in particular if the excluded information is within an electronic database*

58. A second aspect though of what is to be ordered pursuant to my order is not agreed between Daimler and WWL. WWL submit that the order should also state as follows, that the documents to be disclosed pursuant to this order:

*"... if contained in the form of an electronic database or extract therefrom, should be provided with a statement on how the relevant information has been compiled from the database and, if appropriate, guidance on how it is to be examined."*

59. Mr Holmes, who appears for WWL, as I have said, identifies two reasons why he submits it would be appropriate for the order to contain such a provision. The first is that it is appropriate for there to be an explanation of what the electronic database contains as that will help the experts. There is a danger of misunderstanding and also there is a danger that there would have to be further enquiries or queries when there is a fixed and relatively tight timetable to trial.

60. Secondly, it is said that the data itself has been subject to processes before it has been disclosed, including the likes of deduplication, etc. Mr Holmes says that so that the experts can understand and agree what is to be done with that data and to allow the experts to grapple with that data more quickly it is appropriate that there be a short statement -- and he emphasises the word "short" -- as to the method of compilation and guidance as to how it is to be examined.

61. For his part, Mr Kennelly, on behalf of Daimler, has some concerns about whether it is indeed necessary to have such an explanation. He points out that although Mr Holmes says that there only needs to be a short explanation, that could still require the expenditure of a significant amount of money in order to do that. He says it is not necessary and it is not the norm to have such an order.

62. Having given careful consideration to the matter, it seems to me in fact that it may be helpful to the experts for there to be such an explanation. I am particularly alive to the case management considerations that arise and the relatively tight timetable that we have for the experts. I do consider that the experts would be helped by the provision of such an explanation both in relation to the method of compilation and guidance as to how it is to be examined. However, I would stress the word "short". I do not consider that this needs to be a lengthy explanation. I do not think there is any need for very substantial costs to be incurred in relation to it and I would expect the parties to be realistic, as the receiving party, to the level of detail that they receive.

63. I do consider that it will assist the experts and allow them to grapple with the material more quickly, in particular in circumstances where time is relatively tight. In addition, it may also give focus to any subsequent request for documentation, should there need to be, after the initial round of disclosure and specific disclosure is sought. Accordingly, for those reasons I consider

it is appropriate that the order should also contain not only the first passage that I identified but also the provision that WWL proposed.

## C(3) Disclosure of first tranche transaction data

64. The next category of disclosure that arises is largely common ground. There was a small difference as to wording which, through discussion and involvement of the court with the parties, has been resolved and therefore the first category of disclosure in this regard to be given is as follows:

> *"The Third to Seventh Defendants (the WWL Defendants) shall give disclosure and inspection of the following categories of documents…:*
>
> *1) Transaction data (available from electronic databases and other electronic sources showing transactions made between the Claimant (Daimler) and (i) the WWL Defendants from ..."*

65. And then the dates will be determined in due course in this hearing. I continue:

> *"... and/or (ii) EUKOR Car Carriers Inc (EUKOR) from ..."* And again, the date shall be dealt with later on in this hearing

66. And I continue:

> *"... including the following information to the extent available:*
>
> *(a) the payments made by Daimler to the WWL Defendants / EUKOR,*
>
> *(b) the volume of shipments made by the WWL Defendants / EUKOR on behalf of Daimler, and*
>
> *(c) each of the items that (a) to (c) above should allow for the identification of the following:*
>
> *(i) the relevant date, for example the date of the transaction, date of payment and/or date of loading;*
>
> *(ii) the breakdown of the price including base price, BAF surcharge and other surcharges;*
>
> *(iii) the route to which the transaction applies;*
>
> *(iv) the vehicle type(s)/model(s) transported; and*
>
> *(v) the identity of the Daimler paying entity.*
>
> *1.2. contracts between Daimler and (i) the WWL Defendants entered into between 1 February 1997 and 31 December 2013 and (ii) EUKOR entered into between December 2002 and 31 December 2013. Disclosure of such contracts shall include the disclosure of annexes, amendments and addenda insofar as the same form part of such contracts.*
>
> *1.3. cost data (available from electronic databases and other electronic sources) relating to RoRo services provided to Daimler by (i) the Seventh Defendant from 1 January 2007 to 2019 and (ii) EUKOR from December 2002 until 31 December 2019. This data should include:*
>
> *(i) the amount of each costs item; and*
>
> *(ii) a description of each of the cost items listed in (a).*
>
> *1.4. Alternatively and to the extent it is not possible to disclose cost data relating to RoRo services provided to Daimler, aggregated cost data (available from electronic databases or other electronic sources) relating to RoRo services provided to all OEMs by (i) the Seventh Defendant from 1 January 2007 until 31 December 2019 and (ii) EUKOR from December 2002 until 31 December 2019. This data shall include:*
>
> *(a) the amount of each cost item; and*

*(b) a description of each of the cost items listed in (a).*

**C(4) Disclosure of second tranche transaction data**

67. Paragraph 2 of the Order will then read:

> "*Therefore, the WWL Defendants shall give disclosure and inspection of the following categories of document by [and we will address that later in the CMC]:*
> *2.1 transaction data available from electronic databases and other electronic documents showing transactions made between Daimler and the WWL Defendants from 1 February 1997 (to the extent available) to 31 December 2001, including the following information to the extent available:*
> *(a) the payments made by Daimler to the WWL Defendants;*
> *(b) shipments made by the WWL Defendants on behalf of Daimler; and*
> *(c) the transacted unit prices;*
> *(d) each of the items that (a) to (c) above should allow for the identification of the following:*
> *(i) the relevant date, for example, the date of the transaction, date of payment and/or date of loading;*
> *(ii) a breakdown of the prices including data prices surcharges;*
> *(iii) the route to which the transaction applies;*
> *(iv), the vehicle type(s)/mode(s) transported; and*
> *(v), the identity of the Daimler paying entities.*
> *2.2. cost data (available from available databases or other electronic sources) relating to RoRo services provided by the WWL Defendants to Daimler from 1 February 1997 (to the extent available) until 31 December 2019 to the extent this data is not disclosed as part of paragraph 1(iii): including*
> *(a) the amount of each cost item; and*
> *(b) a description of each of the cost items listed in (a).*
> *2.3. Alternatively and to the extent it is not possible to disclose costs data relating to RoRo services specifically provided to Daimler, aggregated cost data (available from electronic databases and/or other electronic sources) relating to the RoRo services provided to all OEMs by the WWL Defendants from 1 February 1997 (to the extent available) until 31 December 2019 to the extent that this data is not disclosed as part of paragraph 1(iii), including:*
> *(a) the amount of each cost item; and*
> *(b) a description of each of the cost items listed in (a).*

**C(5) Timetable for Disclosure by WWL**

68. The next issue that arises is in relation to the date by which the categories of documents that have been discussed should be provided. Addressing first the category in paragraph 3, the rival dates are 30 September 2020, which Daimler proposes WWL should give the disclosure by and the date of 30 November, the date by which WWL proposes to give that disclosure.

69. I have before me factual evidence in relation to the difficulties that arise both in terms of the amount of work involved but also in the context of the current COVID-19 pandemic. I am told that WWL is a Norwegian entity and that there are very strict restrictions in place in Norway at the moment and that although it is a transport provider it is the transport critical aspects of work which is involving employees coming into work at the present stage. Against that, of course, we

are dealing with electronic databases. I have a lack of information before me as to the extent to which those can be accessed remotely.

70. I am concerned that the timetable so far as possible should ensure that with active case management this matter can be effective for trial with the existing trial date and in particular, that there is an appropriate time period between the completion of disclosure and the provision of factual witness statements. During the course of the hearing, Mr Holmes took instructions from his clients as to whether or not it would be possible to bring the date forward from that which was contemplated in WWL's evidence from 30 November to an earlier date. He indicated that they would be in agreement to a best endeavours obligation to provide the disclosure by 30 October.

71. I am concerned about the fact that, as both parties I think agree, there are likely to be further disclosure requests arising out of the initial disclosure as I consider is almost inevitable in a case such as this and time is tight before witness statements.

72. I also feel that a best endeavours obligation by 30 October would simply be too late and would potentially jeopardise the witness statements in the sense of if it was only a best endeavours obligation by that date, as opposed to a longstop date, there must be a real prospect that all disclosure would not have been given by that stage which would be unfortunate in the context of the timetabling.

73. We are in uncertain times and in one sense the uncertainty is greatest in the immediate short term to which I will return in a moment concerning the dates for the initial part of the disclosure. It does seem to me though that one can take a degree of notice that around the world there are steps being undertaken to relax restrictions and it is likely that in the ensuing months, if not in the ensuing weeks, there will be changes to the restrictions in place which will allow greater work to be done. I am of course alive to the possibility that there could be change in circumstances, there could be second waves, and there could be new restrictions put in place at a later date. It seems to me that those sort of problems are best dealt with by a liberty-to-apply type provision, which there will be in any event in the context of this order, but that I should set a tight but what I regard as realistic deadline.

74. In those circumstances I consider that the appropriate order to make would be a best endeavours obligation by 30 September 2020 but that disclosure be completed by 30 October 2020. That said of course, no one can foresee the future and there is of course a liberty to apply and the parties will be expected to cooperate. If difficulties arise in relation to those deadlines then no doubt the parties will liaise and, if they are not able to reach agreement, then it will be necessary to bring the matter before the court, either on paper or for a hearing. That is not an encouragement not to abide by the directions in this timetable but simply a reflection that we live in times where the position changes on a week by week basis. So 30 September 2020, for the reasons I have given, a best endeavours obligation, and the disclosure to be completed by 30 October 2020.

75. Turning to the earlier period, it seems to me ironically that if anything the uncertainty is considerably greater due to the fact that we continue to be in a first phase period where there are undoubted difficulties in terms of compliance. The competing dates here are the 1 June 2020 on the part of Daimler or 31 July 2020, which is proposed by WWL. I note in passing that so far as

Daimler's pass-on disclosure, which I will deal with in due course is concerned, Daimler is proposing the 31 July 2020 for such disclosure as is appropriate and ordered against it.

76. It does seem to me that 1 June is an unrealistic date given that we are already in May. I take on board what is said by Daimler, that WWL has been very much alive to the position and what disclosure is likely to be required for some considerable time but we have also been in an unprecedented position of uncertainty for a number of weeks now and I consider it unrealistic to impose a deadline on a party that is only a few weeks away when there is considerable uncertainty at this time. In circumstances where it is actually the second of the dates that is the key date in relation to disclosure I am going to order that the disclosure, the initial disclosure, be given by 31 July 2020.

## C(6) The level of aggregation for pre-1997 transaction data

77. The next point that arises is in relation to giving disclosure in relation to the period from 1994 to 1997 in relation to transaction data. The position of WWL is that such documentation does not exist but, in any event, it would be at a level of granularity, as the experts call it, which is inappropriate. What has been proposed following extensive correspondence is that WWL provide aggregated data. This proposal has been considered by Daimler who, for present purposes, would be satisfied with such disclosure provided it was broken down by route and period.

78. The reason for that is because part of the Defendants' pleaded case is not to accept that there was a cartel in terms of anti-competitive behaviour on all routes and for all periods which are alleged and therefore the mere provision of aggregated data would not go far enough, says Daimler, for its purposes because it needs to have a defined route and period.

79. Mr Holmes for WWL says, and this has been confirmed in a letter very recently, immediately before the hearing this morning, that such aggregated data as exists will be provided so far as it exists by route and by period in terms of at least quarterly.

80. That position having been reached, the parties are *ad idem* that disclosure should be given in those terms, i.e. that there should be disclosure for that time period of aggregated data split so far as possible by route and at least quarterly, whilst I believe ultimately both Daimler and WWL reserve their position in relation to any wider or different disclosure hereafter between now and trial.

81. A related issue is in the context of the parties reserving their position on disclosure as to what should happen if it transpires that WWL cannot in fact breakdown the aggregated data by route and/or period or have difficulties in doing so.

82. That led the parties, with some encouragement from the Court, to consider a report in writing in the form of a letter of what progress had been made as to whether in fact it would be possible to break down the aggregated data by route and period within a certain period of time because in those circumstances Daimler is currently at least minded to redouble its efforts to apply for disclosure of more granular data.

83. There was debate between Daimler and WWL as to the date for such a letter. Daimler for its part clearly would wish to know as soon as possible and proposed a date of 1 August 2020.

WWL wished to ensure that the date was only one by which stage it had exhausted most if not all possible routes to acquire such data and proposed a date of 30 August 2020.

84. I consider that there are two competing considerations. One is that Daimler understandably would like to know this information as soon as possible and equally WWL want to make sure that they can give a proper answer before they give it and also without being put under undue pressure and also without, as it were, having to give a premature answer where more time might have allowed for a different or more comprehensive answer.

85. In those circumstances I do consider that it is appropriate that a letter be written by WWL's solicitors as to what progress has been made both in relation to if there is a nil return, but also in relation to a brief summary as to where they have got to in terms of aggregate data by route and period. WWL will be required to provide this update by way of letter on 30 August 2020.
86. I make clear that this is not to encourage revisiting this area or an application for specific disclosure; it is purely so that all the parties are aware as soon as possible whether or not this category of disclosure is the appropriate way forward at a time when it is still possible to do something about considering whether or not there are alternative approaches which might be more fruitful if ultimately the court considers they are appropriate.

## C(7) Disclosure relating to EUKOR

87. The next issue that arises is in relation to an entity associated with WWL which is called EUKOR. In terms of the search for the aggregated sales data for the period from 1994 for which transaction datasets no longer exist WWL proposed adding in the words "*save for EUKOR*", where transaction data exists only from December 2002.

88. The position is that EUKOR only came into existence in 2002, but it bought assets from another entity, HMM. The obligation of WWL, at its lowest level, obviously is to disclose any documents which are of relevance to the pleaded allegations against it, subject obviously to any issues in terms of what is necessary and proportionate.

89. I consider that in fact the carve-out referring to EUKOR is something of a red herring. EUKOR is simply a subset of WWL. I consider that the correct order is that WWL should search for aggregated sales data for the period from 1994 for which transaction datasets no longer exist. That will include within it an obligation for WWL to consider what documents are within its custody, power and control and that applies as much to EUKOR and any material that EUKOR has acquired as anything else.

90. I should add that this point is unlikely to be a live point because Mr Holmes, on instructions, has told the Court that he is unaware of HMM having any documentation which is relevant. It does seem to me however as part of the general disclosure obligations of a party that that should be considered by WWL and if indeed the position is that there is no such relevant documentation then clearly no such disclosure will be given. I did not understand Mr Holmes to be identifying any specific point going either to necessity or proportionality, which is hardly surprising as his instructions are that no such documentation exists.

## C(8) Disclosure of Annexes etc to Contracts

91. The next point that arises, which is agreed, is that the WWL Defendants shall give disclosure in respect of:

*"... all annexes, amendments and addenda to contracts that were entered into during the relevant period, in the event that these are not disclosed as part of paragraph 1(ii) of this Schedule 1 above."*

## C(9) Transaction data relating to other OEMs

92. The next issue that arises is in relation to disclosure of material for OEMs, other manufacturers other than Daimler. The current position is that Mr Noble, Daimler's expert, is planning to produce a model, inputting the data that is supplied in relation to Daimler. If there is sufficient information in relation to Daimler, it will not be necessary to seek disclosure in relation to all OEMs.

93. The consequence of that is that at the present stage if, as is being sought by Daimler, I order disclosure in relation to all OEMs, that will undoubtedly cause expense to WWL in circumstances whereby it is not at all clear that that material will ever be required for the trial and therefore WWL submit that it would not be proportionate at this stage, at any rate, for me to order that disclosure.

94. There is, however, a tension which is pointed out by Daimler, which is that there is a danger that it could only become apparent at a stage when the trial date could be jeopardised because there might not be time to liaise with WWL and, if necessary, make a contested application for disclosure in relation to the OEM material.

95. So far as this extraction is concerned Mr Holmes tells me on instructions that that should not be a difficult or time-consuming process. Obviously, however, that then has to be worked upon before it can be supplied.

96. Mr Kennelly's concern is that, as I have ordered, there is a best endeavours obligation to provide the information by 30 September 2020 with an end date of the end of October 2020 and if one gets to the end of October 2020 it could be too late to mount any necessary application.

97. I consider that it would be wrong in principle to order disclosure at a time when that expenditure might be wholly wasted in circumstances where at this point in time I simply do not have before me the material which would allow me to determine the likelihood or otherwise that that disclosure will be necessary or proportionate. Indeed, it strikes me in circumstances where it might never be necessary that it would not be proportionate to order it at this stage. However, that does not mean I am ruling against the application and a fresh application or a restored application can be made hereafter.

98. I then turn to whether or not anything can be done to address Daimler's concerns in relation to timing. It strikes me that the position may not be as pessimistic as suggested by Mr Kennelly in this sense, which is that WWL is under a best endeavours obligation in relation to the information to be provided by 30 September 2020. By 30 September 2020 that information will either have been provided, in which case a month will have been gained, or it ought to at least be clear what has been provided and Daimler will be able to follow up in correspondence as to what is still to be provided or not provided.

99. It seems to me that October 2020 can then provide fertile ground for correspondence between the parties. If it is all to be supplied by the end of October, that is all well and good. If it is not, then that would allow time for any issue between the parties to crystallise and for an urgent application to be made to the court. That would allow time in advance of the end of that term, i.e. before the end of the Michaelmas Term, in order to rule upon those matters. Time might then be tight, it is true, but it does not seem to me that that in itself, with active case management from a judge or judges who are familiar with issues in the case, would not mean that with active case management it would not be possible to maintain the trial date as it is.

100. For those reasons I decline the application to provide that disclosure in relation to OEMs at this stage without ruling upon any future application that will be made and whilst also indicating to the parties that they should both actively consider this issue for the reasons that I have identified, as Daimler no doubt will when it receives disclosure as at the end of September 2020. For its part, WWL will no doubt be alive to the fact that as at that time it is likely to have to provide an explanation to Daimler as to what has been provided and what is still to be provided which should allow time for the parties to crystallise any issue between them and bring it on before the court within short order as an urgent matter. In those circumstances I consider, without binding the court, that the court would be likely to consider sympathetically any urgent application that had to be considered.

## C(10) Disclosure of Margin and Profit Data

101. The next category of disclosure is disclosure of margin and profit margin data which the experts propose to use, or at least Mr Noble for Daimler proposes to use, in the context of margin analysis which both experts accept is potentially useful as an exercise to undertake.

102. The issue which arises is that WWL agree to give any data on margins and revenues of the RoRo business generally from what is known as the STRATA database. That is one of their databases which Mr Holmes, on instructions, has confirmed contains margin information. That therefore would appear to be the appropriate database to order that disclosure be given in relation to in the first instance. Mr Kennelly submits that, as yet, WWL has not undertaken a comprehensive review of all its databases and so one cannot be sure that other margin information may not be available in other databases or indeed that ultimately other databases might prove to be the best source for margin information.

103. On the material currently before me at the moment I consider that the appropriate disclosure to be given at this stage relates to the STRATA database. However, I would make two points.

a. The first is that I am ordering that disclosure is based on STRATA on the basis that that is indeed the best source of evidence of margin data. But as part of their general disclosure obligations and also their review of the documentation that they have, including electronic documentation and databases, WWL will have to be alive to the fact that margin and revenue data is an issue of relevance in this litigation. Accordingly, if a time should come, consistent with their disclosure obligations, where WWL become aware that in fact there is a better source of margin information than the STRATA database then I consider that they would be under an obligation as part of their general disclosure obligations to identify that fact and liaise in relation to what disclosure was appropriate.

b. The other point I make is that I do not rule against the application of Daimler for all time and Daimler are at liberty in the future to restore a wider application should that prove to be necessary which would then be considered on its own merits. But at this stage I am satisfied that it is appropriate to order disclosure of any data on margins and revenues of the RoRo business generally from the STRATA database.

104. Disclosure of a sample of documents relevant to pricing The next category of documents sought, as at the hearing, is a representative sample where available per year for each category of documentation that is identified in paragraph 5(vi), which is documentation or information on how price terms were constructed, i.e. internal pricing models and the individuals who constructed it, including any cost categories and the level of costs taken into account, the market considerations taken into account, and the profit or margin target taken into account, and any significant company-wide changes in sales or pricing policies that took place during the period 1 January 1994 until 1 December 2019.

105. I am satisfied that the correct approach is indeed a sample of documents, that it should be a representative sample, and that it should be by year for each category and it should be where available.

106. In terms of the debate between the parties, Daimler had in addition been wanting to identify the number of documents per year, for example, 50 documents per year for each of the categories. That was objected to by Mr Holmes on the basis that it was over-prescriptive, that there would be difficulties in relation to particular years, including early years, and that it was the wrong approach in principle, and that the guiding principle should be representative samples and that would require the WWL Defendants and those instructing them to consider what would be a representative sample.

107. I also consider that an explanation should be given as to how the sample was selected and whatever samples are provided by way of disclosure should be common to both experts. In other words, each expert should be evaluating exactly the same material within these categories.

## C(11) Disclosure of Tender Materials

108. The next category of documentation which is sought from WWL - and this is a category which is not agreed -- is:

> "*vii. A list of Daimler tenders in which the WWL Defendants /EUKOR participated during the period 1 January 1994 until 31 December 2019, including: (i) information on whether the tender was won, partly won or lost; (ii), the price offers made at each stage of the tender process; and (iii), a list of Daimler tenders that the WWL Defendants/EUKOR were invited to but did not participate in, and the documents stating the rationale for not doing so*."

109. The context in which this material is said to be relevant is the effects analysis, i.e. liability as to whether or not there was a cartel, one that WWL participated in, and if so for which periods. Daimler says that this material is highly relevant and is necessary in order for the court to determine that issue because one of the central issues, as revealed by the EC Settlement Decision, is that there was a respect agreement applied by the cartelists at the tender stage in terms of collusion on how to bid and whether or not to bid and at what prices.

110. Mr Holmes for WWL says this documentation is not necessary or proportionate. Firstly, it is said that getting WWL to disclose this tender information would not enable the sort of analysis that Mr Noble envisages identified at paragraphs 2.8 of his first report and at paragraph 3.4 of his fourth report because obviously a cartel would involve more than WWL. Secondly, it is said, if anyone has this information or most obviously has this information it will be Daimler because Daimler was the tenderer who sought all these tenders from the various entities. The third point is a proportionality point which is that it would be a very substantial exercise to be performed over a very large number of areas with no identified criteria or databases or whatever. In relation to that and applying the legal principles identified at the start of this judgment it would not be necessary or proportionate even if it was relevant to give that disclosure.

111. Addressing each of those points in turn. So far as whether or not the WWL disclosure would enable the analysis to take place, I consider two points should be borne in mind.

a. The first, as is pointed out by Daimler, is that WWL was, I am told, the largest operator at the time and so if WWL did not participate that would be likely to have a major effect on the competitive pressure. Without in way expressing any view on whether that submission is right or not, that clearly is a significant factor in that Daimler are saying that their expert would be able to do something with the analysis, even if there was only WWL material.

b. Secondly, it appears likely that in fact it will not simply be WWL material because I am told, again by Mr Kennelly on instructions, that there is likely to be some material in relation to tendering from the disclosure that is going to be given or has already been given by other parties including those parties who have now settled with the Claimant. I am not convinced that that factor in and of itself is determinative against giving the disclosure. I have rather more sympathy with the second point that if anyone has this material it ought to be Daimler or, at the very least, that Daimler itself should be carrying out proportionate searches to see whether it has that material. I am going to order that Daimler should provide as part of its disclosure what material it has in relation to those categories, subject obviously to what are reasonable and proportionate searches in order to do so.

112. I do not consider, however, that the fact that Daimler may have some of this material is a complete answer to Daimler's request because by the same token, for the reasons that Mr Kennelly has identified to me, Daimler may not any more have available to it all of this material, whereas in the abstract at least one might expect WWL to have at least some of this material, certainly for more recent periods and potentially for earlier periods as well. Exactly what it has, of course, is not at this stage known.

113. The area that concerns me most, however, is the question of proportionality. I have no doubt that this tendering material has the potential to be highly relevant but equally I have sympathy for WWL that it could be, in the abstract, very onerous for them to undertake searches over a 26-year period in relation to searching for documentation. There would be a danger if the disclosure ordered was in the general terms that are identified by WWL that it could be potentially onerous and, equally, WWL would be at risk if there was not focus to the exercise to be undertaken because it might be suggested that WWL had not done that which they should.

114. I consider that this area is a classic area where what is required is a clear focus as to precisely what searches should be undertaken. In that regard I understand, and it has not been substantially challenged by Mr Holmes to date but I give him, as it were, liberty to explain this in due course, that there would have been a sales department involving tendering and it ought to be possible, at least to a certain level of detail, to identify who was involved in tendering and I would have thought that this was a classic area where focused searches with custodians and focused search terms such as "*Daimler within so many words of tender*" could be considered.

115. Of course, that sort of exercise involves liaison between the two parties to discuss who would be appropriate custodians, what would be appropriate search terms and at that stage there might be either agreement between the parties or it might be necessary for further court input. For example, it is always important to ensure that only an appropriate number of custodians are chosen, that search terms are appropriate, and that the number of documents that is produced as a result of that is manageable. All of that factors into the overall question of proportionality and cost versus relevance.

116. It does seem to me that because this tendering material does have the potential to be highly relevant that it would not be appropriate at this stage to refuse the disclosure application that has been made but by the same token I agree with the submission made by WWL that at present, in terms of what is stated effectively to be an absolute obligation to produce a list of such tenders, etc, that would not be proportionate.

117. I consider the appropriate way forward is that within a period of 7 days, or such other period as Daimler may seek from me, Daimler should in a letter propose what form of structured approach to such searching should be in terms of the likes of custodians or the categories of custodians, appropriate search terms, etc. Within a period that I will discuss with WWL they should respond and that Daimler, if appropriate, should reply to that.

118. If absolutely necessary and if agreement has not been reached then the matter will have to come back before the court in a way to be discussed between the court and the parties hereafter.

## C(12) Disclosure of internal material relating to bids on Daimler tenders

So far as concerns the next category, category (viii), that category in fact contains subcategories. The second sub-category is: "*Recommendations or proposals on Daimler business to bid for and price levels to bid at.*"

119. Upon discussion with the parties and further reflection by those parties it is accepted by both Daimler and WWL that the more appropriate location for that request is within (vii) that I have addressed above and therefore the proposals that have been agreed and directed in relation to (vii) will apply equally to (ii) within (viii).

120. That leaves the remainder of category (viii) which is as follows:

> "*Documents containing discussions of and/or recommendations on the WWL Defendants' business with Daimler in the period 1 January 1994 until 31 December 2019 including: (i) minutes of meetings on the Daimler business and ... (iii) internal management presentations on Daimler business*."

121. There is a dispute between Daimler and WWL. Daimler seek the entirety of that material. WWL propose that what is reasonable and proportionate is to undertake a sample in relation to those categories. Without ruling out any possibility of wider future disclosure I consider that what is reasonable and proportionate is that a sample exercise be undertaken with the same qualifications as I identified earlier in my judgment in relation to other sample exercises.

## C(13) Fleet capacity and utilisation data

122. The next and final category in relation to WWL's disclosure is data in relation to overall fleet capacity. It is agreed that this information shall be provided and I so order.

123. Information is also sought in relation to fleet utilisation. In relation to that, the agreed position is that WWL will address whether or not there is any documentation in relation to that in the letter that they are going to write in relation to one of the earlier categories.

## C(14) Agreed categories of pass-on disclosure

124. Moving on therefore to the disclosure which is sought of Daimler, there is a measure of agreement as to what disclosure should be provided at this stage in relation to pass-on within three categories. These are as follows, and I quote:

> *"Actual revenues and planned transportation costs. The Claimant shall by 31 July 2020 give disclosure and inspection of the following categories from its IMPACT database for the period 2006 to 31 December 2013 (to the extent available).*
> *4.1. centrally controlled costs including:*
> *4.1.1. total transportation costs (inclusive of freight charges);*
> *4.1.2. total planned base vehicle costs; and*
> *4.1.3. total planned vehicle option costs;*
> *4.2.local costs, i.e. costs incurred locally by Daimler's Market Performance Centres ("MPCs") and/or Daimler owned dealers including:*
> *4.2.1. within country transportation costs (inclusive of freight charges); and*
> *4.2. allocation of MPC fixed costs of operation;*
> *4.3. data on total vehicle prices charged by MPCs to independent dealers;*
> *4.4. data on total vehicle prices charged by the MPCs where they make direct sales to customers and/or charged by Daimler-owned dealers to customers.*
> *5. Actual RoRo costs. The Claimant shall by 1 June 2020 give disclosure and inspection from Daimler's Contract Rates Database of the following (to the extent available):*
> *(i) the actual cost of RoRo services charged by RoRo carriers to Daimler for the period 2006 to 2017; and*
> *(ii) annual expected shipping volumes and quarterly prices by carrier by route and by vehicle type.*
> *6. The Claimant shall by 31 July 2020 give disclosure and inspection from Daimler's UIS database of:*
> *(i), volumes of vehicles supplied to its MPCs; and*
> *(ii) the freight charge charged by Daimler to its MPCs for transportation, including RoRo services for the period 2006 to 2013 (to the extent available)."*

125. Two issues of principle remain however. The first is whether or not the information supplied should be up to 31 December 2013 or, as WWL suggests, to 31 December 2019. This is for the purpose of the pass-on analysis that Dr De Coninck is proposing to do. Dr De Coninck is

concerned that the 7 years of data that will be available is insufficient temporally for him satisfactorily to do the pass-on analysis that he proposes to do.

126. For his part, Mr Kennelly on behalf of Daimler points out that in fact this already does have some overhang period in it. His expert, Mr Noble, suggests that it might possible for there to be some overhang in the period and because the period the claim relates to ends in September 2012, some 15 months earlier. It is said as well that the material I have just identified is a very rich source of data and indeed runs to an extremely rich dataset, as Mr Kennelly puts it. He points out that this is the sort of disclosure in fact which in the Trucks litigation the CAT said might be disproportionate to the extent it descended to a per vehicle level.

127. Mr Kennelly also points out that this data is highly sensitive data in relation to its business and, even with the benefit of an appropriate confidentiality order in terms of the confidentiality ring, there is always the risk that such information could leak into the public domain. But his main point is that even the experts recognise that it may ultimately prove unnecessary to disclose data up to 31 December 2019. In other words, it is Dr De Coninck's concern that he may find that he does not have all the material necessary but that it may well be in due course, certainly says Mr Kennelly based on his expert Mr Noble, that the information which is disclosed will suffice.

128. It strikes me that this is one of those categories of documents where at this stage it cannot be said that it is necessary and proportionate to extend the time period to 2019 and that the sentiments I identified earlier on in my judgment including in relation to what the experts would wish to have as opposed to what is strictly necessary and proportionate may come into play.

129. The difficulty I have is that the experts have not yet done the exercise that they intend to do by reference to this documentation. Perhaps recognising the points that I have just foreshadowed, during the course of his oral argument Mr Holmes urged upon me that a middle course could be adopted of only ordering a period to the 31st of either October, November or December 2016. Against that Mr Kennelly points out that there is already a 15-month overlap period after the end of the period that the Claimant is claiming in respect of.

130. I am not convinced at this stage that this material is necessary and proportionate going beyond 31 December 2013. That said, the proof really will be in what product can be produced by the experts in relation to pass-on in due course and I do not rule out therefore the possibility that there may be a further application and I am alive obviously to the difficulties that may cause in terms of timing, but at this stage I am not convinced that it would be appropriate to order disclosure going beyond 31 December 2013.

131. Accordingly, for those reasons I limit the period, at least at this stage, to 31 December 2013.

## C(15) Disclosure of actual cost data

132. The next issue of principle is whether, in addition to getting planned costs in relation to vehicles, there should be the actual costs. Mr Kennelly points out that in fact the disclosure that is being given will give both actual vehicle prices and actual RoRo costs. Dr De Coninck's concern, however, is that he does not or may not have, depending on how he interrogates the databases, control for other actual costs. So other actual cost information is sought at this stage.

133. The complication about that is at least twofold. It appears there is no central database in relation to all actual costs, and therefore, in order to obtain this information, it would be necessary to look at all 78 geographical regions. There is also the enormous amount of data, because one would potentially be looking at every individual item that would make up a cost of a vehicle down to every ball bearing, the wiring harness, the different individual elements etc.

134. The point that is made by Daimler is that this information may never be needed in order for Dr De Coninck to do the control that he wishes to do so depending on what information he gets from disclosure from the three databases, not only the IMPACT database but also the two other databases in paragraph 5 and paragraph 6 that I have referred to. All the parties will know by the end of July whether or not in fact he has been able to do the exercise he wishes to do or whether in fact he needs more information as to actual cost.

135. The concern that I have at the present stage is that the disclosure exercise to provide details of actual costs at this stage would appear, at first blush at least, to be enormous in the absence of any centralised database in relation to this, and even if one went down the approach of sampling, which Mr Holmes has proposed as a way forward based on suggestions of the experts, itself would be a very substantial exercise.

136. At this stage I am not in a position to assess whether it is necessary and proportionate to order what appears at first blush at least to be very, very extensive disclosure in relation to actual prices for individual components of individual vehicles over 78 different geographical territories, and that the appropriate time when I would be better placed to consider the position would be after Dr De Coninck has had the disclosure and has crunched that material and interrogated the databases and formed an actual view as to whether he can and cannot do the control that he envisages should be done. At that stage, if need be, a more focused further request for disclosure should be made.

137. Accordingly I do not refuse the further disclosure sought at this stage, I simply regard it as premature to do so at present when it could be that it will become academic. I am also satisfied that it is not necessary at this stage, nor is it proportionate at this stage, to order that disclosure, without prejudice to revisiting the position once Dr De Coninck has had the disclosure and done the work that he envisages doing.

## C(16) Disclosure relating to price-setting practices

138. The next category of documents that is sought from Daimler relates to documents concerning the Claimant's price setting practices. What is sought is a sample along the following lines: documents within representative categories concerning price setting practices, including documents which relate to price increases in response to cost increases, the Claimant to identify potentially suitable representative categories of documents. The suggested categories and the methodology for searching the categories will then be discussed and agreed with the Defendants.

139. These categories could include, for example: (a) documents relating to logistics and transportation costs; (b) guidelines, presentations and emails related to pricing; (c) documents related to how the Claimant accounted for exchange rate movements or currency adjustments in

its price setting process; (d) management presentations relating to pricing; and (e) financial results on a sample basis as identified.

## C(17) Disclosure of invoices

140. The next category of documentation which is sought is invoices issued by the Claimant to customers and dealers, and framework contracts entered into between the Claimant and customers and dealers on a representative example basis. So, what is sought, and I quote:

> "*The Claimant shall disclose appropriate representative examples of invoices issued to customers and dealers, and framework contracts entered into between the Claimant and customers and dealers. These examples should be representative for: (a) each year the cartel period alleged by the Claimant; (b) each jurisdiction in which the Claimant had sales linked to the RoRo services in respect of which it claims; (c) all customer types, (for example without limitation, rental companies, taxi operators, public bodies, corporate clients or other fleet operators, dealers, importers and/or customers for transportation and preparation of the vehicles for sale, the Claimant's subsidiaries and other companies within the Claimant's group (for example importing subsidiaries in each jurisdiction) and private individuals); and (d) all vehicle types sold by the Claimant included within its Claim, including , without limitation cars, vans and trucks*."

141. It is said by Mr Kennelly on behalf of Daimler that a large amount of information that is necessary for the experts to perform their pass-on analysis is contained within a combination of the databases that disclosure is going to be given in respect of and that this material is not necessary or proportionate. It is pointed out that there are a vast number, possibly even millions, of invoices and thousands of framework contracts that could be contemplated within that.

142. Set against that, Mr Holmes says that in fact all they are seeking is representative examples of this. The difficulty I face is in assessing the question of whether or not this material is necessary and also proportionality at this stage at a time when the experts have yet to do the analysis that they are going to do. Having heard submissions from both parties, I do not consider that I am in a position now, at this stage, to undertake that proportionality exercise in a way that would be fair to both parties. Accordingly, I consider that this aspect needs to be adjourned until after the initial analysis has been done by the experts.

## C(18) Disclosure relating to Daimler's understanding of competitors' costs

143. The next category is in relation to documents relating to Daimler's knowledge or understanding of costs for RoRo services incurred by its competitors and the Claimant's industry. It is said to be relevant because it impacts upon pass-on if you know what your competitors are having to pay.

144. Standing back, it strikes me at first blush as, unlikely, but I am not saying impossible, but unlikely that Daimler would know what the competitors were paying in terms of RoRo costs. I have to say that I regard it at best as only tangentially relevant to any issue that will arise but, in any event, it needs not only to be relevant but also necessary and proportionate. Certainly as drafted, it is in the widest possible form of a request saying it should include any correspondence with or any records of contact with the Claimant's competitors in relation to prospective actual prices or costs for RoRo services, any other internal documents indicating an understanding of

the costs for RoRo services incurred by competitors of the Claimant and the Claimant's industry generally.

145. It appears to be unduly wide and speculative both in terms of whether the documentation exists and in order for Daimler to give disclosure of what appears to be only at most tangentially relevant in an area where it is not at all clear that any such documents will even exist. I consider that the request as formulated is disproportionate and that it would not be appropriate to give disclosure in relation to this category.

## C(19) Disclosure relating to Daimler's compound interest claim

146. The final category of documents sought is in relation to Daimler's claim essentially for compound interest but that claim is a large one of some US$187 million. What WWL was seeking was detailed information in relation to the Claimant's actual weighted average cost of capital.

147. During the course of the hearing what was proposed by Daimler was that at the first stage at least what would be given was the public sources of information that the Claimant's expert has used to calculate the figure which would be done by 1 June and in addition it is recognised that Daimler should particularise how it has reached the claim figure that it has. It may be that is all that is necessary. It may be that WWL will need to come back with a further disclosure request hereafter, but I consider that that is the appropriate disclosure and further information that is appropriate at this stage.

## D. DESIGNATION UNDER THE CONFIDENTIALITY ORDER

148. The final matter that appears before me is the question as to the designation of documents under the Confidentiality Ring Order. In that regard on 16 October 2019 I made an Order, but in fact it was a Consent Disclosure Order which will mean that I was the paper application's judge before whom it came, in relation to which disclosure by way of consent of various parties that were identified was designated as confidential in relation to the Commission file.

149. Paragraph 4 provided: "*The Recipients [and these are third parties, i.e. the other parties, many of whom I think were Defendants] shall inform the WWL Defendants by 4 pm on 25 October 2019 of the documents within the Commission File to which the WWL Defendants were granted access by the Commission (the "**Access to File Documents**") that they wish to redact or withhold on the basis of any, or all Leniency Statements, Settlement Submissions, and Privileged Materials* [...]".

150. In that paragraph it is clear that the Recipients are third parties and it is the Recipients who are informing the WWL Defendants of the categories. That paragraph, paragraph 4, continues:

> "*... and shall provide an explanation (in sufficient detail to enable the Claimant to assess any assertion and potentially challenge it by way of an application to the Court, if so advised) of the basis for each redaction or withholding, and shall identify the documents they wish to designate as Inner Confidential Ring Information or Outer Confidential Ring Information as set out in the Confidentiality Ring Order*."

151. It is clear therefore in paragraph 4 that it is the Recipients who identify the documents which they wish to designate as inner or outer confidentiality ring documents. Those Recipients are defined as: "*The First Defendant, the Twelfth Defendant and the Non-Party Addressees (together the "**Recipients**")*".

152. There was then a further Order made on 10 February 2020, again, by me, as a consent Order entitled "Consent Confidentiality Ring Order", by which various things were agreed in relation to the setting up of a confidentiality ring which refers back to the order of 15 October and in paragraph 6.5, which is under the heading of 6, "*Designation of documents/information*", provides:

> *"6.5 A Party receiving documents/information in these proceedings may request that the disclosing Party amend the designation of a document/information **it has provided** (including any amendment to a designation of not confidential):*
> *6.5.1. The requesting Party must provide a written request to the disclosing Party (copied to the other Parties) specifying the following: (a) the relevant Confidential Information; (b) the designation the requesting Party believes is appropriate; and (c) why it is reasonable and necessary for the designation of the Confidential Information to be amended.*
> *6.5.2. The disclosing Party may consent in writing to amend the designation of Confidential Information, with such consent not to be unreasonably withheld and, in any event, a response should be provided within 10 days of having initially received the written request referred to at paragraph 6.5.1 above; and*
> *6.5.3. Should the consent referred to in paragraph 6.5.2 above not be obtained, the requesting Party may apply to the Court for an order that the Confidential Information should be designated as either (i) Inner Confidentiality Ring Information, or (ii) Outer Confidentiality Ring Information; or (iii) not confidential (as the requesting Party deems appropriate), provided that prior notice is given of that application to the other Parties.*"

153. Daimler says that on the basis of those provisions that I have quoted it is WWL who should write to the various third parties where Daimler has requested to WWL that there be a change in status under 6.5.

154. I consider that cannot be right. This turns on the interpretation of paragraph 6.5, fourth line, where it says: "*A Party receiving documents/information in this proceeding may request the disclosing Party amend the designation of a document/information that it has provided...*"

155. The words "*it has provided*" can only mean documents provided by WWL where it makes the designation. It cannot apply to documents where that designation was that of a third party under the consent order of 15 October 2019. The reason for that is, apart from the natural meaning of the fourth line of 6.5 read together with the Consent Order, because what is contemplated in the mechanism of 6.5 at 6.5.2 is a disclosing party consenting to the amending of the designation.

156. It is not within the gift of WWL, which is the disclosing party within paragraph 6.5, as to whether or not to change that designation because it is not WWL's confidentiality. Equally, if the mechanism under 6.5.3 was triggered the court would not be in a position to know whether or not to change the designation from inner to outer or not confidential at all because the entity which gave that designation, i.e. the third party, is not before the court and so the material would

not be available. I consider therefore that the interpretation that is sought by Daimler cannot be right because it is not within WWL's gift as to whether or not to change the characterisation or give its consent.

157. Equally, I can see no purpose in WWL being used effectively as a post-box or intermediary or middleman between Daimler and the third party because ultimately it is only that third party which can give its consent to a change in designation. Equally, it is only information received from that third party which could impact upon the court's view as to any change in designation. I consider, therefore, that the appropriate mechanism is for Daimler to liaise with the third parties in relation to any documentation which Daimler considers should have its status changed.

158. I would add that that would hardly seem to be a surprising conclusion not least, as I understand it, because at least some of these third parties are parties that Daimler has themselves settled with in the context of this litigation. On any view, and in accordance with the overriding objective, it will save costs and expense if Daimler deals directly with those parties.

159. If a difficulty arises about any change in status about Daimler and those parties then Daimler will have to consider what mechanisms are open to it to get before this Court those parties or at least information in relation to that. That goes beyond the scope of the application today and it is not for the Court to identify to Daimler what mechanisms could be used to enable any necessary parties to be before this Court.

160. For all I know, but I am not going to speculate, there may even be contractual provisions between some of those parties which would cut the Gordian knot, failing which Daimler will have to consider how it would get parties before this Court to deal with that problem.

161. Failing that, the categories of confidentiality will remain the same. It is important to bear in mind that this does not stop use of the documentation. It simply means that it is within a particular category. So, for example, if the document is within the inner confidentiality ring there are only certain individuals that that information can be shared between. That may cause practical difficulties for Daimler but it does not mean that the information will not be considered by the court. It simply means that it will be within the inner confidentiality ring.

162. For those reasons I do not consider that there should be any form of order whereby WWL should liaise with the third parties in relation to the change in status of documentations within the disclosure ring. That falls, in my view, to Daimler for the reasons that I have given.