



Neutral citation [2023] CAT 44

Case No: 1528/5/7/22 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6 July 2023

Before:

THE HONOURABLE MRS JUSTICE COCKERILL
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

VOLKSWAGEN AG (and others listed in a schedule to the pleadings)

Claimants

- v -

- (1) MOL (EUROPE AFRICA) LTD
- (7) “K”-LINE HOLDING (EUROPE) LTD
- (8) “K”-LINE (EUROPE) LTD
- (9) KAWASAKI KISEN KAISHA, LTD

Defendants and Rule 39 Claimants

(10) MITSUI O.S.K. LINES, LIMITED

Defendant

- and -

NIPPON YUSEN KABUSHIKI KAISHA

Rule 39 Defendant

RULING (DISCLOSURE)

A. INTRODUCTION

1. This Ruling relates to three disputed requests for disclosure made by the First and Tenth Defendants (“MOL”) and the Seventh to Ninth Defendants (“K-Line”) (together, the “Requesting Defendants”) of the Claimants (the “Disclosure Requests”). The disputed issues concern the scope of material to be disclosed by the Claimants in relation to: (a) their vehicle price setting practices, (b) how transportation costs were distributed within and across the Claimants’ corporate group (the “VW Group”) and (c) the Claimants’ communications with brokers. These disputed issues relate to proposed wording for paragraphs 4 and 6 of a composite draft order (“Draft Order”) and paragraphs 7 and 8.13 of the schedule to the Draft Order (“Draft Schedule”), which were provided by the parties to the Tribunal on 9 May 2023. These were originally scheduled for determination at the CMC, but were deferred by agreement, the hope at the time being that they were all capable of resolution between the parties.
2. Some progress was made but a core of contentious issues remained. The Claimants and Requesting Defendants filed written submissions in relation to the disputed issues in the Draft Order on 5 June 2023. In support of its written submissions, K-Line also provided the Tribunal with a letter dated 5 June 2023 from its economic expert, which explained why the requested items in the Draft Schedule are important to his assessment of damages. The submissions filed on behalf of K-Line were adopted by MOL.
3. The Requesting Defendants considered that the Disclosure Requests were of a nature which could be determined on the papers by the Tribunal whereas the Claimants’ position was that, if the Tribunal were minded to decide in the Relevant Defendants’ favour on paragraph 7 of the draft Schedule, a short hearing was necessary to allow the Claimants to make oral submissions.
4. The Rule 39 Defendant (“NYKK”) is neutral as regards the Disclosure Requests and whether or not the Disclosure Requests are determined on the papers or at an oral hearing.

5. On 14 June 2023, the Claimants filed further submissions in response and K-Line filed a reply on 16 June 2023. I have proceeded to a decision without calling for further submissions because the process of submissions and replies has now been conducted, there is no time before end of term for an oral hearing, and it seems likely that any further submissions will simply result in requests for further replies to be permitted.
6. For the reasons that follow, I am not persuaded that the disclosure sought by way of the Requesting Defendants' proposed wording in the Draft Order is reasonably necessary or proportionate. I am satisfied that it is just and proportionate to resolve these disputes on the papers, without the need for a hearing.

B. PRICE SETTING DISCLOSURE

(1) The Issue

7. The Claimants have agreed (as reflected in paragraph 6 of the Draft Schedule) to provide a narrative of their vehicle price-setting practices, addressing a number of factors relevant to price-setting. A dispute remains over whether the Claimants should provide an overall sample of documents in relation to price-setting (as contended by the Claimants), or a separate sample of documents for each of the relevant price-setting factors (as the Requesting Defendants seek). This is reflected in the following wording (with the disputed wording in square brackets):

“The price-setting statement shall be accompanied by samples of documents relating to [each of] the matters addressed in the statement, to the extent available.”

8. The Claimants submit that a requirement to provide separate samples of documents would effectively become a wide-ranging order for specific disclosure. The Claimants submit that this would be burdensome, and that separate samples of documents are not reasonably necessary for the parties to prepare their expert analysis.

9. The Requesting Defendants contend that the requested document samples will provide important context for the price-setting statement, and will allow them to identify any further material they require.

(2) Decision

10. I am not persuaded that the addition of the words “each of” so as to require sample disclosure in relation to each sub-paragraph within paragraph 6 is reasonably necessary or proportionate. Such a requirement could result in either unnecessarily burdensome disclosure, or otiose disclosure. Disclosure which covers one sub-paragraph may shed sufficient light on others, while some sub-paragraphs may not reasonably require disclosure.
11. The Claimants will need to ensure the sample of price-setting documents is helpful to the Defendants, by covering and illuminating all the sub-paragraphs to the extent feasible. However, a specific order for documents to be provided in relation to “each of” the price-setting factors would be unnecessarily prescriptive and likely to lead to more work than necessary.

C. INTERNAL COSTS DISTRIBUTION DISCLOSURE

(1) The Issue

12. This was the most contentious area. Pursuant to paragraphs 4 and 6 of the Draft Order and paragraph 7 of the Draft Schedule, the Requesting Defendants seek a narrative description and supporting documents explaining how transportation costs were distributed within and across the VW Group (the “Internal Costs Distribution Disclosure Request”).
13. K-Line submitted originally that it requires information about the Claimants’ internal distribution of RoRo costs for its pass-on and volume effects analysis, as this would enable its expert to link the selling price at which a vehicle exits the Claimants’ group to the true RoRo cost incurred by the Claimants for that

same vehicle. K-Line also considers the requested information is necessary for its economic expert to assess the Claimants' interest calculations.

14. The Claimants submitted that the Internal Costs Distribution Disclosure Request should be rejected. First, the Claimants contend that the information and disclosure sought are not relevant to any issue in the proceedings; it does not fall to the Tribunal to determine where an overcharge lies within the VW Group. Second, the Claimants state that the costs and resources that would be necessary for them to comply with the request are disproportionate to any benefit the Requesting Defendants would derive from the disclosure. In their further submissions, the Claimants note that while K-Line's expert states that the internal recharging disclosure would allow him to address systemic biases in the estimates of pass-on that would otherwise occur, the Claimants' expert considers these biases can be corrected by conducting a data-based analysis using information already disclosed. The Claimants also submit that the requested information will not materially enhance the precision of the analysis K-Line proposes to undertake in calculating interest.

(2) Decision

15. I am not persuaded that the disclosure sought is reasonably necessary for the purposes of the actual issues in the case.
16. On the contrary I consider that it is likely to create problems rather than solutions. The Internal Costs Distribution Disclosure Request appears to be a highly complex extra burden which is likely to complicate case preparation and put other deadlines at risk.
17. Specifically:
 - (1) The Claimants have agreed to provide, or will provide, extensive disclosure by virtue of the parts of the Draft Order that are not in dispute. This is not a case of there being a real blank.

(2) Given the fact that these proceedings concern a joint claim by the VW Group, the necessity (and utility) of an internal recharge analysis is far from obvious. Neither the Claimants' nor NYKK's economic experts consider internal pricing or accounting processes within the VW Group to be reliable nor informative about the extent of pass-on, raising doubts over the utility of the requested information.¹ The necessity of the requested information is further undermined by MOL's expert, who considers there are methods to estimate pass-on using econometric analyses that do not rely on factual information on the Claimants' pricing practices and policies.² The internal re-charging information appears to be required not for primary analysis (which will be econometric), but for a cross-check or supplement to the primary approach. That is not reasonably necessary.

(3) The dispute then focussed on the best way to do the cross-check or supplement, with K-Line saying that the Claimants' suggestion would be time consuming and costly and only necessary if in practice there was a minimal or no difference between the recharged costs and the true costs. Stress was then put rather on the importance of a narrative document. However, only a robust narrative would be of any utility for analysing pass-on and volume effects. This would be extremely complicated to produce, particularly in the context of the complexities of the VW Group. I am concerned that it has the scope to pull resource and focus away from the primary exercise.

18. There also appear to be real doubts about the extent to which the complex and costly analysis would significantly or materially improve the analysis. Since the primary analysis is to be econometrics the focus would be on this. It seems premature to cater for the supplemental or cross-check analyses. What is the best supplemental approach may be affected by the material disclosed in the interim or the econometric analysis. The parties' experts should, however,

¹ Rows 36 and 43 of the joint expert statement dated 2 December 2022 (the "Joint Expert Statement") [pp. 164204].

² See paragraph 17 of Ms Pinar Bagci's methodology letter dated 4 November 2022 [pp. 158-163]

consider meeting to discuss the need for and modalities of any supplemental or cross-check approach.

19. As to interest, similar points about the cost benefit balance of the disclosure sought apply. Certainly there is insufficient clarity as to the benefit to justify this very significant extra burden at this stage. Again, however, this would seem to be an area where a live discussion between the experts might well assist to see if further progress can be made, and whether in the light of that either there can be agreed to be minimal utility in the exercise or a more focussed and proportionate method of interrogating the issue can be reached.

D. BROKER COMMUNICATIONS DISCLOSURE

(1) The Issue

20. In paragraph 8.13 of the Draft Schedule, the Requesting Defendants seek “[a] representative sample of documents relating to the Claimants’ communications with brokers (including but not limited to PRONAV) regarding pricing and car carriers’ capacity in relation to RoRo Services and RoRo Charters” (the “Broker Communications Request”).
21. The Requesting Defendants submit that the Broker Communications Request is directed to information about the Claimants’ pleadings regarding (i) the substitutability of liner services, Dedicated Capacity Agreements and RoRo Charters from a demand-side perspective; and (ii) the benchmarking of prices for RoRo Services paid under agreements to market prices for those services.
22. The Claimants consider that the Broker Communications Request should be rejected, submitting that communications with brokers are neither necessary nor relevant for the purposes of the parties’ experts’ economic analyses. The Claimants also submit that the request is disproportionate and premature.

(2) Decision

23. I am not persuaded that the Broker Communications Request is reasonably necessary to resolve issues in dispute in these proceedings. I also consider the request is unlikely to be proportionate. Specifically:

- (1) It is not clear how the documents are proposed to be used and why they are needed in addition to what is already being disclosed. The arguments in favour of the disclosure thus far are too vague to persuade me of the importance of the documents.
- (2) The request for a “representative sample”, while purporting to be proportionate, conceals the need for considerable work to be performed by the Claimants. The Broker Communications Request spans a 23-year period and, to identify a representative sample, the full universe of documents (to the extent that the relevant documents still exist – which is dubious) would need to be located and reviewed.
- (3) As reflected by paragraph 8.5 of the Draft Schedule, which is not in dispute, the Claimants will provide a narrative statement that explains their negotiation and purchasing of RoRo services other than by way of tender process. The Broker Communications Request would best be revisited – if necessary - once the narrative under paragraph 8.5 has been given.

E. CONCLUSION

24. For the reasons set out above, I prefer the Claimants’ proposed wording for paragraph 6 of the Draft Order, which omits “of each”, and I refuse the Requesting Defendants’ Internal Costs Distribution Request and Broker Communications Request.

25. Costs of this exchange, as following on from a case management hearing, shall be costs in the case.

The Hon. Mrs Justice Cockerill
Chair

Charles Dhanowa OBE, KC (*Hon*)
Registrar

Date: 6 July 2023