Neutral citation [2022] CAT 25

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1282/7/7/18
1289/7/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

8 June 2022

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chairman)
DR WILLIAM BISHOP
PROFESSOR STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

UK TRUCKS CLAIM LIMITED

Applicant / Proposed Class Representative

- v -

STELLANTIS N.V. (FORMERLY FIAT CHRYSLER AUTOMOBILES N.V.) AND OTHERS

Respondents / Proposed Defendants

- and -

DAF TRUCKS N.V. AND OTHERS

Objectors in Case 1282

AND BETWEEN:

ROAD HAULAGE ASSOCIATION LIMITED

Applicant / Proposed Class Representative

- v -

MAN SE AND OTHERS

Respondents / Proposed Defendants

- and –

DAIMLER AG

VOLVO LASTVAGNAR AKTIEBOLAG

Objectors in Case 1289

Heard remotely on 19-21, 26 and 27 April 2021.

JUDGMENT
(APPLICATIONS FOR A COLLECTIVE PROCEEDINGS ORDER)

APPEARANCES

Mr Rhodri Thompson QC, Mr Nicholas Gibson and Ms Niamh Cleary (instructed by Weightmans LLP) appeared on behalf of UK Trucks Claim Limited.

Mr James Flynn QC, Mr David Went and Ms Emma Mockford (instructed by Backhouse Jones Solicitors and Addleshaw Goddard LLP) appeared on behalf of the Road Haulage Association Limited.

Mr Tony Singla QC and Mr Matthew Kennedy (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Iveco Respondents in Cases 1282 and 1289.

Mr Meredith Pickford QC, Mr Rob Williams QC and Mr David Gregory (instructed by Travers Smith LLP) appeared on behalf of the DAF Respondents in Case 1289 and Objectors in Case 1282.

Mr Paul Harris QC, Mr Ben Rayment and Mr Michael Armitage (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Daimler Respondent in Case 1282 and Objector in Case 1289.

Mr Daniel Jowell QC, Mr David Bailey and Mr Tom Pascoe (instructed by Slaughter and May) appeared on behalf of the MAN Respondents in Case 1289 and Objector in Case 1282.

Mr Mark Hoskins QC, Ms Sarah Abram, Mr Jacob Rabinowitz and Mr Jon Lawrence (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Volvo Objector in Cases 1282 and 1289.

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A. SUMMARY

1. This judgment determines two applications for a Collective Proceedings Order ("CPO") pursuant to s. 47B of the Competition Act 1998 ("CA 1998")[1] in respect of damages claims resulting from a cartel. The first application is brought by UK Trucks Claim Ltd ("UKTC"), a special purpose vehicle ("SPV") set up to pursue these claims. The second application is brought by the Road Haulage Association Limited ("RHA"), the well-known trade association of those engaged in the haulage industry. For the reasons set out below, we hold that the application brought by the RHA should be granted, albeit for a narrower class definition than is sought, and we reject the application brought by UKTC.

B. BACKGROUND

2. By its decision in Case 39824 - *Trucks* adopted on 19 July 2016 (the "Decision"), the European Commission ("the Commission") found that five major European truck manufacturing groups had carried out a single continuous infringement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and Article 53 of the EEA Agreement over a period of some 14 years between 1997 and 2011. The addressees of the Decision will be referred to by the shorthand name of the corporate groups to which they belong: DAF, Daimler, Iveco, Volvo/Renault and MAN. Together, they are referred to for convenience as original equipment manufacturers or "OEMs".

3. The Decision was a settlement decision adopted pursuant to the procedure set out in Article 10a of Regulation 773/2004/EC and the addressees of the Decision all admitted their liability. The infringement concerned, inter alia, the exchange of information on future gross prices and collusion on the timing and passing on of costs of the introduction of emission technologies required by EURO 3 to 6 standards for trucks weighing 6 or more tonnes, referred to as "medium and heavy trucks". All references to "trucks" in this judgment are to such medium and heavy trucks, save where otherwise stated. The Decision stated that the price coordination arrangements which it found "are by their very nature, among the most harmful restrictions of competition" and imposed fines in aggregate of

[1] All statutory references in this judgment are to the CA 1998 unless otherwise stated.

a little over €2.9 billion (after a discount of 10% for settlement). That figure excludes MAN, which was granted immunity from fines under the Commission's 2006 Leniency Notice: the Commission's press release on the day of the Decision stated that MAN received immunity for "revealing the existence of the cartel" and thereby avoided a fine of around €1.2 billion.

4. Another major truck manufacturing group, Scania, did not participate in the settlement and was the subject of a separate Commission decision on 27 September 2017 ("the Scania Decision"), finding that it was a participant in the cartel and imposing a fine of €880 million. Scania's appeal against that decision was recently dismissed by the General Court, Case T-799/17, *Scania v Commission* EU:T:2022:48, but Scania is appealing further to the Court of Justice of the European Union. Scania is not involved in the present proceedings.

5. A significant number of claims have been brought in the UK seeking damages from one or more OEMs. Seven of those actions, brought by major purchasers, have been case managed together and have now been set down for a series of trials. The first, a joint trial of claims by Royal Mail Group and by BT Group against DAF, is currently being heard. The second, a joint trial of claims by two major truck rental groups, Ryder and Dawsongroup, against four of the OEMs is due to commence on 13 March 2023. And the third, a joint trial of test claimants drawn from three actions by companies in, inter alia, the Suez, Veolia and Wolseley groups, is due to start on 9 April 2024. The various other proceedings are much less far advanced.

6. The claims brought in the UK are among several thousand claims against the OEMs brought in various European jurisdictions. That is perhaps unsurprising since the Commission's press notice at the time of the Scania Decision stated:

> "This cartel affected very substantial numbers of road hauliers in Europe, since Scania and the other truck manufacturers in the cartel produce more than 9 out of every 10 medium and heavy trucks sold in Europe."

C. THE PRESENT APPLICATIONS

7. The application brought by UKTC was filed on 18 May 2018. The application brought by the RHA was filed on 17 July 2018. The Respondents to the two applications are addressees of the Decision, but they are not identical. The UKTC application is brought against Iveco and Daimler; the RHA application is brought against Iveco, MAN and DAF. However, those OEMs who are not Respondents have objected to the grant of a CPO on the basis that they would become subject to additional claims for contribution or indemnity pursuant to r. 39 of the Competition Appeal Tribunal Rules 2015 ("CAT Rules 2015").[2] The Tribunal therefore allowed DAF, MAN and Volvo/Renault to be heard as objectors to the UKTC application and Daimler and Volvo/Renault to be heard as objectors to the RHA application. The Tribunal directed that the two applications be heard together and as a result, all the OEMs have in effect objected to both applications.

8. UKTC relied on an expert report from Dr Andrew Lilico and the RHA relied on an expert report from Dr Peter Davis. Each of the OEMs served substantive responses appending factual witness statements from executives in the respective group, and each of them also filed expert reports from economists. That led to reply expert reports from Dr Lilico and Dr Davis, and supplemental expert reports from the experts for the OEMs. We comment generally on the plethora of expert reports generated by these applications in the Postscript to this judgment.

9. Both applications seek follow-on damages alleged to arise from the infringement found by the Decision. However, in addition to the different character of the two applicants, there are a number of key differences between the applications. In particular:

    (1) UKTC seeks to bring collective proceedings on an opt-out basis. (Its Claim Form presents opt-in proceedings as a second-best alternative, but

[2] All references to rules in this judgment are to the CAT Rules 2015 unless otherwise stated.

that was not vigorously pursued.) The RHA seeks to bring collective proceedings on an opt-in basis.

(2) The UKTC proceedings seek an award of aggregate damages. The RHA proceedings do not.

(3) The UKTC proceedings cover only new trucks. The RHA proceedings cover both new and used trucks.

(4) The UKTC proceedings cover trucks acquired in the UK. The RHA proceedings extend also to trucks acquired in the EEA[3] so long as the acquirer belongs to a group of companies that also acquired trucks in the UK.

(5) UKTC's proposed class definition includes those who acquired trucks between 17 January 1997 and 18 January 2011 (i.e. the period of the infringement[4]) but allows for a 'run-off period' to the end of 2011 before prices are assumed to have returned to competitive levels. Therefore (as we understood the position) it covers also any further trucks acquired by those proposed class members ("PCMs") up to 31 December 2011.[5] The proposed class definition in the RHA's amended Claim Form assumes a much longer run-off period and the class covers those who acquired trucks up to 17 May 2019.

(6) Both proceedings comprise claims by those who acquired trucks for use in providing carriage either as a haulier for third parties or in their own business and both proceedings exclude truck dealers. But beyond that, they define the proposed class differently in terms of exclusions. UKTC excludes those who acquired trucks for leasing for at least 12 months ("operating leases"), but includes the lessees of trucks under such operating leases and also includes truck rental companies that acquired

[3] Defined in terms of the country where the truck was registered.
[4] Save that the infringement by MAN, which was the 'whistle-blower' that received immunity, ended on 20 September 2010.
[5] I.e. it does not include claims by persons who did not acquire trucks in the cartel period but did so in the one-year run-off.

trucks for use in short-term rental (i.e. not by way of operating leases). The RHA excludes those who derive more than half their turnover from selling or leasing trucks (as a means of excluding truck rental companies) but covers all lessees of trucks, whether by way of short or long-term rental.

(7) The RHA proceedings seek to cover claims for loss (by reference to the "total cost of ownership" ("TCO")) allegedly caused by delay in the introduction of new EURO emissions technology that resulted in additional fuel costs. The UKTC proceedings do not claim for such a distinct head of loss but UKTC's application proposes as a common issue the impact of this aspect of the cartel on class members "in terms of operational costs or otherwise".

(8) Dr Davis and Dr Lilico approach the estimation of loss by very different methodologies, as discussed further below.

10. The substantive hearing of the applications was adjourned following the judgment of the Court of Appeal in *Merricks v Mastercard Inc* [2019] EWCA Civ 674 ("*Merricks CA*") pending the further appeal to the Supreme Court: [2019] CAT 15. However, the Tribunal held that it could in the meantime hear as preliminary issues the objections raised by most of the OEMs to the Applicants' funding arrangements, which were not affected by the *Merricks* appeal: [2019] CAT 15. Subject only to certain agreed amendments to the RHA's arrangements with its third-party funder and to UKTC taking certain steps regarding its funding and ATE insurance arrangements in the event that a CPO was granted, those objections were rejected: [2019] CAT 26 (the "Funding Judgment"). A challenge by DAF to that decision was dismissed: *Paccar Inc v Road Haulage Association Ltd and UK Trucks Claim Ltd* [2021] EWCA Civ 299. The Supreme Court granted DAF permission to appeal regarding that issue on 28 April 2022.

11. Following the judgment of the Supreme Court in *Merricks* [2020] UKSC 51 ("*Merricks SC*"), both UKTC and the RHA amended their claim forms.

12. The hearing of the two applications was held remotely because of the Covid pandemic. In view of the contrasting approaches to quantification of damages adopted by the Applicants' experts and the fact that most parties submitted that we either could not or should not grant two overlapping CPOs, the Tribunal decided that it was appropriate to hear oral evidence from both Dr Lilico and Dr Davis. This did not correspond to anything approaching adversarial cross-examination. The Tribunal itself put questions to the experts to clarify their methodology and explore some of the objections raised in the expert reports submitted by the OEMs. We permitted counsel for the OEMs to ask brief supplementary questions. Altogether, we found the oral evidence from Dr Lilico and Dr Davis very helpful. As regard their oral submissions, Counsel for the OEMs helpfully liaised in accordance with the Tribunal's direction to avoid duplication and as a result, despite the wide range of issues canvassed, the hearing was completed in five days.

D. THE LEGAL FRAMEWORK

13. The regime for collective proceedings was introduced into the CA 1998 by the Consumer Rights Act 2015, along with Part 5 of the CAT Rules 2015.

14. Section 47B(1)-(4) state as follows:

> "(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").
>
> (2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.
>
> (3) The following points apply in relation to claims in collective proceedings—
>
> > (a) it is not a requirement that all of the claims should be against all of the defendants to the proceedings,
> >
> > (b) the proceedings may combine claims which have been made in proceedings under section 47A and claims which have not, and
> >
> > (c) a claim which has been made in proceedings under section 47A may be continued in collective proceedings only with the consent of the person who made that claim.
>
> (4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order."

15. Pursuant to s. 47B(5), there are two conditions for the grant of a CPO:

(1) the person proposing to be the class representative must be authorised to act as such ("the authorisation condition"); and

(2) the claims must be eligible for inclusion in collective proceedings ("the eligibility condition").

16. The authorisation condition is set out in s. 47B(8) and r. 78. Section 47B(8) states:

> "(8) The Tribunal may authorise a person to act as the representative in collective proceedings—
>
> (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but
>
> (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings."

Rule 78 provides, insofar as relevant:

> "**Authorisation of the class representative**
>
> 78.— …
>
> (2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person—
>
> (a) would fairly and adequately act in the interests of the class members;
>
> (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
>
> (c) if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;
>
> …
>
> (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including—
>
> …

(b) if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;

(c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—

(i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and

(ii) a procedure for governance and consultation which takes into account the size and nature of the class; and

(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide.

(4) If the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the Tribunal may authorise a person who satisfies the criteria for approval in paragraph (1) to act as the class representative for that sub-class."

17. The eligibility condition is set out in s. 47B(6) and r. 79. Section 47B(6) states:

> "Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings."

"The same, similar or related issues of fact or law" are referred to in the CAT Rules 2015 as "common issues": r. 73(2).

18. Rule 79 provides, insofar as relevant:

> **"Certification of the claims as eligible for inclusion in collective proceedings**
>
> 79.— (1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—
>
> (a) are brought on behalf of an identifiable class of persons;
>
> (b) raise common issues; and
>
> (c) are suitable to be brought in collective proceedings.
>
> (2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

(b) the costs and the benefits of continuing the collective proceedings;

(c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;

(d) the size and the nature of the class;

(e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

(f) whether the claims are suitable for an aggregate award of damages; and

(g) the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act(a) or otherwise

(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—

(a) the strength of the claims; and

(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

19. The statutory eligibility condition accordingly incorporates two related requirements:

(1) the claims must be brought on behalf of an identifiable class of persons; and

(2) the claims must raise common issues.

20. Section 47C addresses damages and costs in collective proceedings, and s. 47C(2) provides:

"(2) The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

Section 47C(3) and (4) proceed to address the payment of damages in, respectively, opt-out and opt-in proceedings.

21. In his landmark judgment for the majority of the Supreme Court in *Merricks SC*, Lord Briggs quoted at [20] from the Government's White Paper which announced its intention to introduce a regime for collective redress in competition law and stated:

> "The aim of these proposals is therefore two-fold:
>
> - **Increase growth**, by empowering small businesses to tackle anti-competitive behaviour that is stifling their business.
>
> - **Promote fairness**, by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress."

22. When considering some of the Canadian jurisprudence on collective proceedings (there called class actions), Lord Briggs observed (at [37]) that the Canadian and UK statutory schemes "serve broadly the same statutory purpose of providing effective access to justice for claimants for whom the pursuit of individual claims would be impracticable or disproportionate". In that regard, he quoted the following dicta of McLachlin CJ, giving the judgment of the Supreme Court of Canada in *Hollick v Toronto (City)* 2001 SCC 68 and referring to the Ontario Class Proceedings Act 1992:

> "The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool … class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters."

E. THE PROPOSED CLASS REPRESENTATIVES

23. As noted above, UKTC is a SPV set up for the purpose of these proceedings. Its chairman is HH Judge Roger Kaye QC, a retired deputy High Court judge.

Its board has seven members who, apart from the chairman, are all individuals of considerable experience in the haulage, delivery and distribution industry.

24. Of the OEMs, only Daimler suggested that UKTC by its nature may not fairly and adequately act in the interests of the PCMs. That submission is advanced on the basis that UKTC's current directors do not include anyone who is representative of the "single-vehicle" truck user although such purchasers are said to comprise over half of the PCMs in UKTC's proposed class.

25. We reject that submission. Judge Kaye explains in his evidence that his role as chairman includes ensuring that PCMs are not discriminated against in the conduct of the proceedings and he has also confirmed that UKTC is willing to appoint additional board members should that be necessary, and to renew its invitation to the RHA to nominate a board member in the event that the RHA's CPO application is refused. We have considered the constitutional documents of UKTC and we note Judge Kaye's very considerable experience of civil litigation. We see no reason to doubt the effectiveness and dedication of the board of UKTC in having regard to the interests of all PCMs.

26. We should add that, contrary to the suggestion by Daimler, there is no presumption against authorising a SPV to act as the class representative. The Tribunal's *Guide to Proceedings* ("the *Guide*"), to which Daimler referred, sounds a note of caution only as regards authorisation of a law firm or third-party funder as the class representative because of potential conflicts of interest: para 6.30. As the *Guide* proceeds to note, in the case of a SPV, the Tribunal will wish to be satisfied as to its constitution and management, as we have been in the present case.

27. UKTC, in seeking to persuade the Tribunal that its application should be preferred, contended that the RHA has a potential conflict of interest with the PCMs in its proceedings, within the terms of r. 78(2)(b), because the OEMs are associate members of the RHA. UKTC suggested that the potential conflict arises both because of the OEMs' financial contribution to the RHA and because, as the main representative body for the road haulage industry, the RHA

has "acknowledged and vested commercial interests" in maintaining a good relationship with the OEMs over the long term.

28. However, Mr Burnett, the chief executive officer of the RHA, states that as associate members the OEMs will not have any influence over the collective proceedings and that the RHA derives less than 1% of its overall total revenue from them (including from advertising and sponsorship of events). Mr Flynn QC, appearing for the RHA, explained[6] that associate membership gives the OEMs no role, no vote and no involvement in the running of the RHA. Further, only two of the OEMs pay membership subscriptions: DAF which has 'bronze' associate membership at a cost of £622 (plus VAT) p.a. and Volvo/Renault which has 'silver' associate membership at a cost of £1,949 (plus VAT) p.a.. Mr Burnett sets out the steps the RHA has put in place for the management of the litigation, including the engagement of additional staff dedicated to the project and the establishment of a steering group with written terms of reference. While important decisions in the proceedings are reserved to the RHA Board, the RHA has engaged several law firms (including a Canadian firm with experience of class actions in Canada) to advise it and it also has the advice of specialist leading and junior Counsel. No OEM is represented on the RHA Board. Taking all this into account, we do not think there is any risk of the RHA failing to act in the interests of PCMs by reason of the fact that the associate members of the RHA include some companies within the OEMs. Aside from the detailed points to which we have referred, the whole purpose and objective of the RHA is to represent the interests of the road haulage industry, not of truck manufacturers.

29. We also do not accept UKTC's contention that the RHA has a conflict because its Board members, who are the ultimate decision-makers in the proposed proceedings, are themselves owners or managers of members of the proposed class. In many collective proceedings, the class representative may be a class member (e.g. Mr Merricks in the *Merricks* case). In many cases, class members will not be identically placed in all respects. We do not see this as a problem.

[6] Although this was not in evidence, the Tribunal was content for Mr Flynn to provide this information to the Tribunal on instructions.

The RHA is a not-for-profit company limited by guarantee and its Board is accountable to its members who also constitute a substantial proportion of the PCMs. Moreover, the broad composition of the RHA Board means that, collectively, they should have no difficulty taking decisions in the interests of the class as a whole.

30. All the OEMs contended that the RHA's proposed class definition comprising acquirers of both new and used trucks gives rise to a conflict of interest within the class. That is a distinct matter which goes to the question of the class definition and whether the RHA can fairly act in the interests of all PCMs; it does not concern the nature of the RHA as such or a conflict between the interests of the RHA and of PCMs. Accordingly, we address that objection separately in section M of this judgment: paras 232-255 below.

31. A major consideration under the authorisation condition is whether the proposed class representative ("PCR") has adequate funding both to meet any potential liability for adverse costs and for its own costs of pursuing the proceedings. Following the Funding Judgment, most of the OEMs did not raise any objection on that score but Daimler suggested that UKTC's litigation budget does not cater for additional disclosure which it and its expert now envisage, or for the creation of a claimant database as proposed in the updated Litigation Plan produced by its solicitors in February 2021. However, the estimated costs budget has been revised and the amount allowed for future disclosure is £4.8 million which, on any view, is a very substantial sum. Mr Surguy of its solicitors has confirmed that this includes provision for the setting up of the limited form of database presently envisaged. Moreover, as we stated in the Funding Judgment, a CPO application does not involve a full costs budgeting exercise. We found after a careful review of the budget then presented that it was impossible to say at this stage that the massive sums committed are inadequate, and we noted that the third-party funder that is financing the proceedings has a clear commercial incentive to continue to fund the claims through to judgment or settlement: see the Funding Judgment at [74]. Mr Surguy confirms in his third witness statement that the funder is fully aware of the inevitable uncertainties and contingencies involved in estimating costs at this stage. At the hearing, we pressed Mr Thompson QC, appearing for UKTC,

on whether the funding arrangements cover the cost of dealing with what we regard as the almost inevitable defence argument of pass-on, and he explained that this would be addressed by the economic expert at an aggregate level on the basis of broad estimates, and not involve substantial additional disclosure. We accept as a broad proposition that the estimated costs budget cannot cover for every contingency. Having revisited this matter, we reject Daimler's contention that UKTC's funding arrangements now cause concern as to the ability of UKTC to act adequately in the interests of its class members.

32. Several OEMs argued that UKTC's litigation plan was unsatisfactory. Daimler, in particular, contended that UKTC's litigation plan showed that UKTC would not be able to act adequately in the interests of PCMs in terms of r. 78(2)(a) and (3)(c). In part, that contention rested on the funding point discussed above, but the other criticisms essentially concerned the proposed approach of UKTC to the various issues in the case and to the calculation of aggregate damages. However, a CPO application is made at a very early stage of the proceedings. We would not expect, nor would it often be possible, for such a litigation plan to set out in detail how (e.g. by way of disclosure applications or additional expert evidence) the PCR would deal with various issues that may arise. Lord Briggs in *Merricks SC* at [42] regarded the Canadian jurisprudence in this area as persuasive, and in *Godfrey v Sony Corp* [2017] BCCA 302[7], the British Columbia Court of Appeal stated, at [255]:

> "… class proceedings are flexible and dynamic in nature. At the certification stage, the standard that a litigation plan must meet is not one of perfection; … the plan need only set out "a framework within which the case may proceed" and "demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case.""

We respectfully agree and adopt that approach. We reject the criticism levelled at the litigation plan produced by UKTC at the time of filing its application.

33. More fundamental objections to the PCRs' approach to the issues and to damages are to be considered in the context of the common issues and expert methodology that are addressed under the eligibility requirement below.

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[7] The decision was appealed to the Supreme Court of Canada on other grounds: see para 45 below.

34. In terms of the authorisation requirement, r. 78(2)(c) refers to consideration of which PCR would be "the most suitable" when there is more than one applicant to be the class representative. We consider this in section L below, where we address a comparison between the UKTC and RHA applications.

F. COMMON ISSUES

(1) The law

35. As Lord Briggs noted in *Merricks SC* at [62], it is necessary to consider what the issues are in the claims and whether they are common issues.

36. Mr Singla QC, who made the submissions on commonality for the OEMs, contended that a common issue means not merely that the same question arises in each of the claims but that this question receives the same, similar or a related answer, i.e. that there is a common answer.

37. However, we note that s. 47B(6) is expressed in terms of "claims … that *raise* the same, similar or related issues of fact or law…." As a matter of ordinary language, we see no meaningful distinction between raising a similar issue and raising a similar question.

38. Moreover, we think that the proper interpretation is, effectively, established by *Merricks CA* and *Merricks SC.* The class there comprised virtually all adults resident in the UK who purchased any goods or services from a retailer or supplier that accepted payment by Mastercard. A major issue in that case was the degree to which such merchants incorporated in their retail prices the charges which they paid to their banks for processing Mastercard payments, such that the relevant element of those charges (i.e. the multilateral interchange fee or "MIF") was borne by their customers. It was not in dispute that there was a wide variety in the degree to which such pass-on to customers (i.e. class members) would have occurred, according to the sector of commerce involved, the nature of the merchant (e.g. large supermarkets or department stores compared to corner shops or boutiques) and even the area of the country. Although the question of whether and to what extent pass-on had occurred was

a common *question*, the Tribunal held that pass-on was not a common issue since the answers would vary greatly as between class members. Reversing the Tribunal's decision, the Court of Appeal held that this was the wrong approach and that pass-on was a common issue: *Merricks CA* at [46]-[47]. Although this was not challenged on the further appeal to the Supreme Court, the Court expressly endorsed the Court of Appeal's finding that the Tribunal had been wrong in this regard: *Merricks SC* at [64(a)].

39. Accordingly, we reject Iveco's submission that for there to be a common issue there must be not only a common question but also a common answer. We note that MAN in its Response to the RHA application accepted that commonality does not require that the question receives an identical answer for all PCMs.

40. This approach also reflects the Canadian jurisprudence, which is helpful in considering some of the further arguments of the OEMs concerning common issues. There has been a Class Proceedings Act ("CPA") in almost all the Canadian provinces for many years and the Canadian courts have devoted extensive consideration to the common issues requirement in those CPAs. In *Merricks SC*, Lord Briggs cited with approval from *Pro-Sys Consultants Ltd v Microsoft Corpn* 2013 SCC 57 ("*Microsoft*"). That was a competition claim, based on the allegation that Microsoft had overcharged electronics manufacturers for Intel-compatible PC operating systems and software. The class comprised the ultimate consumers, who were therefore indirect purchasers who acquired the products from retailers, some of whom in turn purchased the products from other resellers higher up the distribution chain. One of the common issues certified by the judge at first instance was: "Are the Class Members entitled to losses or damages under [the relevant CPA] and if so in what amount?". Giving the judgment of the Canadian Supreme Court, Rothstein J cited at [108] from the Court's previous judgment in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, where McLachlin CJ said of the commonality question:

> "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis."

He proceeded to summarise the instructions regarding common issues set out in *Dutton*, including that "[t]he commonality question should be approached purposively."

41. Rothstein J summarised the submissions of the respondent, Microsoft, as regards the contention that there were common issues in that case, as follows:

> "[109] Microsoft argues that the differences among the proposed class members are too great to satisfy the common issues requirement. It argues that the plaintiffs allege they were injured by multiple separate instances of wrongdoing, that these acts occurred over a period of 24 years and had to do with 19 different products, and that various co-conspirators and countless licences are implicated. Microsoft also argues that the fact that the overcharge has been passed on to the class members through the chain of distribution makes it unfeasible to prove loss to each of the class members for the purposes of establishing common issues."

42. The Court rejected these arguments. Rothstein J stated, at para 112:

> "The differences cited by Microsoft are, in my view, insufficient to defeat a finding of commonality. *Dutton* confirms that even a significant level of difference among the class members does not preclude a finding of commonality. In any event, as McLachlin C.J. stated, "[i]f material differences emerge, the court can deal with them when the time comes" (*Dutton*, at para. 54)."

43. The Court further addressed the question of how strong the expert evidence put forward by the applicant must be at the certification stage. In the passage adopted by the Tribunal in *Merricks* and approved by the Court of Appeal and Supreme Court as appropriate to the UK regime, Rothstein J stated:

> "[118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (ie that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

44. The criteria for common issues were developed further by the Canadian Supreme Court in *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1, where the Court considered the principles derived from its previous judgments. The Court stated:

> "[45] Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> [46] *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members."

45. The Canadian Supreme Court again addressed common issues in the context of a class action involving competition claims in *Pioneer Corp. v Godfrey*, 2019 SCC 42. The proposed representative plaintiff sought to bring a class action against a number of manufacturers of Optical Disc Drives ("ODDs"). The class comprised direct purchasers, indirect purchasers and umbrella purchasers of an ODD or an ODD product. The Toshiba defendants challenged the decision of the judge at first instance certifying loss as a common issue on the basis of the proposed methodology of the plaintiff's expert (Dr Reutter). Brown J, giving the judgment of the majority of the Court, explained that ground of appeal as follows:

> "[91] Godfrey sought to certify several loss-related questions as common issues, principally whether the class members suffered economic loss…. These questions were stated broadly enough that they could be taken as asking whether *all* class members suffered economic loss or whether *any* class members suffered economic loss. And, because they could be taken in two different ways they might, following the common issues trial, be answered in different ways.
>
> [92] The certification judge certified the common issues relating to loss on the basis that the standard outlined in *Microsoft* requires that a plaintiff's expert methodology need only establish loss at the indirect-purchaser level…. The questions, therefore, of whether *any* class members suffered loss and of whether *all* class members suffered loss, fulfil the requirements of a common question. Toshiba says that he erred, and argues that *Microsoft* requires, for loss to be certified as a common issue, that a plaintiff's expert's methodology be capable either of showing loss to *each and every class member*, or of distinguishing between those class members who suffered loss from those who did not…. Dr. Reutter's methodology, Toshiba says, does not meet this standard…"

46. Brown J noted that Dr Reutter had explained that while his methodology would use an average selling price across the ODD market he took the view that all class members would have been impacted. However, Brown J continued:

> "[102] In any event, even were Dr. Reutter's methodology incapable of showing loss to every class member, as I explain below, it is not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology establish that each and every class member suffered a loss. Nor is it necessary that Dr. Reutter's methodology be able to identify those class members who suffered no loss so as to distinguish them from those who did. Rather, in order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level. This leaves the only question being whether the courts below were correct in finding that Dr. Reutter's proposed methodology satisfies that required standard of commonality (C.A. reasons, at paras. 125 and 149). I see no reason to interfere with the certification judge's determination that Dr. Reutter's methodology satisfies this standard."

47. Turning to the question of the requisite standard, Brown J cited from *Dutton, Vivendi* and *Microsoft* and said:

> "[107] … *Microsoft*, therefore, directs that, for a court to certify loss-related questions as common issues in a price-fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that loss reached one or more purchasers — that is, claimants at the "purchaser level". For indirect purchasers, this would involve demonstrating that the direct purchasers passed on the overcharge.
>
> [108] Additionally, showing that loss reached the indirect purchaser level satisfies the criteria for certifying a common issue, since it will significantly advance the litigation, is a prerequisite to imposing liability upon Toshiba and will result in "common success" as explained in *Vivendi*, given that success for one class member will not result in failure for another. Showing loss reached the requisite purchaser level will advance the claims of all the purchasers at that level.
>
> [109] When thinking about whether a proposed common question would "advance the litigation", it is the perspective of the litigation, not the plaintiff, that matters. A common issues trial has the potential to either determine liability or terminate the litigation …. Either scenario "advances" the litigation toward resolution."

48. Brown J held that there was no basis to interfere with the certification judge's determination that the question of loss was a common issue. Addressing the judge's further determination that the question whether damages could be available on an aggregate basis was a common issue, Brown J held that Toshiba was correct in its criticism of the judge's statement that the aggregate damages provision of the British Columbia CPA enabled an award of damages to class

members who suffered no loss, since the statute was purely procedural. In that regard, the Tribunal has held in *Gutmann v First MTR South West Trains Ltd* [2021] CAT 31 that the UK statutory regime differs from the class action statutes of the Canadian common law provinces: see at [108(3)]-[113]. Nonetheless, it is notable that the Canadian Supreme Court did not disturb the judge's conclusion that the question of aggregate damages was a common issue, and Brown J significantly said this:

> "[120] It should be borne in mind that the trial judge, following the common issues trial, might reach any one of numerous possible conclusions on the question of whether the class members suffered loss. For example, the trial judge might accept Dr. Reutter's evidence that *all* class members suffered a loss, in which case it would be open to the trial judge to use the aggregate damages provisions to award damages to all class members. Alternatively, the trial judge might conclude that *no* purchasers suffered a loss -- for example, if the trial judge does not accept that Dr. Reutter's methodology demonstrates that loss reached the direct and indirect purchaser levels. Were that the case, the action would fail. Or, it might be that the trial judge finds that an *identifiable subset* of class members did not suffer a loss, in which case the trial judge could exclude those members from participating in the award of damages, and then use the aggregate damages provision in respect of the remaining class members' claims. Finally, the trial judge could accept Toshiba's argument that some class members suffered a loss and some did not, but that it is impossible to determine on the expert's methodology which class members suffered a loss. In such a case, individual issues trials would be required to determine the purchasers to whom Toshiba is liable and who are therefore entitled to share in the award of damages. At the certification stage, no comment can or should be made about the potential conclusions that the trial judge may reach. I outline these possibilities and the availability of aggregate damages merely to provide guidance.
>
> [121] But again, to be clear -- neither the range of possible findings of the trial judge following the common issues trial, nor the unavailability of aggregate damages for class members that suffered no loss, is relevant to the decision to certify aggregate damages as a common issue…"

49. We should add that in *Gutmann* the Tribunal drew attention to some other differences between the Canadian class action statutes and the UK collective proceedings regime, pointing out that although "common issues" is a convenient shorthand, the statutory expression in s. 47B(6) is "the same, similar or related issues of fact or law". The Tribunal considered that this is a broader and more flexible concept than the term "common issues" used in the CPAs of the Canadian common law provinces. Further, in its judgment on the timing of the carriage dispute in *O'Higgins FX Class Representative Ltd v Barclays Bank PLC* [2020] CAT 9, the Tribunal observed, at [35]:

> "… the teaching of other jurisdictions can be no more than a guide, and the benefit to be derived from a comparative approach operates not at the granular level but broadly, in terms of lessons that can be learned from such jurisdictions."

50. The above discussion of the Canadian case law provides some support to Iveco's further submission that a common issue means that there must be a sound methodology for resolving the issue on a common basis (even if the answer will not be the same or even apply to all class members). Whether the question of the expert methodology is integral to the finding of a common issue or a separate matter to be addressed under the head of suitability may not matter. If there is no plausible method of addressing the proposed common issues on a common basis, the claims are not suitable for collective, as opposed to individual, proceedings.

(2) The present applications

51. Both the RHA and UKTC Claim Forms set out what they contend are the common issues.

52. The RHA amended Claim Form identifies 12 common issues as follows (at para 47):

> "47.1 Confirmation that the CAT has jurisdiction over the claims.
>
> 47.2 The relevant substantive law(s) applicable to the claims.
>
> 47.3 The relevant limitation period(s) applicable to the claims.
>
> 47.4 The extent to which the cartel had an impact on EEA gross list prices.
>
> 47.5 Whether and to what extent the cartel had an impact on UK (and other country) list prices either through the cartel's impact on EEA gross list prices or otherwise.
>
> 47.6 Whether and to what extent the cartel had an impact on prices paid by road haulage operators for new medium and heavy trucks manufactured by the cartel members either through the cartel's impact on EEA and/or country list prices and/or because of other areas on which the cartel members coordinated (*e.g.*, costs to be charged for Euro emissions technologies).[20] This may be further divided into: (a) the impact on prices paid by road haulage operators purchasing or leasing from cartel members or from their affiliated sales channels; and (b) the impact on prices paid by road haulage operators purchasing or leasing from companies that are not group companies or and are not affiliated with the cartel members.

47.7 Whether and to what extent the cartel had an impact on prices paid by road haulage operators for new medium and heavy trucks manufactured by non-cartel members.

47.8 Whether and to what extent the cartel had an impact on prices paid by road haulage operators for pre-owned medium and heavy trucks.

47.9 Whether and to what extent the cartel otherwise had an impact on costs (*e.g.*, fuel costs) borne by road haulage operators.

47.10 Whether and to what extent the cartel had an impact on prices paid by road haulage operators for medium and heavy trucks or costs borne by road haulage operators during any run-off period.

47.11 The appropriate interest rate at which to adjust damages suffered by road haulage operators in the past to compensate for the passing of time, additional finance costs, and/or a loss of return on investment.

47.12 Whether interest should be awarded on a simple or compound basis."

53. UKTC's amended Claim Form states the common issues as follows (at para 55):

"(1) Did the Cartel lead to an Overcharge for members of the Proposed Class?

(2) If so, what was the level of Overcharge, and in particular:

(i) […]

(ii) Did the level of Overcharge vary as between Medium Trucks and Heavy Trucks and/or sub-categories of Medium Trucks and Heavy Trucks?

(iii) Did the level of Overcharge during the Cartel Period vary over time?

(iv) Did the level of Overcharge differentially affect Trucks that were available for purchase or lease?

(3) Did the Overcharge have the effect of inflating the retail selling prices or leasing costs of Medium Trucks and Heavy Trucks produced by Truck Manufacturers who were not Cartelists?

(4) Did the Overcharge inflate the retail selling prices or leasing costs of Medium Trucks and Heavy Trucks during any Run-off Period?

(5) If so, what was the duration of the Run-off Period?

(6) What was the impact of the Cartel as to "*the timing for the introduction of emission technologies*" in terms of operational costs or otherwise on members of the Class?

(7) What level of interest should be awarded to reflect the passage of time and/or the increased cost of borrowing since the relevant losses were incurred?

(8) Should such interest be simple or compound?"

54. At the hearing, Mr Thompson submitted that there are a series of additional common issues such as the nature of the cartel as found by the Decision, the character of the competition on the UK trucks market (including the elasticity of demand), and the nature of the collusion between the OEMs in respect of compliance with emissions technology standards. This may be correct, but we think they are essentially sub-issues embraced by the main issues identified in UKTC's Claim Form.

55. The first issue identified by the RHA (the Tribunal's jurisdiction) does not appear to be in issue at all; and issues (2) and (3) arise only insofar as the RHA class includes foreign trucks: see further at paras 175 to 180 below. But in any event, they are essentially issues of law and do not require discussion.

(a) Overcharge issues

56. We accept the general submission of the OEMs that it is important not to frame common issues at too high a level of generality since they are then of little utility to the litigation. The question "whether" the cartel had an impact on prices is in our view a common issue since the OEMs submit that it did not. Moreover, the RHA's issues (4) and (5) concerning the extent of any effect on gross prices, in our view qualify as common issues. In addressing them, the Applicants will have the benefit of the Decision, and the various facts and findings in the recitals, some of which have been held to be binding on the OEMs as a matter of EU law, and as to most of which it has been held that for the OEMs to contest them in private damages claims would be an abuse of process under English law: *Royal Mail Group Ltd v DAF Trucks Ltd* [2020] CAT 7 and *AB Volvo (Publ) v Ryder Ltd* [2020] EWCA Civ 1475. We have little doubt that the question of the impact of the cartel on gross prices can be approached on a common basis, even if it should emerge that the degree of impact may differ as between different categories of truck.

57. However, we think it was accepted by all parties that a critical issue is the overcharge on trucks which it is alleged was paid by the PCMs, i.e. the effect on net or transaction prices. We note that UKTC's list of common issues goes directly to this issue without considering a prior question of gross prices. This

over-arching issue can be broken down in various ways into more specific issues, as in the formulations put forward by the RHA and UKTC: e.g. between different categories of truck; between prices paid for purchase and for lease; (in the case of RHA), between new and used trucks; between trucks manufactured by the OEMs and 'umbrella' trucks (i.e. where the manufacturer of the truck was not an OEM or Scania): RHA issue (7) and UKTC issue (3); and whether there was an overcharge during a run-off period after the end of the cartel and if so, for how long: RHA issue (10); UKTC issues (4)-(5). Subject to these qualifications, it is fundamental to both applications that these overcharge questions are held to be common issues.

58. The OEMs stressed that there is no presumption that the collusion between them found by the infringement actually caused any loss. Art 17(2) of the EU Directive 2014/04 (the "Damages Directive") sets out a presumption that a cartel has a harmful effect; but as transposed into UK law, that provision does not apply to these proceedings since they relate to loss and damage allegedly suffered before the relevant date under the transposition of the Damages Directive into UK law: paras 13 and 42 of Sch 8A, CA 1998. The burden of proof that the cartel caused damage to the PCMs therefore rests on them, through their class representative. However, we note that the claimants may derive some assistance from the Decision. Contrary to the suggestions in some of the expert reports served on behalf of the OEMs, this was not purely an information exchange cartel concerning only gross or list prices. In particular, the Commission found in recital (51) of the Decision that within the period 1997 to 2004:

(1) in some cases the OEMs at their meetings agreed respective gross price increases;

(2) occasionally they also discussed net prices for some countries; and

(3) the OEMs agreed on the additional charge to be applied to emissions technology complying with EURO emissions standards.

All these findings have been held to be binding on the OEMs for the purpose of private damages claims: *Royal Mail Group Ltd v DAF Trucks Ltd*, at [148] (a)-(b). More details of the facts underlying these findings should become available on disclosure.

59. The OEMs raised a host of arguments against the overcharge being regarded as a common issue. They emphasised, with the support of factual evidence, the heterogeneous nature of the products and the market. Their contention was summarised as follows in the skeleton argument of Counsel for Iveco:

> "25. … due to the nature of the products, transactions, and the parties involved, each Truck acquisition is essentially unique. The effect of this is that, even if the Infringement had any effect on net or transaction prices (which is not accepted), there is likely to have been considerable variation in any such effects across time, as between OEMs, and as between different Trucks configurations and, more generally, as between PCMs."

60. In summary, the OEMs stressed in particular:

(1) the wide variety of specifications for trucks supplied, depending inter alia on the truck's intended use, so that a transaction was not simply for one of a limited number of standard models;

(2) the fact that transactions were frequently not for the "bare" truck (which essentially comprises the chassis and cab) but involved a significant degree of bundling with extraneous features that affected the final price;

(3) the fact that trucks were in the majority of cases (depending on the particular OEM) acquired by PCMs from independent dealers who in turn often acquired the trucks at discounts off gross prices from the OEMs, so that the final transaction price was a price negotiated with the dealer not the OEM; and

(4) the enormous variation in bargaining power as between different acquirers which affected the transaction prices agreed.

61. As we have mentioned, the heterogeneity on which the OEMs strongly relied could be regarded as relevant to the question of overcharge being a common

issue or instead to the question of suitability on the basis that if this issue can only be determined on an individual basis the claims are not suitable for collective proceedings. The OEMs put their objections under both heads. However, given the importance of identifying the common issues we address it here.

62. We do not accept Iveco's contention that the CPO regime is, in effect, likely to suit only a case "involving commoditised products and undifferentiated consumers". Its submission that this should be the benchmark against which an application is assessed would, in our view, largely frustrate the Parliamentary intention in introducing collective proceedings for competition claims. On close examination, most markets involve significant diversity of products and/or customers.

63. Mr Harris QC, appearing for Daimler, relied on a number of Canadian authorities in arguing that the individualised features of the claims made them unsuitable for collective proceedings. Although he advanced his submissions under the head of suitability of the UKTC application, some of those Canadian cases in fact concern the common issues requirement and it is relevant to address them here.

64. *Kett v Mitsubishi Materials Corp,* 2020 BCSC 1879, is a certification judgment of the British Columbia court. The plaintiff sought certification of a class action on behalf of:

> "All persons in Canada who purchased a new vehicle or motorcycle manufactured by Toyota (including Lexus), Honda (including Acura), Subaru, Suzuki, Mazda, Mitsubishi, Isuzu, Hino or Yamaha between 2002 and 2018."

65. The defendants were five companies in the Mitsubishi group who were suppliers from Japan of automotive parts to these vehicle manufacturers ("the vehicle manufacturers"). The basis of the claim was the discovery that some products delivered by the defendants to their customers had wrongfully deviated from the customer specifications ("non-conforming products") because some inspection tests had not been properly carried out and/or inspection results falsified, leading to the defendants' conviction for violation of the Japanese Unfair

Competition Prevention Act. The claim alleged that the defendants had over-charged OEMs as a result of their failure to carry out proper parts testing and that the prices of vehicles bought by class members were correspondingly inflated.

66. The judge stated that "[t]he breadth of products which the plaintiff seeks to cover in this litigation is staggering". He noted that the automotive supply chain is complex and that the defendant's products entered the supply chain in Japan. Several of the defendants did not supply the OEMs directly but sold to customers higher up the supply chain, many of whom supplied a wide range of industries. There were at least 1,774 different models of vehicle sold in Canada by the OEMs during the relevant period and it was not known what proportion of those vehicles sold contained the defendants' products at all. Moreover, for several of the defendants only a minority of the products which they delivered to their customers during the cartel period were non-conforming products.[8] For some products, it was even impossible to tell whether they were non-conforming products.

67. The judge found that the question whether the defendants fraudulently altered quality control certifications for their automotive products could not be regarded as a common issue:

> "[125] Notably, the plaintiff concedes that there could not be a single answer for all components manufactured by all defendants. The analysis would, at best, have to be performed on a product-by-product basis. Hence, at a minimum, this first question would have to be reformulated as follows:
>
> (a) Did the defendants fraudulently alter quality control certifications for some of their automotive products? If so, which ones and for what period?
>
> [126] However, the problems with this question run deeper than reflected by this potential amendment.
>
> [127] While it is true that nuanced answers can be given to a common question, the difficulty in this case is that there is little unifying the pursuit of the answer from product to product, or shipment to shipment.
>
> [128] The plaintiff does not plead that there was overarching systemic wrongdoing in relation to all products across all defendants. Although the

[8] E.g., for one defendant, on a one-year review period, only one of its customers that received non-conforming products was involved in the automotive sector and only 1.4% of the products delivered to that customer were non-conforming: judgment at [42].

> plaintiff pleads that the defendants operated as a joint enterprise, he does not allege that a boardroom-level decision was taken by the parent company to start falsifying test results across all subsidiaries. There is no single conspiracy alleged across the defendants. Rather, on the evidence, it appears that any fraud was made levels down from the parent company's board room.
>
> [129] This lack of allegation of overarching systemic wrongdoing sets this case apart from the systemic negligence sexual abuse cases certified in *Rumley v. B.C.*, 2001 SCC, and others.
>
> [130] It also sets the case apart from the price-fixing cases where plaintiffs allege a single overarching conspiracy across all defendants.
>
> …
>
> [134] A common issue should be one in which all class members at least have an interest. The problem here is that, for example, Class Member #24,567, with a vehicle containing Part #357 from Shipment #106,454, has no real legal interest in whether Class member #264,568, with Part #957 from Shipment #23,456, succeeds in establishing fraud in relation to the testing protocol used for the latter shipment. As such, it cannot reasonably be said that answering the question for the first class member "is necessary to the resolution of each class member's claim."
>
> [135] This distinguishes the present situation from cases such as *Reid v. Ford Motor Company*, 2003 BCSC 1632, where a single and universal alleged design defect applied across multiple vehicle models, and "all proposed class members [had] an interest in determining whether [the TFI module] placement was defective or negligent": paras. 2, 43-44 and 51."

68. For the same reason the other allegations concerning misconduct by the defendants were held not to constitute common issues. Turning to the issue of whether questions of fact or law common to the class members predominate over questions affecting only individual members, which was a mandatory consideration under the British Columbia CPA in the determination of whether class proceedings were a preferable procedure, the judge noted the extreme heterogeneity of circumstances at every level of the supply chain. He said:

> "182. Based on my review of the evidence, I expect the required analysis would come very close to a vehicle-by-vehicle evaluation, in a case involving millions of vehicles – a daunting prospect to be sure.
>
> 183. In my view, this case really seeks to tie together many potential class actions. The CPA is not designed to stitch together a case with so many dangling threads. It is designed for cases with a strong factual and legal bond."

69. The question whether there are common issues is a matter of fact and degree, and we consider that *Kett* is very far removed from the circumstances of the present cases. Here, the Decision found that there was an overarching systemic

wrongdoing, all the OEMs' trucks (as defined) were covered by the infringement, and all the PCMs purchased or leased either such a truck or an umbrella truck. As regards the umbrella trucks, the distinct question whether and to what extent that affected the market prices of the minority of trucks produced by other manufacturers clearly qualifies as a common issue and none of the OEMs sought to differentiate that question and submit that it would not in any event be a common issue. The question of overcharge paid by a PCM for an umbrella truck may not be the same issue as the overcharge paid for an OEM-produced truck, but it is clearly a "related" issue. Altogether, we regard *Kett* as wholly distinguishable from the present cases.

70. *Dennis v Ontario Lottery and Gaming Corporation,* 2013 ONCA 501, which concerned a refusal of certification under the Ontario CPA, is in our view even further distinct in nature from the present cases. The representative claimant was a problem gambler who signed a "self-exclusion form" with the defendant ("OLG") whereby OLG undertook to use its "best efforts" to deny him entry to their gambling facilities, but the claimant was nonetheless able to return to those facilities to gamble on a regular basis and lost significant sums of money. He sought certification for claims for breach of contract, negligence and occupier's liability against OLG for a class defined as "all residents of Ontario and the United States, or their estates, who signed a self-exclusion form between December 1, 1999 and February 10, 2005", seeking damages flowing from their gambling losses.

71. In the Ontario Court of Appeal, Sharpe JA (with whose judgment the other members of the court agreed) referred to the central issue as follows:

> "…is this a case in which the need for individualised inquiry is so pervasive that it overwhelms the appellants' attempt to treat it as a case of systemic wrong?"

72. Upholding the refusal of certification by the lower courts, Sharpe JA explained

> "54. The case law offers many examples in which a class action has provided an appropriate procedural tool to resolve claims when all class members are exposed to the same risk on account of the defendant's conduct. [Examples cited]. In these cases, liability essentially turns on the unilateral actions of the defendant, is not dependent to any significant degree on the individual circumstances of class members, and the only remaining issues requiring

> individualized determination are whether and to what degree that conduct harmed the class members.
>
> 55. The claim at issue does not fit into that category. The central problem is that the alleged fault of OLG does not turn solely on the execution of the contract. It is inextricably bound up with the vulnerability of the individual class members. The complaint against OLG is that it failed to prevent them from harming themselves. The harm suffered by Dennis and other Class … Members resulted from their own actions. They were the ones who returned to OLG premises to gamble and to lose money. In that regard, they were like the thousands upon thousands of individuals who frequent OLG premises to gamble and, more often than not, lose money. Unsuccessful OLG gamblers have no recourse against OLG for their losses.
>
> 56. The entire premise of the statement of claim and the causes of action pleaded is that because they signed the self-exclusion form Dennis and the other Class … Members are different from other OLG gamblers: they are vulnerable and OLG was obliged to protect them because of their vulnerability. In my view, it is inescapable that to assess whether OLG was at fault and liable to them for the self-inflicted harm they suffered, the court could not decide the case simply on the basis that they had signed the form. Rather, the court would have to engage in a detailed inquiry into the particular circumstances of individual gamblers including: their gambling history; the nature and severity of their addiction and vulnerability to gambling; whether and to what extent they experienced moments of clarity; whether they returned to OLG facilities to gamble despite signing the self-exclusion form; if they did return, the nature and extent of their gambling and whether they returned because of their addiction; whether they could have been prevented from gambling or suffering losses; whether and to what extent their failure to self-exclude contributed to the loss; and whether the exclusion of liability clause is enforceable against the particular individual."
>
> 57. The issue of OLG's alleged fault cannot usefully or fairly be considered in the abstract and without reference to the circumstances of each individual class member. As the motion judge observed, assessment of each Class … Member's claim will necessarily involve careful, individualised consideration of legal and factual issues relating to his or her personal autonomy and responsibility. Without answers to those specific and individualised questions, it would be impossible to assess whether OLG was at fault or whether OLG bears any legal responsibility to protect them from their own actions…."

73. In *Dennis*, the overwhelming obstacle to certification concerned the alleged liability and fault of the defendant, which the courts held could not be established on a common basis since it was primarily dependent on the individual circumstances of each class member. Here, infringement of EU competition law by the OEMs is conclusively established by the Decision. The proposed common issues concern the causative effect of that infringement on the prices paid by the PCMs for the products that were the subject of the infringement (or related products in the case of used and umbrella trucks). It is notable that neither *Kett* nor *Dennis* was a cartel claim seeking damages for

price rises caused by anti-competitive collusion. Both *Microsoft* and *Godfrey* demonstrate that the Canadian courts at the highest level have certified class actions, and therefore approved common issues, in cartel damages cases, rejecting objections based on the diversity of the products and the heterogeneous ways in which they were distributed (*Microsoft*) or the variety in the character of the purchasers (*Godfrey*).

74. This is not to say that a cartel damages claim will always raise common issues, still less that it will meet the eligibility condition. As the Canadian cases demonstrate, this is a very fact-sensitive assessment. As regards the overcharge issues here, we consider that the factual features which the OEMs highlighted do not prevent those issues from being common issues provided that there is a method of economic analysis which satisfies the *Microsoft* test and enables them to be addressed on a common basis. Those economic methods fall to be assessed according to whether the proceedings seek aggregate damages (the UKTC proceedings) or individual damages (the RHA proceedings). We discuss the expert methodologies proposed in section H below: see paras 117-157.

75. A distinct question arises in the RHA action as regards the alleged overcharge on used trucks: RHA issue (8). Prima facie, that is an issue arising in the claims of those PCMs who purchased used trucks, albeit that a significant proportion of them purchased new trucks as well: see para 250 below. That in itself is not an objection to it being a common issue. However, a higher overcharge on used trucks implies a greater level of pass-on of the overcharge on new trucks by way of an enhanced resale or buy-back price obtained for those trucks. The OEMs contended that the PCMs therefore have conflicting interests in the answer to this question, and that on the basis of the Canadian jurisprudence this precludes it from being a common issue.

76. The alleged conflict within the RHA class is a fundamental objection raised to the RHA application, which therefore merits separate consideration. We address this at paras 232-255 below. If, as we proceed to hold, this is a matter that can satisfactorily be addressed, then on that basis we also consider that the overcharge on used trucks is to be regarded as a common issue. Precisely because of the need to take account of product pass-on, the determination of that

overcharge is necessary to resolve the claims of all PCMs. And we note that none of the many economic experts have suggested in their reports that there is a realistic prospect of 100% pass-on when a truck is re-sold, so that there is no realistic prospect that the answer to this issue will lead to failure of the claims in respect of new trucks.[9]

(b) Pass-on

77. UKTC does not seek to identify pass-on as a common issue, submitting that this would be premature before the OEMs plead their defences. The RHA does not seek to do so at this stage, but accepts that it might be appropriate to consider whether it can be a common issue as more facts emerge: amended Claim Form at paras 51.1A-51.1B. At the same time, as we have just discussed, that aspect of pass-on which concerns resale of the truck itself is effectively encompassed within the common issues proposed in the RHA application.

78. As regards the UKTC action, since those proceedings seek aggregate damages we think it is essential to address this question now. It seems inevitable that the OEMs will plead pass-on as a defence. They have all done so in the non-collective truck claims to which we have referred and indeed confirmed their intention of doing so in these proceedings should a CPO be granted. Therefore no computation of aggregate damages can fail to address it and, to be fair, UKTC's expert, Dr Lilico confirmed that he will be able to estimate this.

79. Further, we note that in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 ("*Sainsbury's*"), the Supreme Court held that pass-on in a competition case can be estimated by use of the "broad axe" and referred to such a contention as "likely to depend in considerable measure on economic evidence and involve imprecise estimates": see at [217]-[226].

[9] Dr Durkin, in his first report for Iveco, suggested that PCMs may have passed on all of the overcharge to their customers, but that is a reference to downstream pass-on not product pass-on when a truck is re-sold or bought back. In his second report, Dr Durkin also suggested that PCMs may have been able to pass on "some, if not all, of any overcharge paid to the next buyer of the PCMs' trucks" but we do not read this as indicating that he considers that 100% pass-on by way of resale was likely.

80. *Merricks* demonstrates that pass-on, however much it might vary as between members of the class, will be a common issue if it can be addressed on a common basis. As with the overcharge, we therefore hold that since the UKTC action seeks aggregate damages, it will be necessary for pass-on to qualify as a common issue, which then depends on the expert methodology proposed.

81. The RHA action is different in this regard because aggregate damages are not sought and only opt-in proceedings are proposed. As noted above, product or re-sale pass-on is effectively put forward as a common issue by the RHA. However, there is also what in the non-collective actions is referred to as "downstream pass-on", i.e., pass-on in the charges to customers. As the RHA action involves individual awards of damages, it would be possible to approach this on a more individualised basis once the primary loss is established, since in effect it addresses the question whether that loss has been wholly or partially mitigated. The focus when it comes to pass-on is entirely on the PCMs, and it could be approached, for example, by considering PCMs in different commercial sectors. Alternatively, it could be addressed as giving rise to common issues for a series of sub-classes: see rule 88(2)(a). We therefore accept that for the RHA proceedings, it is not necessary to determine at this stage whether downstream pass-on gives rise to a common issue or issues.

(c) EURO emissions

82. The Decision held that the OEMs colluded on the timing and the passing on of costs for the introduction of emission technologies for trucks required by EURO 3 to 6 standards: Art 1. The underlying findings which supported this conclusion included, for example, in recital (52):[10]

> "They agreed not to offer EURO 3 standard compliant trucks before it was compulsory to do so and agreed on a range for the price additional charge for EURO 3 standard compliant trucks."

83. Insofar as that concerns increased prices, this is covered by the claims for overcharge. But as regards the delay, the RHA Claim Form asserts, at para 73:

[10] One of the recitals which have been held to be binding for the purpose of private damages claims: *Royal Mail Group Ltd v DAF Trucks Ltd* at [83].

> "A further consequence of the Infringement was delays in the availability of successive Euro emissions technologies from Euro III to VI, each of which Euro technology led to more fuel-efficient engines as compared with the previous Euro technology. Through being delayed in their access to more fuel-efficient engines, the Proposed Class Members at all material times suffered inflated fuel costs and/or other costs higher than would otherwise have been the case."

The UKTC pleading is more equivocal. The amended Claim Form does not include the effect of delay in the supply of EURO standard compliant trucks in its four heads of loss set out at para 141, but states at para 142:

> "Dr Lilico also explains that he has not yet sought to account for loss of profits due to volume effect or increased operational costs arising from delays to the introduction of new emission standards which may have been caused by the unlawful behaviour identified in the Commission's Decision. UKTC submits that this approach is appropriate, reflecting that the burden lies on the Respondents to plead and to prove pass on and mitigation…"

84. As set out above, both the RHA and UKTC identify this as a common issue: RHA issue (9); UKTC issue (6). As a matter of analysis, we consider that this involves three distinct sub-issues:

(1) When would the various OEMs have introduced emission standard compliant trucks absent the collusion?

(2) To what extent did emission standard compliant trucks have lower operating costs (in particular as regards fuel efficiency)?

(3) What loss if any was suffered by the PCMs who acquired trucks during that period of delay?

85. We have no doubt that (1)-(2) above constitute common sub-issues, although in each action it is relevant only to a minority of PCMs. However, for this head of claim to succeed, (3) above is obviously critical.

86. For the RHA, although readily accepting that this aspect affected only a minority of the RHA's PCMs (i.e., those who would have obtained trucks compliant with more efficient fuel standards earlier), Mr Flynn emphasised that this head of claim was not a "side show", since fuel costs are very significant for PCMs. Dr Davis puts forward a method for seeking to estimate the

additional costs incurred, that we consider below. Subject to that methodology, we agree that this gives rise to a common issue, relevant to a part of the class, in the RHA action.

87. However, in the UKTC action, as expressly acknowledged, Dr Lilico has not put forward any method for seeking to estimate this potential aspect of loss by way of aggregate damages. We do not see that this can be explained by reference to pass-on and mitigation: this is an additional head of primary loss which the claimants will have to prove. This is not to take an over-critical view of Dr Lilico's proposed methodology: for this discrete element of the claims, he has not sought to put forward any methodology at all. Indeed, when asked about this by the Tribunal, he said that his "natural assumption" was that, from the point of view of the acquirer/user of the truck, the EURO-standard compliant truck would work out more expensive, on the basis that the increased capital cost outweighed any saving from increased fuel efficiency. Dr Lilico added that testing that assumption was not a matter for economic evidence, and that if his assumption proved incorrect then calculation of that head of claim would be through a different kind of expertise, probably based on estimation of the saving for "a typical truck's usage."

88. How one might arrive at this typical use of a truck is wholly unclear, given the wide diversity of trucks in the class. However, more fundamentally, we consider that aggregate damages for this element of an opt-out class would present particular challenges, since it involves estimates of the operating costs of the relevant trucks acquired by only a minority of the class, and no method has been put forward, grounded in the facts of the case, for estimating even with the broadest of brushes, what proportion of the class bought trucks at the different stages when the successive EURO standards would have been introduced in the absence of collusion. In any event, in the absence of any proposed method, we do not accept that the EURO emissions claim constitutes a common issue in the UKTC action.

(d) Interest

89. Both the RHA and UKTC seek to recover compound interest and identify this as a proposed common issue: RHA issue (12); UKTC issue (8). Since the infringement lasted for 14 years and ended over 11 years ago, and the sums claimed are significant, compound as opposed to simple interest makes a substantial difference to the size of the claims.

90. The issue of compound interest arose in *Merricks* after its remittal by the Supreme Court to the Tribunal. In *Merricks v Mastercard Inc* [2021] CAT 28 ("*Merricks II"),* the Tribunal discussed the criteria for the award of compound interest under English law following *Sempra Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34. The Tribunal pointed out that compound interest could be claimed only as damages, and held that the right to claim this distinct head of loss depended on the particular circumstances of the claimant and could not be addressed on the basis of assumptions across a diverse class. That judgment was issued several months after the hearing in the present cases, but no party sought to make further submissions upon it (save that UKTC anticipated it by asserting that business purchasers are in a different position from consumers).

91. Whilst the class in both of the present cases is very significantly smaller than in *Merricks*, the amount referable to each PCM is significantly greater and, as we have observed, the inclusion of compound interest makes a substantial difference in financial terms. Although the factual circumstances of some PCMs may support a claim for compound interest, those of other PCMs may not. In the counterfactual where they were not subject to an overcharge, some PCMs may have used the money they therefore did not have to spend on trucks (i.e. their avoided expenditure) to reduce borrowings (including financing costs of the trucks) and accordingly suffered a loss by way of additional payment of compound interest. But others may have used this money to increase expenditure on other aspects of their business. Accordingly, the fact that the PCMs here are businesses not consumers does not, in our view, mean that they are necessarily entitled to compound interest on the primary damages.

92. In *Merricks II* the Tribunal found it unnecessary to decide whether the compound interest claim raised a common issue (see at [96]) but excluded it as unsuitable for resolution in opt-out collective proceedings seeking aggregate damages since no plausible method was put forward for estimating this distinct head of loss. As regards the UKTC claim, Dr Lilico does not include a proposal as to how to estimate the entitlement to what is a distinct head of loss on an aggregate basis across the class.[11] We do not find that surprising since it would be very difficult to do so without information as to the financing of the diverse businesses carried on by PCMs (many of whom acquired trucks not for a haulage business but for use for carriage and delivery in their own line of commerce) and as to the aggregate overcharge paid by that proportion of the class whose financial arrangements at the time could support a claim for compound interest. We could therefore take the same approach as in *Merricks II* since we indeed consider that this element of the claim in the UKTC action is unsuitable for resolution by way of collective proceedings. However, having reviewed the principles governing a common issue, we think that it is appropriate to conclude that the claim to compound interest cannot qualify as a common issue in the absence of a plausible method of estimating the entitlement to it on a common basis either for all or for an identifiable part of the class.

93. In our judgment, the same conclusion applies to the RHA claim, notwithstanding that the RHA does not seek aggregate damages. Dr Davis has also not put forward a means of addressing the basis for a claim to compound interest on a common basis (as opposed to determining the relevant rates of interest), whether for the class as a whole or for an identifiable sub-class. However, in response to the points made by the experts instructed by the OEMs, he said in his reply report (at para 503) that the relevant question is:

> "… whether there is a reasonable prospect that a common approach can be constructed on the basis of data available from public sources, the Defendants, PCMs or third parties to produce for use at trial a sensible approximation to the actual interest costs suffered by PCMs."

And in his fourth report he added (at para 205):

[11] Dr Lilico's first report simply states (at para 7.2): "The interest rates should be compounded year-on-year to reflect that interest earned in a previous period can itself be reinvested."

> "… I believe that with enough data it would be possible to draw a link between the interest rates being paid and the characteristics of PCMs."

94. We do not exclude the possibility of the RHA seeking to advance such a claim on a common basis as a result of information obtained at some later stage of the action. However, in our view it cannot now be approved as a common issue within the scope of a CPO.

95. Simple interest is very different since it is not a head of damage but can be sought under statute on the primary damages. The question of the rates of simple interest to be applied is in our view a common issue.

G. OVER-INCLUSIVE CLASS?

96. The OEMs submitted that the class definitions are defective since they will include PCMs who can have no claim. It may be that this relates to the degree to which the claims raise common issues for the purpose of r. 79(1)(b); or it may be said that this is a factor which goes to suitability more widely: r. 79(1)(c). As Lord Briggs observed in *Merricks SC* at [64], the question of certification involves "a single, albeit multi-factorial, balancing exercise in which too much compartmentalisation may obscure the true task." In the Canadian jurisprudence, such objections are generally considered on the basis that the class should not be over-inclusive and for convenience we address the points raised under this head.

97. Objections were raised as regards (1) deceased persons and defunct companies; (2) PCMs who are individual claimants in other proceedings; (3) PCMs who suffered no loss in relation to emissions technology; and (4) hauliers who operated on a cost-plus or 'open book' basis. UKTC raised a further point regarding the RHA class definition, contending that the specified exclusions were arbitrary and inadequate.

(1) Deceased persons and defunct companies

98. The PCMs will be a mixture of companies, partnerships and sole traders. Mr Thompson confirmed that UKTC's class definition includes persons who had

died and companies that had been struck off the register before the UKTC proceedings were started in May 2018.

99. At the hearing, Mr Thompson understandably was not prepared to concede that deceased persons could not be included in the class, since judgment on that point in *Merricks* was pending. However, the Tribunal has since held in *Merricks II* that because they could not have started claims individually, persons who were not alive when the proceedings commenced cannot be members of a class for the purpose of collective proceedings. There has been no appeal against that decision. That judgment did not address companies, but the position seems to us effectively the same: once dissolved, a company cannot start proceedings.

100. Mr Thompson at one point suggested that this was addressed by para 15 of the draft CPO which provides:

> "Any successor in title (domiciled in the United Kingdom on [date]) of any member of the Class who has become insolvent or died must give notice of its intention to opt out by [time] on [date]."

However, aside from the problem of whether the Tribunal can *direct* anyone to opt-out, we consider that this addresses the entirely different point of companies which become insolvent or persons who die *after* the start of the proceedings. In our view, following *Merricks II*, companies which did not exist and persons who were deceased *before* the proceedings started cannot be members of the class.

101. Mr Thompson suggested that this was something of a side show and could be dealt with by adjustment to the expert's damages computation. However, although far from the main ground of opposition to the application, we do not think it is insignificant on the facts of this case or can be disregarded as *de minimis*. Mr Burnett of the RHA stated that between 2002 and 2014 alone, over 16,000 truck operators incorporated as limited companies ceased to hold an operator's licence (an "O licence") and were no longer active companies on

Companies House records.[12] Mr Burnett's evidence also showed that some 54,000 individuals either surrendered or had their O licences terminated over the same period: some will doubtless have retired but a significant proportion are likely to have died. An adjustment to the estimated damages deals with the quantum claimed; it does not address the membership of the class. In our view, as a matter of class definition these two categories need to be excluded. This is a preliminary matter: such persons cannot bring claims and therefore have no claims which can be combined in collective proceedings within s. 47B(1).

102. Since UKTC is seeking aggregate damages on an opt-out basis, as a consequence of this exclusion Dr Lilico would need to adjust his calculations of the value of commerce to reflect the value of trucks thereby dropping out of the action. That would necessarily be a broad-brush estimate and to arrive at it is not without problems, but we consider that it probably could be done on a very approximate basis.

103. The same point does not arise on the RHA application since that seeks a CPO for opt-in proceedings. Self-evidently, only living persons and existing companies will be in a position to opt-in.[13] We do not accept Daimler's submission that defunct companies present a problem for the RHA action on the basis that an existing company may seek to claim for trucks transferred to it when acquiring the assets of a dissolved company which had purchased those trucks. A company opting in to the RHA action can be asked to specify what trucks it acquired itself, from whom and when. Moreover, a shareholder or director of a defunct company incorporated in the UK which has been struck off the register can apply within six years for administrative restoration of the company to the register: Companies Act 2006 s. 1024. As Mr Flynn pointed out, many small businesses are owner-operated companies and under opt-in proceedings there would be the opportunity for owners of such companies to have them restored in order to participate in the proceedings if they so wished.

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[12] Since an O licence is required by an operator of a truck of 3.5 tonnes or above whereas a truck for the purpose of the Decision and these claims is a truck weighing 6 tonnes or more, this overstates the number within the proceedings, but it provides an indication of the scale of the figures involved.

[13] We consider that the class definition could probably be amended to include the personal representative of natural PCMs who died since the proceedings were commenced, as was done in *Merricks*, but that point is not presently before us.

(2) Claimants in other damages actions

104. As noted at para 5 above, there are a significant number of actions pending before the Tribunal brought by companies and public authorities that acquired trucks and there are also trucks claims before the Scottish and Northern Irish courts. Some of those actions involve a large number of claimants. It is axiomatic that if a person is pursuing an individual claim, they cannot at the same time be part of collective proceedings covering all or part of the same loss, and r. 82(4) expressly provides:

> "(4) A class member who has already brought a claim that raises one or more of the common issues set out in the collective proceedings order may not be a represented person unless the class member:
>
> (a) discontinues the claim, or;
>
> (b) for claims brought in England, Wales or Northern Ireland, applies to stay that claim, or;
>
> (c) for claims brought in Scotland, applies to sist that claim before the time specified in the collective proceedings order under rule 80(1)(h) to opt into or out of the collective proceedings."

It is possible that if a CPO is made, some of those claimants might discontinue or seek to stay or sist their individual claims and choose to be part of the collective proceedings instead. However, whether and to what extent that might happen is obviously uncertain.

105. As presently drafted, neither the UKTC nor the RHA class definition makes any reference to this. We consider that the class definition requires amendment to give effect to r. 82(4) and state clearly that it excludes those who are claimants in other actions unless they discontinue or stay or sist those claims by a specified date.

(3) PCMs with no emissions technology claims

106. As we understand it, this objection is raised by Daimler only in respect of the UKTC opt-out class. As set out above, we have determined on other grounds that those claims should not be included in the UKTC collective proceedings. We would only add for completeness that we do not see the fact that the majority

of PCMs may have no claim to this loss as in itself an objection to that loss forming part of the UKTC action. Daimler argued that for collective proceedings each PCM has to have suffered more than nominal loss, citing Canadian and US cases. Whether or not that is correct under the UK regime where aggregate damages are claimed (and in *Gutmann* the Tribunal held that this is not correct under the UK statutory regime: see at [109]-[111]), there can be no suggestion that those PCMs who have no claim in respect of emissions technology suffered no loss: they are all claiming in respect of an overcharge whereas the delay in emissions technology is simply an additional head of loss. There is no requirement that all members of the class must suffer all the same heads of loss where aggregate damages are claimed. If aggregate damages include compensation for loss attributable to only some members of the class, this may have implications for the way the aggregate sum is distributed, but that is not relevant at the certification stage. Accordingly, we reject that objection as misconceived.

(4) Cost-plus/"open book" contracts

107. The OEMs contended that of the PCMs that operated a haulage business, some did so by charging their customers on a cost-plus basis and that any overcharge on the price of a truck would in consequence be fully passed on. MAN therefore submitted that those "cost-plus operators" suffered no loss; the critical common issues do not cover them and they should in any event be excluded from the class.

108. Such cost-plus contracts are often referred to in the industry as "open book" contracts since the customer can inspect the haulier's books to verify the charges. However, UKTC explained in the evidence of its chief executive, Mr Leonard, drawing on the extensive experience of UKTC Board members regarding haulage services, that:

(1) such open book contracts were exceptional at the time: they generally operated on a temporary basis, when demanded by the customer (out of concern about the haulier's cost management or level of profits);

(2) it is very unlikely that smaller hauliers supplied services on this basis; and

(3) for those, larger hauliers who had such contracts, they would also be supplying haulage services on a normal ('closed book') pricing basis.

109. Mr Leonard stated:

> "To the extent that MAN is seeking to suggest that some hauliers would have operated exclusively on a cost plus basis, or that it would be possible to purchase a new truck on the basis that it would be used only for cost plus contracts that would allow for the acquisition or leasing costs simply to be passed through to the customer, I consider this to be incorrect. Given the onerous and quasi-audit nature of cost plus contracts where they are imposed by a major customer, it is unlikely that hauliers would voluntarily operate on a cost plus basis or would assume that this would be their standard charging policy.
>
> In the great majority of cases where hauliers would be asked by one of more of their customers to enter into cost plus arrangements from time to time, such arrangements would operate alongside their other "closed book" haulage contracts. Moreover, as I have explained, customers would usually revert to a closed book arrangement once they had satisfied themselves in respect of costs."

110. For Daimler, Mr Harris accepted that a haulier should be excluded from the class only if it operated exclusively on a cost-plus basis. We consider that he was right to do so. On UKTC's evidence, it appears that there were no or virtually no such exclusively "cost-plus operators". We understand that the OEMs do not accept that evidence. That is not a dispute which we can resolve at this stage. However, the argument concerning cost-plus arrangements is essentially a mitigation argument. The PCM still paid the overcharge, but the contention is that it fully mitigated its loss by its charges to downstream customers. We note that the OEMs intend to run a downstream pass-on 'defence' to all the claims in any event. The extent to which contracts in the relevant period were on a cost-plus basis and the degree to which that enabled the passing on of the fixed costs of the purchase of the trucks will be matters for trial and the computation of damages can be adjusted accordingly. Therefore we would not think it appropriate to exclude cost-plus operators from the UKTC class.

111. The RHA adopted a different position regarding cost-plus contracts. It acknowledged that a haulier which supplied services on a cost-plus basis cannot claim in respect of those trucks, accepting that there would be a full pass-on of the overcharge, but contended that where the acquirer of those services was itself a PCM then it could claim the additional cost of those services.[14] We regard that proposal as impractical and involving disproportionate complexity. It would introduce into the proceedings claims for damages that do not relate to the acquisition or operation of trucks but to the custom for haulage services and therefore an entirely different market. And of course other customers of haulage services are not part of the class at all. We accept the submission of MAN that the proper reflection of the RHA's view of cost-plus contracts is that hauliers who operated on a cost-plus basis should be excluded from the proposed class. The proposed class definition will accordingly need to be amended on that basis.

(5) Inadequate exclusion in the RHA class definition

112. The RHA class seeks to exclude truck dealers and truck rental companies. As Mr Burnett explains, the intention of the RHA is for the proceedings to combine the claims of UK road haulage operators who carry goods for hire and reward (i.e. for third parties) or for their own businesses.

113. For that reason, the RHA's class definition, as set out in the amended Claim Form, incorporates an express exclusion of:

> "All persons whose primary business is to sell or to lease new or pre-owned medium or heavy trucks."

"Primary business" is given the following definition:

> ""Primary business" means that the person in question derives more than half its turnover from selling or leasing medium or heavy trucks."

114. UKTC submitted that this exclusion may work in an arbitrary fashion and not achieve its purpose since the definition of "primary business" is based on the turnover of the PCM's business as a whole. Therefore a company that only

[14] The example given was of a supermarket which had its own trucks fleet but occasionally procured additional haulage services on a cost-plus basis.

leased out trucks, and never itself used trucks in its business, would be within the class if it derived more than 50% of its turnover from another line of business, or indeed from rental of light trucks and vans and/or cars.

115. Mr Flynn reiterated the intention of the RHA in his oral submissions but we think that there is force in this criticism and that the way the RHA has defined the class in this respect requires amendment. It is not for the Tribunal to redraft the class definition for the PCR and there are no doubt various ways it could be amended. We would only suggest that it might be more straightforward for the definition to state in express terms what Mr Burnett says it is seeking to do: i.e. to state that the class comprises persons who purchased or leased new or pre-owned medium or heavy trucks which they used in road haulage operations. The RHA's definition of "road haulage operations" already states that this means carriage for hire and reward or on an own account basis. We think it should be clear that the claims being pursued in the proceedings are in respect of those trucks and not any others.

116. Such a suitable amendment would also take care of the other criticism raised in UKTC's skeleton argument, which goes the other way in contending that the "primary business" definition may exclude claims of some persons who ought to be included, and which it is therefore unnecessary to consider further.

H. EXPERT METHODOLOGY

117. An overcharge is a concept that compares two prices: the price in fact charged during a cartel episode and the 'counterfactual' price that would have been charged but for the illegal cartel. Subtracting the second number from the first number gives the estimated overcharge. The skill and effort in overcharge cases goes into calculating the 'counterfactual' price. However, in a claim for aggregate damages across a class, it is also necessary to calculate the aggregate volume of commerce affected, to which the estimated percentage of overcharge can then be applied. That further task accordingly arises in the UKTC action but not in the RHA action where it would be necessary to determine the value of commerce only at an individual level, which might be provided by the individual class members rather than by an expert estimation.

118. Both the RHA's economic expert, Dr Davis, and UKTC's expert, Dr Lilico, have extensive experience as economic consultants engaged in competition matters, and Dr Davis was between 2006 and 2011 the Deputy Chairman of the Competition Commission. As we observed above, Dr Davis and Dr Lilico put forward sharply contrasting methods by which they proposed to quantify the counterfactual price.

119. The various experts instructed by the OEMs in their reports have strongly challenged the intended methodology of Dr Lilico for the UKTC proceedings on fundamental grounds, and also the practicality of the method proposed by Dr Davis for the RHA proceedings. Dr Davis and Dr Lilico have served no less than four reports each, seeking in their reply and supplemental reports to respond to the various criticisms and, as noted above, they gave oral evidence providing clarification and responding to questions from the Tribunal. Before discussing the respective approaches of Dr Davis and Dr Lilico, it is appropriate to consider the standard to be applied when considering the expert methodology at the certification stage.

(1) The standard for economic evidence for a CPO

120. In *Merricks*, this Tribunal adopted the test for evaluation of the expert evidence set out by the Supreme Court of Canada in *Microsoft*, and that approach was approved by the Court of Appeal and the Supreme Court: see at para 43 above. However, it is pertinent to recall the context in which the Canadian Supreme Court came to articulate that test. In that case, Microsoft argued that the court should weigh the expert evidence of both sides where a conflict arises and review the representative plaintiff's evidence in a "robust" and "rigorous" manner: judgment at [117]. In setting out the formulation quoted above, which has come to be called the "*Microsoft* test", Rothstein J rejected Microsoft's submission. He went on to state:

> "To hold the methodology to the robust or rigorous standard suggested by Microsoft, for instance to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage. In Canada, unlike the US, pre-certification discovery does not occur as a matter of right."

The same is true of the UK regime, whereas in the United States disclosure has become a drawn-out and hugely expensive aspect of class action certification. After summarising the approach of the two experts relied on by the plaintiff in that case, Rothstein J stated (at [126]):

> "It is indeed possible that at trial the expert evidence presented by Microsoft will prove to be stronger and more credible than the evidence of Dr Netz and Professor Brander. However, resolving conflicts between experts is an issue for the trial judge and not one that should be engaged in at certification."

121. Furthermore, in *Merricks SC*, Lord Briggs emphasised that claimants who have suffered loss are entitled to quantification of their damages, notwithstanding the forensic difficulties that this may involve, and that the "broad axe" or "broad brush" metaphors applied to damages reflect the need for the court to do its best on the evidence available. Lord Briggs quoted and effectively approved as consistent with English law the following passage in the Commission Staff Working Document, *Practical Guide* on *Quantifying Harm in Actions for Damages Based on Breaches of Articles 101 or 102*, C (2013) 3440 ("the Commission's *Practical Guide*"):

> "16. It is impossible to know with certainty how a market would have exactly evolved in the absence of the infringement of article 101 or 102 TFEU. Prices, sales volumes, and profit margins depend on a range of factors and complex, often strategic interactions between market participants that are not easily estimated. Estimation of the hypothetical non-infringement scenario will thus by definition rely on a number of assumptions. In practice, the unavailability or inaccessibility of data will often add to this intrinsic limitation.
>
> 17. For these reasons, quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be expected. There cannot be a single 'true' value of the harm suffered that could be determined, but only best estimates relying on assumptions and approximations. Applicable national legal rules and their interpretation should reflect these inherent limits in the quantification of harm in damages actions for breaches of articles 101 and 102 TFEU in accordance with the EU law principle of effectiveness so that the exercise of the right to damages guaranteed by the Treaty is not made practically impossible or excessively difficult."

122. This approach was similarly emphasised by the Supreme Court in its determination of the degree of precision required in establishing the extent of pass-on of an overcharge in *Sainsbury's*, concerning several (non-collective) competition damages claims arising out of the payment card interchange fees. While recognising that the Damages Directive similarly did not apply to those

claims, the Supreme Court quoted, as reflecting the EU principle of effectiveness, Art 17(1) of the Damages Directive, which states:

> "Member states shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member states shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available."

123. The Court referred to the 'broad axe' principle and said, at [217]:

> "The court and the parties may have to forgo precision, even where it is possible, if the cost of achieving that precision is disproportionate, and rely on estimates. The common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved …."

Further, referring to the claim of one group of claimants for volume effects insofar as the overcharge was passed on to their customers, the Court significantly accepted (at [218]) that:

> "Such a claim is likely to depend in considerable measure on economic opinion evidence and involve imprecise estimates."

(2) Dr Davis' approach to estimating the overcharge

124. Dr Davis proposes to use econometric estimation of price during the cartel period and after the cartel ended. This allows the use of control variables to strip out the various determinants of price that have nothing to do with the cartel. The difference between the cartel period and the post-cartel period - if there is any difference - is captured by a dummy variable. The dummy variable is used to isolate the measure of the percentage increase in price owing only to the existence of the cartel activity (and/or any other uncontrolled variables).

125. Such an econometric regression analysis is well-established and often used to investigate and estimate the price effect of a cartel. In *Microsoft*, the Canadian Supreme Court quoted at [116] the finding of the British Columbia Court of Appeal in a previous case that "statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases". In *Microsoft* itself, the class

representative's expert proposed using regression analysis to establish the extent of passing-on to establish loss at indirect purchaser level (see at [124]).

126. Although the conventional during-and-after econometric approach essentially adopts the assumption *post hoc ergo propter hoc,* this is tempered by the controls built into the equation to account for circumstances that differed between the two periods (or between parts of the two periods). For example, if the average price was higher in the later period because the mix of products purchased included a higher proportion of expensive refrigerated trucks, then either separate equations or the various controls used would net out the part of that higher average price which flowed from this 'refrigeration effect'.

127. Dr Davis proposed to take account of the varied composition of the class by conducting separate regression analyses for a series of sub-classes. As a working framework, which he expressly acknowledged may need adjustment following disclosure and once more data becomes available, he proposed six sub-classes, such that the extent of average overcharge within each sub-class would be separately calculated:

(1) PCMs who purchased new trucks on cash price contracts from the manufacturer or its affiliated dealer in the UK;

(2) PCMs who leased new trucks on non-cash price contracts from the manufacturer or its affiliated supply channel in the UK;

(3) PCMs who purchased new trucks on cash price contracts from non-affiliated dealers independent of the manufacturer in the UK;

(4) PCMs who leased new trucks on non-cash price contracts from non-affiliated supply channels independent of the manufacturer in the UK;

(5) PCMs who purchased used trucks from any sales channel in the UK; and

(6) PCMs who leased used trucks on non-cash price contracts from any sales channel in the UK.

128. By purchase on "cash price contracts" Dr Davis was referring to a transaction whereby the acquirer will end up as owner of the truck: this therefore includes hire purchase and lease purchase, by comparison with operating leases or contract hire. Moreover, for new trucks, he proposed separate regression equations to examine the UK list price regression and a customer transaction price regression, since this would examine the effect of the cartel on list prices (which was the focus of the cartel), and then whether and to what extent that translated to transaction prices.

129. The proposed sub-classes therefore essentially distinguish between purchased trucks and leased trucks, new and used trucks, and supply by the OEMs or their affiliated dealers (as an integrated form of supply) and supply by independent outlets where there would be a further stage of independent decision making in the supply chain. Dr Davis explained that they reflect his preliminary understanding of the differences in the way truck prices are set, and in the supply and demand factors. Therefore, although the sub-classes are expressed in terms of PCMs, in reality they are defined in terms of the truck and truck transaction, since the same PCM could well be part of several sub-classes. Dr Davis considered that the period after the end of the claim period is likely to be the appropriate benchmark for comparison, although he did not exclude other possible benchmarks.

130. Dr Davis explained:

> "The approach I adopted is to define the boundaries of Proposed Sub-Classes based on where I believed there was a reasonable prospect that a common methodology (a single regression methodology) could reasonably be applied. I did not require that there be a common quantum (i.e. the same actual damages across all claimants) within [each] Proposed Sub-Class. As a matter of economics, common quantum within a Proposed Sub-Class is not presumed because the regression model for the Sub-Class is constructed precisely with the aim of allowing the quantum of damage to vary with the claimant characteristics that may be relevant to quantum. (And indeed some or all PCMs may be found not to have been harmed – since the methodology does not presume harm.)"

131. The methodology will then enable the estimation of the damage for each truck bought by each PCM, and the total damages for each PCM can then be

quantified by aggregating the predicted damage for each truck on a 'bottom up' approach.

132. Although Dr Davis envisaged that the primary source of data would be the OEMs and secondly that data could be obtained from dealers, as a third source he expected to obtain some data from the class members as this is an opt-in class. A sample exercise carried out on 42 PCMs showed that a significant degree of relevant information is likely to be available, and even if only a minority within each sub-class has some of the information, the large numbers overall mean that the class members should yield a significant volume of data points which can be used as a basis to predict missing values. The rich data set should enable Dr Davis not only to estimate the primary equations but also to test many propositions of fact that have already been raised by the OEMs and disputes which can be expected to arise in the course of the proceedings.

133. In his substantive second and fourth reports (195 pages and 96 pages long, respectively), Dr Davis responded to the many points raised in the various expert reports submitted by the OEMs and suggested some refinements to his methodology to take account of the factual evidence and some of the comments of the OEMs' experts. Thus he accepted in the light of evidence from MAN and Dr Israel's report that a different approach might be required for trucks supplied by way of spot-hire from other leased trucks, and that potentially a separate sub-class for that category might be appropriate.

134. The OEMs' experts in their reports asserted that estimation is necessarily complicated by the fact that higher list prices for the bare truck were 'mitigated' (i.e. offset) through lower pricing than otherwise might have occurred of complementary products such as truck bodies, repair and maintenance ("R&M"), financing, extended warranties, buy-backs and trade-ins. This phenomenon of 'bundled pricing' with implicit bundle discounts is very familiar for many manufactured or industrial products. Dr Davis addressed each of these potential 'mitigations' in turn, setting out possible uses of control variables to net out such effects (if indeed they exist). For example, a complex analytical problem arises from a contract which gives the buyer an option to sell the truck back to the supplier at a stipulated price or at a price set by a predetermined

formula. Dr Davis discussed how he might construct a variable to measure, or proxy for, this 'option value'.

135. The OEMs placed emphasis on the variation in bargaining power which, their experts pointed out, meant that individual negotiation could significantly affect transaction prices. Dr Davis put forward a method for identifying certain transaction characteristics as a control variable in the regression, including the character of the seller and buyer and number of trucks acquired, to serve as a proxy for bargaining power associated with different kinds of transactions. Altogether, Dr Davis explained in answer to a question from the Tribunal:

> "The aim of the methodology is to get to individual damages for each individual truck in each sub-class, and then add them up….
>
> … in essence we are going to have a regression model which can allow for a significant degree of heterogeneity, even within a sub-class across different types of claimants and, potentially, you know, not just the claimant characteristics, it may be that the nature of the dealer impacts the overcharge or the identity of the manufacturer. All of those will be possible, and it will be possible to evaluate one specification versus another, so you know, fundamentally what we are shooting at here is individual damages. Yes, there may be a degree of averaging ultimately, but only to the degree in the overcharge estimates… that the data suggests that that is appropriate."

136. Dr Davis also explained his methodology for estimating the total cost of ownership ("TCO") of a truck for the purpose of the EURO emissions standard head of damage, although it was necessarily based on limited information at this stage. His equation would consider the impact of delay on fuel consumption and R&M costs by evaluating the TCO of the EURO standard compliant truck compared to that of the corresponding truck available at the time when it is asserted that the EURO standard would have been introduced but for the cartel (which is a matter for factual evidence and argument, not economic evidence).

137. Although the RHA did not seek to define pass-on as a common issue, in his second and fourth reports Dr Davis considered how pass-on could be addressed by economic modelling. The resale value of a new truck is already considered in the regression regarding used trucks. Beyond that, Dr Davis recognised that different treatment is required as regards potential downstream pass-on through haulage rates by hire and reward operators and through wholesale/retail prices by own account operators. Primarily, such contentions will be for the OEM

defendants to allege and prove. But Dr Davis considered that an econometric method to address this could be developed by first determining the relevant market definitions and then undertaking an empirical evaluation of the extent to which changes are fed through into the charges or prices of operators in each market. Following *Sainsbury's*, to some extent this can be estimated on the basis of economic theory.

138. Dr Davis' methodology, as refined and explained in his supplemental reports, does not capture or account for every variation which the OEMs' experts pointed out. But we found that those criticisms were based on a degree of precision which was unrealistic and disproportionate. For example, as regards the variation in bargaining power, Dr Israel for MAN criticised Dr Davis' use of proxies because it ignored "the idiosyncratic nature of new truck negotiations" such as the availability of substitute trucks, the newness of the customer, the potential for future sales and the brand value which might be perceived by the OEM or its dealer to flow from having the truck brand associated with the purchaser. Dr Durkin for Iveco criticised the assumption in Dr Davis' TCO method for estimating the emissions damages that the PCM's use of the emission compliant truck that they would have purchased in the counter-factual would have been the same as the truck they actually did purchase. However, we consider that a level of imperfection and simplifying assumptions are unavoidable in every competition damages estimation. To require perfection or every permutation to be accounted for would be contrary to the principle of effectiveness for such damages claims and the overall approach that we set out above.

139. We were impressed by Dr Davis' explanation of his methodology and his professional ingenuity in devising tests for actual and possible issues. Altogether, with the many refinements set out in Dr Davis' further reports, we find that the RHA's analysis has been advanced to a more sophisticated level than might normally be expected at the certification stage. Nonetheless, we recognise that it may be that at least some of the various criticisms raised by the OEMs and their experts of the application of Dr Davis' methodology to the facts may prove to be well-founded when the analyses are actually carried out on the basis of all the information which becomes available. But in our judgment,

those are matters for trial. Applying the criteria relevant for the certification stage, we conclude that the RHA's expert methodology clearly satisfies the *Microsoft* test.

140. A distinct objection to the implications of Dr Davis' method was raised by Iveco under the suitability requirement and we accordingly address this under that head: paras 181-186 below.

(3) Dr Lilico's approach to estimating the overcharge

141. Dr Lilico's approach was very different. He proposed as his primary method to use simulation modelling. He would construct a simulation model of how the market would have operated in the claim period under competitive conditions (i.e., in the absence of the cartel). The prices produced under the simulation model would be compared with the prices actually charged to produce the estimated overcharge percentage(s). The aggregate damages would then be quantified by applying that percentage to the estimated amount paid by the class members as a whole.[15] Accordingly, as Dr Lilico emphasised, this method is not one that compares pricing in the cartel period with the post-cartel period.

142. Simulation models of strategic interaction were first developed to understand differences in market outcome (price and output) that depend on market structure, i.e. essentially on the number of competing firms. Their use can be extended to the study of market outcomes under a variety of different conditions, such as changes in cost for one firm relative to others, decline or increase in the attractiveness of one firm's brand relative to others, and independent changes in purchaser preferences. Such strategic modelling has therefore been used for merger analysis. No party was able to point to any case where this method has been used and approved by a court to assess damages from a cartel overcharge, but that in itself is not necessarily a criticism: every method that is now conventional once had a first use.

[15] Obviously, the percentage overcharge would be calculated as incorporated in the total estimated amount paid; it is not calculated as a percentage on that amount.

143. Moreover, as Dr Lilico pointed out, simulation modelling is one of the methods referred to in the Commission's *Practical Guide*. An example is given of the use of a simulation model in a differentiated product market. However, the Commission proceeds to comment, as follows:

> "102. This example is particularly demanding in terms of data requirements and assumptions. Simpler simulation models may be envisaged to estimate damages but they rely even more heavily on crucial assumptions that are difficult to verify. For example, damages following a cartel infringement could be calculated by comparing monopoly prices (aimed at reflecting prices during the cartel) with prices expected under a Cournot model (aimed at reflecting prices in the non-infringement scenario), using data such as market shares, costs, and market price elasticity. However, such a method crucially depends on the assumed competitive interactions in the infringement and non-infringement scenarios and entails the risk that these do not mirror sufficiently closely the way in which the cartel operates during the infringement period and the way in which competition on the market would have operated absent the infringement.
>
> …
>
> 104. Each model simulating market outcomes is an approximation of reality and relies on theoretical and often also factual assumptions regarding market characteristics and the likely behaviour of producers and customers. Although, by their very nature, models rely on simplification of reality, even simple models may in certain cases provide useful insights regarding the likely damages. Therefore, pointing out that a model relies on seemingly simplifying assumptions should therefore on its own not be sufficient to dismiss it; rather, one should consider how some of the simplifying assumptions are likely to affect its results. Building a comprehensive model that replicates a range of specific features of the market in question, if it can be properly solved and evaluated, can increase the likelihood that the result of the simulation is a reasonable estimate for the hypothetical non-infringement scenario. Even very comprehensive models, though, still depend very much on the right assumptions being made, in particular regarding the central questions of what is the likely mode of competition and the likely customer demand in the non-infringement scenario. Moreover, the development of complex simulation models can be technically demanding and may require significant amounts of data that may not always be accessible to the party concerned or possible to be estimated with sufficient reliability."

144. In his initial report, Dr Lilico put forward two potential models: an undifferentiated product model and a differentiated product model, the latter based on the assumption that there is some degree of product differentiation in the trucks market. He explained this on the basis that there was uncertainty as to the degree of product differentiation in the trucks market. Dr Lilico's undifferentiated product model was heavily theoretical. In it he assumed that the outcome under the cartel was the perfect single-monopoly price. He then compared this to the theoretical economic ideal under perfect competition,

where products are priced at marginal cost. Dr Lilico's differentiated products model was also simplistic, using a single parameter for the whole market to account for the degree of differentiation between firms/products: i.e., the degree of differentiation firm-to-firm was assumed to be uniform across the market.

145. Dr Lilico also proposed using nine sub-classes: four for medium trucks split according to their weight; and five for heavy trucks, comprising rigid two-axle trucks, rigid three-axle trucks, rigid four-axle trucks, articulated two-axle trucks and articulated three-or-more axle trucks. However, he accepted the view of Mr Biro, the economist instructed by Volvo/Renault, that it is preferable to postpone any firm decision on appropriate sub-classes or categories until more data becomes available.

146. Dr Lilico's undifferentiated product model seems to us a very significant over-simplification, since the trucks market was far from perfectly competitive. We think that the UK trucks market was closer to an oligopoly and although Dr Lilico did not accept that, he agreed that the OEMs may have at least what he called "intermediate market power." Economic theory, empirical research and experience all show that in more oligopolistic markets, firms often achieve higher margins than in highly competitive markets. Dr Lilico's single parameter model also appears to be a drastic simplification which, in our view, might very well not be appropriate. The evidence confirms the existence of product differentiation such as high-end and low-end brands. Mr Corcoran, for example, refers to Renault trucks' position at the lower end of the market. Mr Cussans too speaks of different brands being important to customers. It may well be that potential buyers of high-end trucks, such as Mercedez-Benz trucks produced by Daimler, are not sensitive to Renault's pricing, and vice versa.

147. The OEMs strongly criticised Dr Lilico's approach as effectively assuming what the claimants need to prove, i.e. that the infringement produced a significant overcharge. We accept that there is considerable force in that criticism as regards the simple models put forward in Dr Lilico's initial report. However, at the hearing, Dr Lilico explained that those models were set out by way of illustration of possible methods. He said that when real data became available on disclosure, he would be able to develop more sophisticated models

based on that data. Furthermore, Dr Lilico said that he would use the post-cartel period in effect to calibrate the modelling for the cartel period. On the assumption that the prices observed in the post-cartel period are the optimal choices of the OEMs in the market, this would yield estimated parameter values for each firm's reaction function. Then, turning to the cartel period, those estimated reaction functions could be combined with input-variable values from the cartel period (e.g., the costs at that time) to yield predictions for each firm for that period. Those predicted prices could then be compared to the actual prices for the cartel period to determine the extent of any overcharge. In our view, this method answers the criticism that the method assumes what it seeks to prove.

148. However, there remains the more general concern about the degree to which the methodology depends on assumptions or, if reliance on assumptions is to be limited, the extent of data required: i.e. the difficulties with this methodology highlighted in the Commission's *Practical Guide.* For example, Dr Israel in his report for MAN produced a list of the variables that he asserted were the minimum needed for a strategic model to produce reliable results. One was the overall market elasticity of demand: Dr Lilico agreed that this needs to be estimated. But Dr Israel also said that reliable estimates of own-price and cross-price elasticities of demand for all brands of each type of truck would be needed. One brand may be more sensitive to the price of some rivals than of others. If, for example, Mercedes Benz and Scania are perceived as upscale of other trucks (perhaps believed to be better engineered or more robust than others) then the pricing decisions of Daimler will have more effect on Scania than the pricing decisions of Renault, DAF, Iveco or MAN. That sensitivity would affect the modelling of the price-and-quantity outcome. There are two cross-price elasticities as between any two products and, in general, they are not identical and can be sharply different. But estimating all cross-price elasticities in an elasticity matrix would be a formidable undertaking demanding large quantities of high-quality data. We recognise that it is possible that this plethora of cross-elasticities would not really add much value to the estimation and that a good model could be constructed using only the cross-effects of known, close competitors. However, whatever the detail of the procedures used, it is clear

that, to some degree, the accuracy, and hence the value, of modelling can come at a high price in data demands. Dr Lilico said that he could construct a model with limited data. That is doubtless correct, but as the Commission's *Practical Guide* points out, such a model is unlikely to be reliable.

149. The modelling of the costs for each of the OEMs is critical to the strategic model because it is fundamental to the computing of expected profits and hence to the pricing decisions firms make. The relevant measure is marginal cost, which is notoriously slippery and difficult to calculate. An exercise attempting to analyse the cost structure of each of the OEMs would be a major exercise. Furthermore, the costs of different firms in the UK truck market would be expected to change frequently in significant ways. Because marginal costs are difficult to quantify, the results of a strategic, simulation model can be "fragile": large changes in predicted outcomes can flow from small and highly disputable differences in those marginal costs.

150. The relevant prices for the overcharge are of course the net or transaction prices. Dr Lilico said that he would expect to get market data from at least some of the OEMs but recognised that this would not be comprehensive as some made no or very limited direct sales to PCMs. He said that it may be possible to make assumptions from those prices as regards wider pricing, since the products were competing in the same market; or he may seek evidence from an industry expert regarding dealer margins, to the extent that this did not emerge from the OEMs' disclosure. Further he envisaged that a limited dataset could be compiled from a sample of class members. That is challenging for an opt-out class action where, as Dr Lilico put it in his third report, the approach to quantification must recognise that "a large number of claimants … will not be in a position to submit data during the proceedings (even if a subset of claimants can and does do so)". In his oral evidence, Dr Lilico clarified that he regarded this as only one possible source of data, especially if it emerged that there are niche or specialist categories of trucks (or truck users) raising particular issues.

151. The OEMs and their experts also highlighted the need for the modelling of transaction prices to reflect the divergence in bargaining power of the class members. Dr Lilico's response, as we understood it, was that the modelling

would produce an average percentage for the overcharge on the prices actually paid (whether within sub-classes or across the board) and the effect of any superior bargaining power would therefore be reflected in this average. His assumption was that most of the members of the opt-out class would be the smaller firms with less bargaining power, so that use of the average is likely to produce a conservative estimate that may well understate their loss.

152. In his second report, Dr Lilico also suggested that he might deploy the synthetic counterfactual method ("SCM") to estimate damages. Using this statistical technique would be novel in an overcharge damages case, so far as we are aware, but the basic idea reflects the familiar approach in cases of damages for business interruption flowing from tortious conduct or contractual breach, where damages are sometimes assessed against the yardstick of a comparator. Since the trucks cartel covered the whole of the EEA and most of the manufacturers, a direct comparator is not available. The SCM essentially generalises this 'comparator' concept by creating a hypothetical comparator from a selected set of appropriate commercial activities. However, the method therefore depends on having a rich data sets of activities which might be expected to vary in ways similar to the counterfactual price. Such a weighted average of comparators is something of a 'black box', with a risk that the results derive opaquely from chance rather than the underlying reality of the trucks market, statistical testing notwithstanding. Dr Lilico very properly recognised in his fourth report that it is impossible to guarantee that use of the SCM will produce robust results.

153. Dr Lilico said that the method he would ultimately use would depend on the data that could be obtained, primarily on disclosure from the OEMs but potentially supplemented by the other sources mentioned above. The OEMs' experts say that he is unlikely ever to have sufficient data for a reliable and convincing model. However, we consider, particularly in the light of the guidance from *Merricks SC*, that it would not be appropriate to demand as a condition of certification that the applicant can show the data which is likely to be available, and it is inappropriate to turn this CPO inquiry into a mini-trial on the data issue.

154. There are, however, two further considerations which we think need to be addressed. First, to arrive at the aggregate damages, the estimated overcharge has to be applied to the volume of commerce ("VoC") of the class (or each sub-class, if there are different overcharge figures for the different sub-classes). This was not addressed in Dr Lilico's written reports but raised by the Tribunal with Dr Lilico at the hearing. There are particular features of this case which make estimation of the VoC challenging:

(1) The need to exclude the VoC related to PCMs who have brought individual proceedings. As we have observed, this is a significant factor because of the number of other actions and we have held that the class definition should make clear that their claims are excluded: para 105 above. Dr Lilico assumed that the necessary information for adjustment to the VoC could be obtained from the pleadings in the other actions, but although those pleading may state the numbers of trucks they often do not give the necessary detail for a VoC calculation. Save for the first wave of cases which have been set down for trial, most of those cases are at an early stage or are being stayed pending judgments in the first wave cases. It is therefore likely to be necessary to seek information from those individual claimants.

(2) The need to exclude the VoC of those firms which ceased to exist or sole traders who died before these proceedings were commenced. Dr Lilico said that the general business churn rate could be used to arrive at a "best guess as to the average number of firms that disappeared in each year". Then it would be necessary to look at the information about all truck acquirers to derive proportions for those buying large numbers of trucks or smaller numbers, and the different kinds of truck, and the churn rate can be applied to those numbers accordingly. We note that some relevant information of a more precise kind is set out in the evidence of Mr Burnett for the RHA (although concerning only limited companies dissolved since 2002), derived from a combination of O licence records and Companies House records. Assumptions about the average VoC relating to different kinds of truck or truck fleets can then be applied to reach the estimated reduction in overall VoC. A similar process could

be carried out to estimate the effect on the VoC of deceased sole traders. Dr Lilico recognised that this is a somewhat 'rough and ready' approach but pointed out that when statistical averages are applied to a large number, the error factor is much less.

(3) The UKTC class excludes purchasers of trucks who rented them out under long, operating leases, but includes the lessees under those leases. Therefore, in principle, it is necessary to exclude from the VoC the aggregate payments by those purchasers but include the payments by those lessees. Dr Lilico noted that, unlike (1) and (2), this does not affect the number of trucks for which class members are claiming. As we understood his explanation, he considered that it is appropriate for the VoC to use the purchase price paid by the lessors on the basis that it is only this element, as passed on into the leasing price, which is subject to an overcharge whereas the overall leasing price is determined by different market conditions.

155. Secondly, there is the wider question of pass-on as a mitigation 'defence'. As discussed above, we do not think this can be ignored simply because it is a matter to be raised by the defendants once the collective action goes forward. If the defendants can establish on the balance of probabilities that pass-on is likely to have occurred, it is not for them to produce a method by which this effect can be quantified on an aggregate basis: in order for the proceedings to be suitable for an aggregate award, it will be for the class representative to have a method of adjusting the aggregate damages claimed. It is therefore appropriate to consider this now.

156. For that purpose, there are broadly two types of pass-on: product pass-on by way of either a resale of the truck or a buy-back arrangement with the original supplier; and downstream pass-on by way of increased charges for the goods or services supplied by the class member. Dr Lilico had not been asked to address this in his written reports, but in his oral evidence he said that he did not accept that the first kind of pass-on necessarily occurred as the market for second hand trucks was probably distinct, although instinctively he accepted that there probably would be an effect. That could be assessed by analysis of the

relationship of new truck and used truck prices over time. That would enable any overcharge effect on used truck prices to be derived from the percentage overcharge calculated for new trucks. The correlation would probably have to be calculated for each of the different categories of truck in the nine sub-classes since the relationship might differ. As for downstream pass-on, Dr Lilico considered that this could probably be narrowed to the sectors where competitive conditions made pass-on more likely. That seems to us consistent with the use of economic theory in the manner envisaged by the Supreme Court in *Sainsbury's.* For those sectors, Dr Lilico said that an econometric analysis of the relationship of input costs and prices might be required, and he recognised that for this data from a sample of class members in the relevant sectors would be necessary.

157. Altogether, and making full allowance for the fact that this is very much a preliminary stage where the experts do not have access to the data they would hope to obtain once proceedings get under away, we have some concerns at the primary method advanced by Dr Lilico and the extent to which it rests on assumptions or, alternatively, would involve very intensive data demands. We note also that the various additional matters that we have raised involve further challenges, and Dr Lilico's response to some of them involves complex assessments. However, in our judgment, it was significant that Dr Lilico also made clear that he would seek to undertake some econometric estimation of the overcharge on a during-and-after basis as a check on his strategic model. We regard this as an important clarification, while noting that this makes Dr Lilico's overall approach much more of an undertaking. In view of the demands and difficulties discussed above, we would be doubtful about the practicability and reliability of a simulation modelling approach without the reality check that standard econometric estimation could provide. Moreover, the more conventional approach would be available as an alternative if the strategic modelling approach should prove impossible to carry out reliably. Given that the *Microsoft* test is not intended to be onerous (per Lord Briggs in *Merricks SC* at [41]), we conclude that Dr Lilico's method is sufficiently plausible to cross that threshold.

I. SUITABILITY

158. In *Merricks SC,* the majority of the Supreme Court held that the "suitability" requirement in s. 47B(6), reproduced in r. 79(1)(b), is a relative concept: it means suitable to be brought in collective proceedings rather than individual proceedings: see at [56]. Further, the judgment of Lord Briggs emphasised that the various factors listed under r. 79(2) are not separate suitability conditions but that, since the rule specifies also that the Tribunal shall take into account "all matters it thinks fit":

> "[61]…the CAT is expected to conduct a value judgment about suitability in which the listed and other factors are weighed in the balance. The listed factors are not separate suitability hurdles, each of which the applicant for a CPO must surmount."

159. The OEMs all submitted that neither action was suitable for collective proceedings. In part, their submission rested on a challenge to the expert methodology as inadequate, and a particular challenge to the suitability of the UKTC proceedings for an award of aggregate damages. We have discussed that aspect above and concluded that in both cases the respective expert's proposed method of quantification is sufficiently credible and plausible to justify certification.

160. However, the OEMs also contended that the claims in these actions are more suitable to individual determination. They pointed out that a significant number of individual truck claims have been brought before the Tribunal (or started in the High Court and transferred to the Tribunal). On that basis, counsel for Daimler submitted that "individual claims are a viable, realistic and preferable alternative". The OEMs argued that the amount of loss per truck should be sufficient to incentivise claimants to bring claims individually (or in groups). Moreover, they noted that some of the claimants in the pending, non-collective actions are small businesses claiming for less than 10 trucks, whereas some of the PCMs in the present actions are significantly larger. DAF pointed to a number of PCMs in the RHA action with claims amounting to several million pounds, and submitted that the OEMs are prejudiced if claims which can be treated separately are bundled together with quantification relying on simplifying assumptions.

161. To assess these submissions, it is relevant to consider the number and value of the individual claims. Mr Burnett states that as of 29 March 2021, over 17,500 PCMs had signed up or registered an interest in the RHA's proposed collective proceedings. He confidently expects that to increase if a CPO is granted, and we think that is a reasonable expectation. Furthermore, Mr Burnett says in his evidence:

> "… the overwhelming majority of signed-up claimants continue to be micro, small and medium-sized businesses. Indeed, over 10,000 of the claimants which have signed up are firms operating 10 or fewer trucks."

162. Since UKTC seeks to bring an opt-out claim, it does not have a registration procedure and there is some dispute as to the size of the potential class. However, the evidence of Mr Burnett was that as at May 2019, 65,039 operators held an O licence, excluding operators of passenger carrying vehicles. Of that total, 54,517 had fleets of five trucks or less. However, an estimated 30% of those operators never operated medium or heavy trucks. That leaves some 38,000 operators with potential claims for five trucks or less. Even after further excluding operators who have started individual proceedings (which may well not be a significant deduction since individual claims are mostly by operators with larger fleets) this is still a very sizeable number of PCMs with relatively small claims, and the small fleet size supports Mr Burnett's view that most of them will be SMEs. Although the potential UKTC class is smaller, since a significant portion[16] of the 38,000 never operated new trucks and are therefore outside the UKTC class, it is clear that the UKTC class will nonetheless also contain a very substantial number of PCMs with small claims.

163. The total sizes of the two potential classes are still larger since they include also operators with fleets above five trucks who have not started individual proceedings. Moreover, we consider it is possible that if a CPO is granted, some of those who have started individual actions might choose to discontinue those actions so as to become part of the collective proceedings instead.[17]

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[16] The figures in the table set out in Mr Burnett's second witness statement have to be analysed with care since the stated 34% proportion who never operated new trucks appears to relate to *all* operators with fleets of no more than 5 trucks, and not to operators with fleets of no more than 5 trucks of 6 tonnes or more.

[17] That would particularly apply to the claimants in the *McCulla* action: see fn 19 below.

164. The RHA application states that the *average* price of a truck over the relevant period was £50,000 and gives what it acknowledges is only a crude estimate of the potential cartel overcharge at 25%. On that basis, the *average* damages per truck are £10,000 plus interest. The UKTC application states that Dr Lilico's very preliminary rough estimate is that the damages are £21,000 per truck, including compound interest.

165. Accordingly, whatever the precise figure, it seems to us clear that it is fanciful to suppose that, save for a few exceptions,[18] such PCMs could bring independent, individual actions. The potential damages recovery on an individual basis for such claimants is dwarfed by the vast cost of such damages proceedings, and it is unrealistic to expect small businesses to take the risk of litigation of this nature against major and very well-resourced defendants. In our view it is of little weight that the PCMs are businesses not consumers: it is clear that the legislative policy underlying the collective proceedings regime is to enhance access to justice for businesses as well as consumers: see the quotation at para 21 above.

166. It is correct that there are a significant number of individual actions pending. But it is notable that the first to come to trial is brought by Royal Mail Group and BT Group, who are of course both very large companies with substantial truck fleets. That trial involves only one defendant, DAF, from whom those claimants purchased their trucks, but is nonetheless scheduled to last nine weeks. The second trial involves claims by Ryder and Dawsongroup, who are two of the largest truck rental groups in the UK, but as their claims are somewhat distinct and between them involve all the OEMs as defendants, the trial is listed for 24-26 weeks. The third of the so-called 'first wave' of trucks cases is a joint trial of claims by large commercial groups operating across a range of industries, including Veolia, Suez Group and Wolseley. The complexity of those claims means that the Tribunal has had to select a series of test claimants and even on that basis the estimated length of the trial is 28 weeks.

[18] On the evidence, 0.3% of the PCMs signed up to the RHA proceedings as at 29 March 2021 have claims for 900 or more trucks.

167. Many of the other, later actions are also brought by very large companies with substantial truck fleets, such as The BOC Group Ltd, Balfour Beatty Group Ltd, Hertz Autovermietung GmbH, and Enterprise Rent-a-Car UK Ltd. But the issue is not simply that the great majority of the PCMs covered by the present applications are small businesses. As we noted at the outset, the Commission estimated that 90% of the trucks supplied in the EEA over the relevant period were within the scope of the cartel. And since the Applicants (like the claimants in many of the individual actions) allege that as a consequence there was an overcharge across the whole truck market (i.e. also 'umbrella' trucks, not produced by the OEMs but of which the price was inflated and for which overcharge the OEMs are therefore liable), virtually every truck acquired in the UK over, at least, the 14 years of the cartel potentially gives rise to a claim. In *Hollick*, in the passage quoted by Lord Briggs in *Merricks SC*, the Chief Justice of Canada described one of the main benefits of class action proceedings as "judicial economy", i.e. the avoidance of unnecessary duplication of fact-finding and legal analysis: see para 22 above. Lord Briggs expressly referred to the burden on the court of the "pursuit of a multitude of individually assessed claims for damages": *Merricks SC* at [57]. Similarly, in one of the Canadian cases cited by the OEMs, *Carom v Bre-X Minerals Ltd* (2000) 51 OR (3d) 236, the Court of Appeal of Ontario referred to "litigation efficiency" as one of the principal goals of class actions. Delivering the judgment of the court, MacPherson JA said, at [4]:

> "This goal is sometimes framed with different terminology -- judicial economy. The underlying objective of either formulation is the same, namely to find a mechanism to enable the court system to deal efficiently with a large number of claims being made by many aggrieved persons who have all suffered injuries from the same event or product."

These observations apply to the claims by the minority of the PCMs seeking to recover in respect of the effect of the cartel on purchases of more than 5 trucks as much as to those of the majority claiming in respect of the purchase of only one or a handful of trucks.

168. Daimler seeks to rely on the fact that the RHA organised in March 2020 the issue of a 'protective' action in the High Court by all the individual truck operators who at that time had signed up their interest in the collective

proceedings, there suing in their own names,[19] and asserts in its Response that this demonstrates that "there is a perfectly proper individual action that can be brought by each of them in the High Court". We regard that submission as misconceived. It is understandable that the RHA should seek to protect the position of those PCMs so that they are not left with no possible right of action. But that does not remotely mean that a case brought by over 14,000 named claimants is an efficient or proportionate manner of proceeding, particularly when it is fundamental to the OEMs' stance in opposition to the present applications that the position of each claimant has to be considered individually. The Veolia, Suez Group and Wolseley actions alone have demonstrated the significant challenges in terms of case management and proportionate disclosure involved in claims even by multiple companies within the same corporate group. Accordingly, we are also wholly unpersuaded that it is appropriate to screen out from the class operators above a certain size: e.g. those who acquired more than 100 trucks or 500 trucks. Any such cut-off would be arbitrary and, in our view, unjustified. The collective proceedings would then continue for the great majority of PCMs while yet further increasing the number of individual actions before the Tribunal which are already a cause of concern. The methods of estimating damages advanced by the economic experts can account for larger as well as smaller purchasers. Altogether, we should emphasise that the relative test of suitability does not require a determination that it is *impossible* to try the claims individually but that it is *more suitable* to try the claims collectively, having regard to a multi-factorial evaluation.

169. Accordingly, the size and nature of the proposed classes in both the RHA and UKTC applications, the costs and benefits of the collective proceedings, and our findings on the expert evidence that collective proceedings will enable a fair and efficient resolution of what we have accepted as common issues in each action, along with the other matters discussed above, all indicate that the claims are more suitable for collective than individual proceedings.

[19] Claim no. CP-2020-000008, *McCulla & Ors v CNH Industrial N.V. & Ors.*

170. However, there are three further specific matters that we consider should be addressed in the context of suitability: (1) tax; (2) the RHA claim for "foreign trucks; and (3) the RHA quantification method and the compensatory principle.

(1) Tax

171. The issue of tax raises complex questions. Daimler served an experts' report from a forensic accountant as well as an economist, and the former pointed out all the individualised matters that would have to be taken into account to arrive at a tax calculation for any PCM. Those include the extent to which a PCM would have been operating at a profit even absent any overcharge, its individual effective tax rate (including potentially corporation tax group relief), the application of capital allowances and potentially the tax treatment of lease or interest payments. The accountancy expert (Mr Grantham) emphasised that such analysis would require consideration of the position of each PCM throughout the claim period.

172. Unlike compound interest, tax is of course not a distinct head of claim but, on the contrary, a matter to be taken into account in the assessment of primary loss. UKTC contends in its Reply that the issue does not arise at all since any damages will be taxable in the hands of the PCMs. We cannot decide that point at this stage, but given the change in tax rates we doubt that this is a complete answer. However, the question of tax will arise in virtually all collective proceedings where the class comprises business claimants and, as UKTC points out, the claimants in the class will almost inevitably have very different tax positions. We have noted above that an express purpose of the collective proceedings regime is to enable not just consumers but also small businesses to recover their loss from anti-competitive behaviour. We therefore think it is important that the potential diversity of individual tax calculations is not allowed to frustrate the legislative purpose.

173. The rates of tax and level of capital allowances over the relevant period are of course ascertainable. Despite the heterogeneity of the class, we expect that the effect of tax should be susceptible to reasonable estimation on the basis of broad assumptions about the PCMs comprising the class and, in our judgment, this is

not to be approached by seeking the kind of precision which Mr Grantham suggests. Moreover, it should be remembered that the question of tax arises only once the claimants have demonstrated on a collective basis that they have suffered damage. We do not think that an application for a CPO should be expected to include accountancy expert evidence, as well as economic expert evidence, to set out a way in which the effect of tax could be estimated. Moreover, in the RHA action, where aggregate damages are not sought, it will be possible to make adjustments to approximate for the effect of tax on a more individualised basis through data provided by a sample of the PCMs and we note that in his second report Dr Davis outlines a way this could be done, while stating that "suitable tax accounting expertise" would be required.

174. Accordingly, in our judgment, the need to make allowances for the incidence of tax is not such a powerful factor when weighed against all the other matters so as to make the claims unsuitable for collective proceedings.

(2) Foreign trucks

175. The RHA seeks to include claims by road haulage operators that purchased or leased trucks in EEA Member States (i.e. outside the UK) provided that they belong to a group of companies that purchased or leased trucks in the UK in the claim period. The RHA amended Claim Form states that of the more than 15,000 PCMs who have signed up to the proposed collective proceedings, 32 belong to larger groups of companies with road haulage operations outside the UK. Mr Burnett's explanation for including these claims is as follows:

> "The reason for including these road haulage operators who purchased or leased Relevant Trucks outside the United Kingdom is because there are a number of larger RHA members that belong to pan-European or even global groups and it made sense to the RHA to enable them to include their non-UK truck purchases and leases within these Proposed Collective Proceedings."

176. Mr Burnett states that the large number of signed-up and registered PCMs as at 28 January 2021 are together estimated to have purchased and leased some 315,000 trucks during the infringement period, 1997-2011. He says that of these, an estimated 697 trucks were acquired outside the UK, in the EEA, and he provides a breakdown showing the country in which they were acquired:

Relevant Trucks Purchased And Leased by Signed-Up Claimants In EEA Countries DuringThe Infringement Period	
Country	**Truck Numbers**
Belgium	64
Czech Republic	111
Denmark	17
Germany	219
Ireland (Republic)	101
Latvia	10
The Netherlands	122
Sweden	21
France	1
Lithuania	1
Poland	29
Unknown	1
Total	**697**

As can be seen, in only four countries were more than 100 trucks acquired.

177. In our view, to include what on the RHA's evidence is a limited number of foreign trucks, even allowing for the fact that the number might grow if a CPO is granted, would very significantly complicate the proceedings. Claims for damages arising from such sales are likely to involve questions of foreign law, and given the range of countries therefore a large number of foreign laws, each relevant to only a tiny proportion of the total claim.[20] Further, the relevant markets on which those sales or leases took place may well be national markets and thus different from each other. We note that the Decision refers to the truck dealers operating in national markets (recital (27)), and the six sub-classes proposed by Dr Davis for his regression analyses are all confined to trucks acquired in the UK. Although Dr Davis thought that it may be possible to include factors relevant to specific non-UK countries in the framework of his proposed methodology, he acknowledged that if a country-by-country analysis was required, that would not be feasible unless the number of PCMs from each country substantially increased.

178. We note that the RHA itself recognised the potential difficulty over such foreign truck claims. In its Amended Reply, the RHA stated:

[20] The RHA Claim Form states that for trucks acquired outside the UK prior to 11 January 2009, the governing law (including for limitation purposes) will be the law of the country in which they were purchased or leased; for acquisitions made from 11 January 2009, the claimant may have a choice of governing law based on Art 6(3) of the Rome II Regulation (Reg EC 864/2007).

> "Should the numbers remain at substantially the same level as they are now, the RHA can see that there is force in the suggestion made by the OEMs that including EEA trucks within the scope of the Proposed Collective Proceedings would or may be disproportionate."

179. However, as Volvo/Renault pointed out in their submissions on this issue, since the Tribunal would have to consider each country individually, even if the overall number of foreign trucks were to increase, that would not assist unless there was a very substantial increase in the number in each country. There is further the possibility that claimants would then join the class with only a small number of trucks in additional countries. Moreover, we think there is force in the point made by Volvo/Renault that to determine whether, and if so what, appropriate factors could be included in the regression model to control for differences between countries would require significant evidence regarding each country.

180. Having regard in particular to the costs and benefit involved and the need for a fair and efficient resolution of the common issues, in our judgment it is not suitable to include claims for non-UK trucks within the class. To do so would add significantly to the complexity of the proceedings, for the benefit of a very small number of PCMs and therefore to the detriment of the great majority of PCMs who are claiming only for trucks acquired in the UK. Insofar as there are a limited number of UK businesses which acquired trucks abroad, or indeed belong to "groups" of companies which acquired trucks abroad, as Mr Burnett recognises those will be large, multi-national and in some cases global businesses. They are a self-defining group of claimants, well able to bring individual actions, and indeed do not need to do so in the UK: as we observed at the outset, there are a large number of truck damages claims in other European jurisdictions and such claimants have the option of suing the OEMs elsewhere.

(3) The RHA method and the compensatory principle

181. Iveco expressly did not suggest that Dr Davis' method was unsound or implausible in principle, by contrast with its fundamental challenge to Dr Lilico's method. But aside from detailed criticisms by several of the OEMs of Dr Davis' method as applied here, which we have discussed above, Iveco

submitted that since the RHA was not seeking aggregate damages, the proposed method of quantifying those individual claims offends against the compensatory principle and therefore makes the pursuit of those claims unsuitable for collective proceedings.

182. Iveco contended that even if the infringement led to an overcharge, the effect on PCMs is likely to have varied considerably and that there are likely to be trucks for which prices did not increase. Dr Davis recognised that it is possible that some PCMs suffered no loss, although he did not accept that this is likely. The different regressions in his various analyses by different categories will result in average figures for trucks in each category, which may be further broken down by the kind of truck, etc, but they will always be average figures. Those figures will then be applied on a 'bottom up' basis to the individual PCM according to the number and nature of trucks they acquired, whether new or used, purchased or leased, and in which year. The calculation of estimated resale pass-on will similarly be on an average basis, so some PCMs who purchased new trucks may suffer a greater deduction for resale pass-on than they in fact experienced. However, Mr Singla argued that this demonstrated that if causation of loss is established on a more generalised basis, then individual PCMs will receive individual awards of damages that may be far removed from their individual loss (if any).

183. We note that Iveco's expert, Dr Durkin said in his second report:

> "Dr Davis's assumption that average overcharges provide reliable estimates of individual overcharges may be valid in some cases where the nature of the infringement and the products suggest that there is unlikely to be substantial variation in overcharges as a result of unobservable characteristics."

After describing what he considered were the "unobservable characteristics" of transactions in the trucks market, Dr Durkin concluded:

> "The results further imply that individualized inquiry would be needed to establish that individual PCMs paid overcharges."

184. We fully accept that the fact that the trucks market is heterogeneous may lead to greater variation in individual overcharges. But in all cases, whether individual or collective, the calculation of damages by way of a cartel

overcharge is an imperfect exercise in which the court or tribunal will have to determine, as the Commission's *Practical Guide* quoted by Lord Briggs puts it, "best estimates relying on assumptions and approximations": para 121 above. In a more heterogeneous market, the approximation may well involve a greater degree of simplification. Even in the individual truck actions pending before the Tribunal where a large claimant is seeking to recover in respect of several thousand trucks acquired over the 14 years of the infringement, it has been recognised that it is not proportionate or even practicable to consider the circumstances of each acquisition although it may well have distinct features (and of course relative bargaining power can significantly change over such a long period).

185. Mr Singla accepted in response to questions from the Tribunal that the effect of Iveco's argument was that all the PCMs in the RHA action would have to bring individual proceedings in which as a "starting point" each would have to prove its case "by reference to factual evidence and disclosure". He also accepted that this objection rested on the RHA proceedings seeking individual damages and would not have the same force if the RHA sought aggregate damages since in that case, as held by *Merricks SC*, the compensatory principle would not apply as regards each PCM.

186. Mr Singla expressly placed this ground of opposition under the suitability requirement. As noted above, that has been held in *Merricks SC* to be a relative requirement which involves the balancing of various factors. Here, we think it is significant that the application of Dr Davis' method using averages to quantify individual damages, does not in itself lead to any greater financial liability for the OEMs than if they were used to quantify aggregate damages. A governing principle under the CAT Rules 2015 is that each case should be dealt with justly and at proportionate cost: r. 4(1). And rule 4(2) provides:

> "Dealing with a case justly and at proportionate cost includes, so far as is practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate—

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

…

(e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases;…"

That principle applies to collective proceedings as much as to individual proceedings: see r. 3(a). Having regard to that principle, we cannot regard the pursuit of the claims of 17,500 PCMs, many of whom are SMEs, by 17,500 individual actions, each with its own disclosure and, presumably, separate economic regressions calculated on the individual facts, and each brought against one or more substantially larger OEM defendant(s), as more suitable than combining the claims in collective proceedings where the individual damages are quantified using averages that involve no substantial injustice to the OEMs. Accordingly, we reject Iveco's argument.

J. IDENTIFIABLE CLASS OF PERSONS

187. Although not raised in their skeleton arguments for the hearing or in their oral submissions, Iveco and Daimler contended in their Amended Responses to UKTC's application that its class definition is not sufficiently clear as to who is included, and therefore fails to satisfy the requirement that the claims are brought on behalf of an identifiable class of persons: r. 79(1)(a). The contention appears to concern the treatment of trucks rented out under certain kinds of short-term leases. However, we think the position is clear from the definitions of "Acquired", "Lessor", "Long-Term Financing Arrangement" and "Operating Lease" in UKTC's draft CPO. In our view, there is no prospect of confusion: persons who rented trucks (i.e. as lessees) under arrangements whereby they would have use of the truck for less than 12 months are not within the class, whereas the lessors under such arrangements are within the class. The real objection of the OEMs, as we understand it, is that persons who acquired trucks which they used to supply haulage services 'cost plus' arrangements ought to

be excluded on the basis that they will have passed on any overcharge in full. That does not mean that the definition is not for an identifiable class but rather that such persons should not be included in the class as defined. It therefore concerns the distinct question of the proper scope of the class, which we have considered at paras 107-110 above.

188. Iveco, in a submission adopted by Daimler, contended that it is not clear how purchasers and lessees falling within the class definition can be identified from licence data held by the DVLA (the Driver and Vehicle Licensing Agency) or the DVSA (the Driver and Vehicle Standards Agency) as suggested by UKTC. However, as UKTC pointed out in its Amended Reply, the identifiability requirement in r. 79(1)(a) is concerned solely with the objectivity and clarity of the class definition: see the *Guide* at para 6.37. Therefore the definition should not be based on subjective or merits-based criteria. The requirement is not concerned with the manner in which a PCM proves that they come within the objective class definition, a question which generally arises only at the time of distribution of damages. Iveco's argument under r. 79(1)(a) is accordingly misconceived.

189. As regards the RHA class definition, we have held at para 111 above that it should be amended to exclude those who supplied haulage services on a cost-plus basis. In the light of that conclusion, the objection that the RHA's proposed class definition did not properly identify the persons who it had proposed should recover in respect of cost-plus services falls away.

190. We therefore consider that both the UKTC application and the RHA application, once amended in accordance with this judgment, define the class in terms whereby any person can determine whether or not they are included, and they accordingly satisfy the requirement in r. 79(1)(a) that the claims are brought on behalf of an identifiable class of persons.

K. TWO CPOS?

191. Although the proposed classes in the RHA and UKTC applications are not identical, they substantially overlap. This raises the question whether the

Tribunal is able to certify two overlapping sets of collective proceedings and, if that is possible as a matter of law, whether it is appropriate to do so here.

192. In deciding whether to authorise an applicant to act as the class representative, r. 78(2)(c) provides that the Tribunal shall consider:

> "if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, [whether that person] would be the most suitable…"

193. The OEMs, in submissions advanced by MAN, contended that it is clear from this provision that it is not possible to authorise two representatives for the same or overlapping classes. In their submissions, counsel for MAN sought to buttress that interpretation by reference to some of the other rules, which assume that there is a single class representative, save only in respect of potential sub-classes: e.g., r. 80(1)(a). UKTC submitted that while it is impossible to have overlapping sets of *opt-out* proceedings, there is no legal bar on having *opt-in* collective proceedings alongside opt-out proceedings. UKTC referred in that context to the *Guide*, which indicates at para 6.32 that r. 78(1)(c) is really directed at opt-out proceedings.

194. It is of course fundamental that the *Guide*, as a practice direction, cannot override the CAT Rules. However, we do not think it necessary to resolve the question of interpretation of r. 78(2)(c). Whatever the jurisdictional position, we have no doubt that it would be wholly inappropriate to approve both the RHA and UKTC applications. As we have noted, one of the significant benefits of collective proceedings is efficiency both for the parties and for the Tribunal. If there were two, overlapping collective actions, they would clearly have to be heard together, which would very substantially increase the cost and complexity of the proceedings generally and the trial in particular. As discussed above, the economic experts instructed by the two proposed class representatives put forward very different methodologies, each of which is complex and would then have to be analysed and considered. All this would be contrary to the governing principle in r. 4 that the case should be conducted at proportionate cost, which applies as much to collective proceedings as to other proceedings before the Tribunal.

195. Furthermore, certification of both proceedings would in our view be very confusing for PCMs. Any person who purchased, or leased for at least 12 months, a truck registered in the UK in the 14 year infringement period for use in road haulage would come within the class in both actions. As noted above, many are SMEs or micro businesses and it would be challenging to provide sufficient and clearly explained information to all PCMs to enable them to make an informed choice as to which class they should join (i.e. whether to opt in to the RHA class and out of the UKTC class). In addition, it is relevant to have regard to the additional burden on the OEMs in having to defend two sets of proceedings.

196. Although both UKTC and some of the OEMs have referred to various decisions in Australia, where (unlike Canada) opt-in proceedings are possible, the Australian class action regime is fundamentally different from that in the UK in that there is no initial certification or approval stage and the courts have to resort to their general case management powers. Moreover, there have been recommendations by public bodies in Australia to reform the position there on this very point, to which the parties also drew our attention. We therefore were not greatly assisted by the Australian references. Our decision is very much based on the practical reality of the two applications before us.

L. THE CHOICE

197. Having concluded that the claims are in principle eligible and suitable for inclusion in collective proceedings, it follows that we have to determine which of the two applications before the Tribunal is preferable. We consider that there are a significant number of relevant factors, which do not all point the same way. We address these below, but before doing so we should say that both Applicants are represented by experienced and very well-qualified legal teams. There is nothing to choose between them in terms of the quality of their legal representation.

(1) The class representative

198. UKTC is a SPV of which the sole function is the pursuit of these proceedings, established with an experienced board of directors. The RHA is a well-established not-for-profit trade association, with strong connections to the road haulage industry. The different character of the two proposed class representatives offers certain advantages in each case. We therefore consider this a neutral factor.

(2) The class definition

199. The classes encompassed by the UKTC and RHA applications both omit different categories of potential claimants.

200. UKTC's proposed class comprises all purchasers of new trucks. The only extension beyond acquirers by purchase is to persons who acquired their vehicle under an operating lease of at least 12 months or equivalent long-term financing arrangement. The UKTC action therefore excludes claims by those who rented trucks for periods of less than a year, who may well have suffered an overcharge if an increase in the cost of the truck was reflected in the rental charges they paid. The RHA, by contrast, includes claims by lessees of trucks as well as purchasers of trucks.

201. Conversely, the RHA's proposed class excludes truck rental companies. There are some questions concerning the way the exclusion is defined, but those are matters of detail that we address separately below. For present purposes, the significant point is that those who purchased trucks to rent them out, whether for short term hire or long leases, and who have potential claims unless any overcharge was completely passed on in the rental charges, are not covered by the RHA action.

202. In our view, the contrast in treatment of truck rental cuts both ways. Neither action seeks to bring within the class all operators involved with rental trucks, and both are therefore likely to leave some potential claimants without an effective remedy. We have no evidence as to whether those renting out trucks

or those who rented trucks comprise a greater proportion of SMEs, although we note that some large truck rental businesses (Ryder, Dawsongroup, Hertz and Enterprise Rent-a-Car) have brought individual actions.

203. Secondly, the UKTC action does not include any purchasers of used trucks whereas the RHA class comprises acquirers of both new and used trucks. It is clearly plausible that an overcharge on a new truck was to some degree passed on when the truck was sold, and as noted above the OEMs will contend strongly to that effect. If so, used truck purchasers also have potential claims. Furthermore, as Dr Lilico recognised, the inflation of truck prices resulting from any overcharge may have affected also the prevailing prices for used trucks. This is a very significant category. Mr Burnett states in his evidence:

> "While there are a significant number of smaller HGV operators in Great Britain, my overall impression based on many years of experience within the GB road haulage industry and the profile of the RHA's own membership, [is] that … the vast majority of smaller operators do not operate new trucks."

To investigate this, the RHA commissioned a survey of a sample of truck operators who have no more than five trucks specified on their O licence.[21] This indicated that almost half of 38,431 such operators who purchased trucks of 6 tonnes or above (i.e. medium or heavy trucks for the purpose of the claims) never operated new trucks.[22] For those purchasing only one or two trucks, the proportion is slightly higher, at 53%. Inclusion of used trucks in the class therefore provides the many SMEs who acquired only used trucks with effective access to justice for their potential claims. Moreover, it serves to capture the resale pass-on element of an overcharge on new trucks, which would otherwise reduce the OEMs' liability and avoid their taking into account all the loss they have caused, contrary to one of the benefits of collective proceedings highlighted by McLachlin CJ in *Hollick*: see at para 22 above.

204. UKTC's justification for excluding claims for used trucks is that it limits the claim for loss to one claimant per truck and so avoids conflicts within the class. We address the conflicts issue separately below and conclude that for the RHA

[21] The survey was conducted independently of the RHA and the sample size was selected so as to give a confidence level of 95% and a 5% margin of error.
[22] I.e. 18,756 as a proportion of 38,431.

opt-in class the presence of both new and used trucks does not give rise to such conflict as to preclude the grant of the CPO. If the conflict problem is not a valid objection, then we consider that the inclusion of used trucks is a significant advantage of the RHA application as it will enable a large number of potentially affected SMEs to pursue their claims.

(3) The Run-off Period

205. It is generally recognised that there is often a time after the end of a cartel infringement before normal market dynamics return prices to competitive levels. In consequence, cartel damages claims often cover such a run-off period and both the UKTC and RHA actions do so here. UKTC's Claim Form states:

> "As a minimum, UKTC avers this will have taken until the end of 31 December 2011. In support of this averment, UKTC rely [sic] on §60 of the Decision, which states that Gross Price List increases had been collected [i.e. from participants in the exchanges] in January 2011 such that, UKTC avers, the effect of the Cartel would have continued until at least when those Gross Price Lists would have been revised, approximately 12 months later."

206. The UKTC class is nonetheless confined to persons who purchased trucks during the infringement period, but Dr Lilico seeks to include in his quantification of damages also trucks purchased *by those operators* up to 31 December 2011. This means that the UKTC action does not cover operators who purchased trucks only in the run-off period, i.e. if they had not purchased trucks before, they are not within the proposed class.

207. The RHA application adopts a radically different approach. The RHA amended Claim Form expressly includes a claim for loss caused by the delay in the availability of successive EURO emissions technologies from EURO III to VI, as well as loss due to the alleged overcharge, and states:

> "Not least owing to the truck manufacturers' truck commissioning process and truck life-cycles, as well as the fact that the collusive practices extended to Euro VI trucks which were not introduced until the start of 2014, the Proposed Class Representative contends that the impact of the Infringement extended for a period beyond the Infringement Period in that Relevant Truck prices did not return to competitive levels immediately following the Infringement Period (the "Run-Off Period"). The Proposed Class Representative accordingly claims for damages for the losses the Proposed Class Members have suffered as a result of the Infringement, including losses arising as a result of inflated

> Relevant Truck prices and delayed access to more fuel-efficient engines both during the Infringement Period and during any applicable Run-Off Period."

The proposed class is then defined as covering a person who purchased or leased a truck for road haulage operations up to 17 May 2019. That accordingly amounts, in effect, to a run-off period of over eight years.

208. In our view, neither approach is satisfactory. If, as both applications contend, there was a run-off period, then it seems to us fair that the class should include those who acquired trucks in that period, irrespective of whether they had purchased trucks previously. UKTC's approach, in our view, arbitrarily excludes potential claimants. As Mr Burnett observes, a significant number of new O licence holders are incorporated each year.[23] On the other hand, we regard a run-off period of eight years as remarkably long. In *Hollick,* McLachlin CJ stated, at para 21:

> "There must be some showing … that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended."

209. The RHA responded to criticism of its approach by contending that it was not positively asserting that there was a run-off period of over eight years. Its Reply states:

> "Whether there was or was not a run-off period and, if so, for how long and in respect of which aspects of the collusion – is a matter that will need to be determined during the course of the Proposed Collective Proceedings. It is plainly not something that can be resolved by the Tribunal at certification …."

The RHA proceeds to emphasise that the infringement included collusion over the pricing of EURO VI emission trucks, which were not supplied in the UK until early 2014; that the OEMs' commissioning process for trucks is lengthy, with many trucks not built until orders are placed; and that as regards used trucks, most new trucks are kept for a substantial period until resale, quoting

[23] Mr Burnett also says that the average number of new HGVs over 6 tonnes registered in the UK each year between 1998-2000 was over 45,000. However, many of those will doubtless belong to operators who had previously registered trucks.

evidence from the OEMs that, in some cases, this could be a period of between three and five or six years.

210. When asked about this at the hearing, Dr Davis, who has considerable experience in studying the effect of cartels, acknowledged that he had not encountered a case where a cartel had an eight year run-off period. He said that "intuitively" eight years seemed to him a long period for pricing effects, but that he cannot rule that out, especially where there may have been long-run contracts which were agreed during the cartel period. He further accepted that it may well be that the pricing overcharge run-off is somewhere between zero and four years, and that the EURO emissions effect runs out in 2014. Accordingly, the end date of May 2019 put forward by the RHA is not based on any economic assessment.

211. In our view, it is not satisfactory in the case of collective proceedings to leave the duration of the run-off period effectively 'open', to be considered as the proceedings unfold. Even in individual cases, claimants generally cannot 'sit on the fence' but have to assert the run-off for which they claim: not only is that essential to determine the boundaries of proportionate disclosure but the defendants are entitled to know the extent of their potential exposure. In collective proceedings, the imperative is all the greater. The CPO has to describe the claims certified for inclusion: r. 80(1)(d); and it is necessary for the class of persons covered to be clearly identified, so that any class member can decide whether to opt-in or opt-out as the case may be: see rr. 79(1)(a) and 82. Moreover, once the class has crystalised, the proceedings encompass the claims of all represented persons, and the class representative would be in a difficult position if after a lengthy disclosure process it were to seek to narrow the class to exclude a large number of hitherto represented persons on the basis that it had over-defined the period for claims.

212. In our judgment, it is necessary to reach a view for the purpose of certification and avoid an over-broad class definition. In his closing submissions Mr Flynn came close to conceding that the RHA could not really support the extended period set out in the amended Claim Form and accepted that a period to the end of 2015 might appear more reasonable.

213. Any cut-off will inevitably be imperfect and risks leaving some potential claimants outside the class, but a reasonable line has to be drawn. We consider that it is necessary to distinguish between different aspects of the claims. We see no difficulty about including in the class persons who entered into contracts to purchase or lease trucks during the cartel period and a fairly short run-off period, even if all or part of the price was paid, and the physical truck was delivered, subsequently. Secondly, we acknowledge that since the RHA action includes used trucks, a longer run-off may be appropriate for used trucks. On the basis of the material we have seen and in the circumstances of this case, we consider that a reasonable run-off for the RHA action is 31 January 2014 for new trucks and any EURO emissions claim, given that this covers the date when EURO VI emissions trucks became mandatory; and one year later (i.e. 31 January 2015) for used trucks to allow a modest extension for resale. Based on Dr Davis' findings, these periods may need to be curtailed further and that is something which needs to be explained in the notice to PCMs inviting them to opt-in to the RHA proceedings. Limited in this way, we think that the approach of the RHA to run-off claims gives some benefit to potential claimants over the narrower approach of the UKTC action, and enables the claims to be pursued for loss through delayed introduction of the EURO VI compliant trucks.

(4) Damages for the EURO emissions delay

214. We have noted above that the RHA puts forward a method for claiming damages for increased costs resulting from the delayed introduction of EURO emission compliant trucks. By contrast, UKTC has no such methodology and we have held that such claims cannot be pursued as a common issue in the UKTC action. We obviously cannot reach even a preliminary view at this stage as to whether such a head of loss is sustainable. But we note that collusion regarding the introduction of emission compliant trucks was a significant aspect of the Decision. This is therefore a factor favouring the RHA proceedings.

(5) Aggregate versus individual damages

215. The UKTC action seeks aggregate damages whereas the RHA action does not. Aggregate damages offer the benefit of a single, final quantification and in some

cases involve a simpler and more efficient procedure. However, the quantification process for an aggregate award is more challenging since it makes greater demands on the method of quantification. Moreover, although UKTC has not sought to have pass-on approved as a common issue, we have held that this cannot be avoided: it will have to be confronted in the assessment process in arriving at an aggregate figure. We consider that the relative benefits of aggregate compared to individual damages in the present cases are closely tied to the relative strengths of the alternative expert methodologies, which we therefore proceed to consider next.

(6) Expert methodology

216. We have discussed the alternative approaches of Dr Davis and Dr Lilico in some detail above. Although we have found that both approaches pass the *Microsoft* test, we have to say that on considering all the expert evidence presented and after hearing clarification from the expert appointed by each of the two Applicants, we feel more confidence in the robustness of the method proposed by Dr Davis. In part, that is because the use of regression analysis is well tested and widely acknowledged. But more significantly, it is because the RHA is proposing opt-in proceedings which will give Dr Davis access to a significant volume of data from the class members, which he can therefore deploy for the purpose of sophisticated analysis that takes more account of the heterogeneity of the trucks market.

(7) Opt-out versus Opt-in

217. This is perhaps the most fundamental difference between the two applications before us. Although UKTC does raise the alternative of opt-in collective proceedings, its very clear preference is for opt-out proceedings and Dr Lilico's reports were prepared on that basis. Not only is this a very relevant consideration in choosing between the two applications, it is a matter which the Tribunal must in any event address when presented with an application to certify opt-out proceedings. Rule 79(3) provides:

> "In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—
>
> (a) the strength of the claims; and
>
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

218. As Lord Briggs observed in *Merricks SC* at [60], it is only in the context of the decision whether collective proceedings should be authorised as opt-in or opt-out that the rules specify that consideration of the merits is relevant. This shows the additional scrutiny which is appropriate before certifying opt-out proceedings, reflecting the particular burden and risk of oppression to which opt-out collective proceedings can give rise: see *Merricks SC* per Lords Sales and Leggatt at [98]. In the present cases, we have no concerns about the strength of the claims. These are follow-on claims based on the Decision which found a very serious infringement.

219. However, we consider that it is practicable for the proceedings to be brought as opt-in proceedings. That is obviously the view of the RHA: Mr Burnett states in his first witness statement:

> "Trucks constitute a material capital outlay. In addition, the haulage industry operates on tight profit margins, which means that any damage and loss caused by the Infringement will have had a material impact on road haulage operators. The RHA therefore took the view that it was unlikely that there would be inertia on the part of potential class members to opt in to the Proposed Collective Proceedings."

220. In our judgment, the view of the RHA is reasonable and well founded. In June 2017, the RHA established a website dedicated to the proceedings, providing information and offering a platform for PCMs to register their interest and sign up. By the time the RHA issued its application for a CPO a year later, almost 3,500 operators had formally signed up and a further 700 were in the process of doing so or had registered their interest. By the end of January 2021, the number had substantially increased to 13,200 operators signed up and a further 1,108 that had registered their interest. By the end of March 2021, the number signed up had risen to 15,761 and a further 1,871 had registered their interest. As

mentioned above, over 10,000 of those PCMs are firms operating 10 or fewer trucks. Moreover, while the RHA main members are estimated to account for about half the approximately 500,000 HGVs (i.e vehicles over 3.5 tonnes and therefore a broader category than the trucks that are the subject of these proceedings) on the roads in the UK, it is clear that the RHA has succeeded in reaching out to non-members: 45% of the PCMs who had signed up to the RHA's proposed proceedings by 2018 are non-members. The RHA has strong connections with the industry, and the publication of a CPO and publicity for a formal deadline for opting-in can be expected to lead many more firms to join the proceedings. Accordingly, we do not accept the submission of UKTC that this is a case where there would be "a significant risk" that small or single vehicle operators would not have the motivation or financial incentive to opt-in to the proceedings.

221. As Lord Briggs observed in *Merricks SC* at [92], opt-out proceedings are:

> "designed to facilitate access to legal redress for those who lack the awareness, capability or resolve required to take the positive step of opting in to legal proceedings."

That characterisation clearly applied to the gargantuan class of individual consumers, each with very small claims, in *Merricks*. It is likely to be a significant consideration for other proceedings combining claims by consumers and/or where the recovery by each individual is very small. The potential class and likely amounts involved here are very different. In the circumstances of the present proceedings, we consider that even very small firms or individual traders are likely to become aware of the proceedings and that, if they are interested in recovery, they will take the initiative to join in. In short, we do not think that there will be significant practical problem in converting potential claimants into litigants.

222. In seeking to persuade the Tribunal to prefer its opt-out application, UKTC also raised the spectre of a limitation defence being raised against PCMs joining the RHA opt-in class, which it contended would not be available as against its opt-out proceedings. The RHA action was commenced on 17 July 2018, within the applicable two-year limitation period from the date of the Decision: see r. 31 of

the Competition Appeal Tribunal Rules 2003, as applied by r. 119 of the CAT Rules 2015. The suggestion appears to be that the OEMs could seek to argue that for each claim comprised in the opt-in proceedings, the limitation period applies to the date on which that claimant exercises the right to opt-in. However, it is notable that UKTC did not go so far as to suggest that this would be a sound argument and none of the OEMs suggested that such a limitation argument was available to them. We think that any such argument would be misconceived. It is clear from s. 47B(1)-(2) that it is the class representative who commences the proceedings, and it is those proceedings which serve to "combine" the various claims which are included. The decision of the Tribunal to grant a CPO does not constitute a decision that the proceedings may be started, but that they may be "continued": s. 47B(4). Moreover, we consider that it would frustrate the legislative purpose of the collective proceedings regime if for the purpose of limitation a class member became a party only from the time when they opt-in, and if opt-out proceedings were regarded differently: see *Lloyd v Google LLC* [2021] UKSC 50 at [81]. We should add that if any of the OEMs were nonetheless subsequently to raise such an argument after the stance it adopted at the determination of the CPO applications, this might constitute an abuse.

223. There is no presumption under the legislative scheme in favour of opt-in over opt-out proceedings: see now *BT Group PLC v Le Patourel* [2022] EWCA Civ 593. However, for the present claims, opt-in proceedings have the notable advantage of giving the expert economists access to a very significant source of data from the claimants to inform and support their quantification of estimated damages, as discussed above. In all the circumstances, we consider that they are not only practicable but the more reasonable and sensible way of proceeding, in the interests of justice to all the parties.

(8) Funding arrangements

224. UKTC submitted that its opt-out application was preferable for PCMs since its funding arrangements for that action were "considerably more favourable" to its PCMs than the arrangements which would apply to the RHA's opt-in proceedings.

225. In the case of UKTC's opt-out proceedings, under the arrangements with its third-party funder and after-the-event ("ATE") insurer, the funder's remuneration and ATE premium would fall to be paid from any sum ordered by the Tribunal after the appropriate damages had been paid to the claimants seeking payment. In the case of the RHA's opt-in application, the funder and insurance premium would be paid out of the damages recovered for all the individual claimants, so diminishing the amount available for them. In that regard, UKTC stressed that the percentage of damages recovered payable to the RHA's third-party litigation funder ("Therium") varies between 5% and 30%, depending on the level of recovery.

226. Both the UKTC and the RHA applications understandably depend on third-party funding which, as Henderson LJ observed in his judgment (with which the other members of the Court of Appeal agreed) on the appeal from the Tribunal's Funding Judgment in the present proceedings, "is widely acknowledged to play a valuable role in furthering access to justice": *Paccar Inc v Road Haulage Association Ltd and UK Trucks Claim Ltd* at [5]. The distinction in the remuneration arrangements for the funder flows from the provisions in the statutory regime for collective proceedings. The funder's remuneration and any ATE premium are not recoverable from the losing party and, prima facie, must therefore be paid by the successful party out of the damages recovered before any distribution is made to the claimants, in the same way as any unrecoverable portion of the successful party's legal fees. That is the position in all litigation where the successful party is supported by third-party funding.

227. However, s. 47C includes the following provisions:

> "(5) Subject to subsection (6), where the Tribunal makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.
>
> (6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."

Accordingly, the Tribunal may order that the class representative's costs and expenses, which will include the remuneration due to the funder and any ATE premium, are paid out of the unclaimed 'pot' of aggregate damages. All the experience with opt-out class proceedings in North America has shown that there is usually a significant portion of the aggregate damages in such proceedings that are not claimed: see *Gutmann* at [174]. It is well-known that commercial third-party funders rely on this when providing very substantial funding for opt-out class actions. By contrast, for opt-in proceedings where all the represented persons have expressly decided to take part, it can be expected that virtually all will seek payment of their share of damages recovered, whether those damages are assessed on an aggregate or individual basis.

228. Mr Flynn submitted that if this objection to the RHA's basis of funding were valid, there would be an inherent preference for opt-out proceedings whereas that is not what the statutory regime provides. We do not think it is necessary to go that far. We recognise that although this distinction is inherent in the arrangements that are likely to apply to most such proceedings, it is not expressly mentioned under r. 79(3). However, that rule enables the Tribunal to "take into account all matters it thinks fit" and, in our view, the impact of the funding arrangements for PCMs can be a relevant consideration.

229. Nonetheless, we consider that it is necessary to consider this in concrete, not abstract, terms. Mr Flynn showed the Tribunal the provisions of the funding arrangement with Therium governing the extent of the funder's remuneration. In the event that the RHA action is successful, then after reimbursement of its contributions to the RHA's legal and other expenses, a significant portion of which should be recovered by the RHA from the losing party, the degree of Therium's remuneration is determined by what Mr Flynn described as a "waterfall": the percentage paid to Therium decreases as the amount of damages increases. Specifically, if the total damages reaches £3 billion, Therium's remuneration is 6% whereas if it is £2 billion, the remuneration is 8%, and so forth. It is only if the total recovery is no more than £150 million that Therium's remuneration reaches the 30% figure. As at 28 January 2021, PCMs signed up and registered for the RHA action accounted, according to Mr Burnett, for some 315,000 trucks in total (i.e. new and used), and by 29 March 2021 the number

had increased further.[24] As we have observed, the number of class members, and therefore the number of trucks for which claims are made, is likely to increase significantly if a CPO is made. Even on the numbers presently signed up or registered with the RHA, recovery on average of £6,700 per truck (including interest) would mean that the £2 billion figure is reached.

230. That figure for potential average damages is to be compared with the RHA's admittedly very preliminary suggested overcharge figure of £10,000 per truck *plus* interest and UKTC's suggested figure of £21,000 per truck (but including compound interest): para 164 above. Precise calculations are obviously impossible at this stage and estimation is complicated by the uncertainty of pass-on. But we do not consider that there is here a realistic concern that the remuneration arrangements with Therium may operate unfairly as regards the class members or that, if their claims are successful, those class members are likely to be deprived of a significant part of their damages. We have held above that without collective proceedings the overwhelming majority of those class members would be unlikely to be able to bring their claims at all. The collective proceedings would be impossible without third-party funding. If the Tribunal considers that opt-in proceedings are otherwise preferable in the circumstances of the case, we think it should be slow to reject opt-in proceedings where the funder's remuneration does not appear unreasonable, only because the funder will be paid in the manner that is inevitable for proceedings of that kind.

(9) Conclusion

231. Taking all these factors into account, we have reached the clear view that the RHA opt-in proceedings are preferable to the UKTC opt-out proceedings, or even to the UKTC proceedings on an opt-in basis. However, that conclusion is based on a determination that the RHA action can comprise both new and used trucks, a question to which we now turn.

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[24] Mr Burnett says that as at 29 March 2021, signed up PCMs account for over 250,000 *new* trucks in the period of the cartel plus one year. The number of *new and used* trucks with a longer run-off period will clearly be significantly higher.

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232. It was urged strenuously by the OEMs that the RHA application was unsustainable because the inclusion of claimants for both new and used trucks in the class would give rise to an irreconcilable conflict of interest on the part of the RHA and its legal advisors. Claims in respect of new trucks would face the pass-on argument that all or part of the overcharge would be recovered in an enhanced price that could be charged on re-sale of the truck after a period of use. Claims in respect of used trucks were dependent on establishing such a pass-on by way of an overcharge in the used price. The RHA in its Reply recognises that:

> "The total damages awarded to purchasers of new Relevant Trucks will need to account for any overcharge suffered by purchasers of used Relevant Trucks (at least to the extent that the purchasers of new Relevant Trucks sold on their Trucks and the same Relevant Trucks are implicated) and, broadly speaking, the lower the overcharge suffered by purchasers of used Relevant Trucks, the higher the overcharge suffered by purchasers of new Relevant Trucks (and vice versa) …"

233. Accordingly, it is in the interest of those claiming for new trucks to argue that there was no or little pass-on, whereas the interest of those claiming for used trucks is precisely the reverse. On that basis, it was submitted that the RHA cannot fairly represent both these interests since they gave rise to a direct conflict, and that the requirement of r. 78(2)(a), that the RHA "would act fairly and adequately in the interests of the class members" cannot be satisfied. Further, it was argued that the question of the level of overcharge on used trucks does not constitute a "common issue" if the class members have opposing interests as to its resolution. The OEMs therefore submitted that the RHA action cannot be approved insofar as it covers both new and used trucks.

234. We recognise that the real concern of the OEMs is not any representational problems for the RHA or conflicts within the class, but to minimise their own potential exposure to damages by reducing the scope of the proceedings. UKTC sided with the OEMs in this regard, but its concern was to promote its own application as preferable, no doubt appreciating that the Tribunal might be unable or disinclined to certify two overlapping sets of collective proceedings. Nonetheless, the argument is clearly an important one.

235. The OEMs pointed to strong statements in the Canadian jurisprudence to the effect that there cannot be fundamental conflicts of interest in the certified class. MAN referred, for example, to the judgment of the Ontario court in *Carom v Bre-X Minerals Ltd* (1999) 44 OR (3d) 173. Those were complex proceedings brought on behalf of shareholders in the defendant gold-mining company ("Bre-X"), essentially alleging fraudulent announcements concerning the discovery of gold resources, which greatly inflated the Bre-X share price. There were seven related applications for class action certification, and after a thorough analysis of all the claims, Winkler J (as he then was) granted certification for the class action against the company and its officers,[25] but refused to certify the actions against various brokers and analysts who were alleged to have promoted Bre-X shares. The latter decision rested heavily on the finding that collective proceedings of the claims against the brokers and analysts were not the preferable procedure (a requirement under the Ontario statute) since the individual issues were so significant that resolution of the common issues would not materially advance the litigation (see at 239-244). But the judge also held as regards the claims against two of the investment banks that the proposed representative plaintiffs faced an irreconcilable conflict of interest. He said, at 245:

> "The representative plaintiffs proposed for [the claims against the two banks], are also proposed representative plaintiffs in the main Bre-X-Carom I action. This dual status leaves each of them in a position where they have potential conflicts in interest with the other subclass members on the common issues. The conflicts arise from the causes of action pleaded. In the main action, the plaintiffs have claimed in conspiracy against the Bre-X defendants. There are no allegations of conspiracy against [the banks]. However, proof of the conspiracy claim against the Bre-X defendants in the main action may well serve as a defence to the claims against [the banks]. Where the success of a claim of one class may serve as a defence to the claims of another class or a subclass, the representative plaintiffs advancing the separate claims cannot help but have a conflict on the common issues."

[25] Winkler J refused to certify the claim in negligent misrepresentation, but that decision was reversed by the Court of Appeal of Ontario (2000) 51 OR (3d) 236, and is not material for present purposes.

236. Mr Jowell QC referred to the statement by the Court of Queen's Bench of Alberta in *Elder Advocates of Alberta Society v Alberta* (2008) ABQB 490 at [521] as a convenient summary of the position in Canada:[26]

> "Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests: *Western Canadian Shopping Centres Inc.* at para. 40. If one class member is successful on a common issue, either all class members are successful or some class members are indifferent to that issue. There is no common issue if success for one member of the class means loss for another: *Paron* at para. 66 (citing *Western Canadian Shopping Centres* at para. 40)."

As the RHA noted, the judge proceeded to explain, at [522]:

> "Class members need not be identically situated and wide differences between class members can be tolerated: *Condominium Plan No. 0020701* at para. 77; see also *Western Canadian Shopping Centres Inc.* at para. 54. The real focus of this analysis is whether there is a conflict of interest within the class, as such conflicts tend to destroy the commonality of interest and put counsel in an impossible situation. In some cases, a conflict of interest can be dealt with by naming formal subclasses and, if necessary, providing separate representation for each of the subclasses. Alternatively, the problem can be resolved by redefining the class to exclude those with conflicting interests. In other instances, however, the conflict may be so fundamental that it prevents the action from proceeding as a class action; for example, where all the issues are only "sub-class common" and there are no "universally common issues:" *Paron* at para. 67; *Metera* at paras. 56-57."

237. Mr Flynn sought to rely on the judgment of the Supreme Court of Canada in *Infineon Technologies v Option Consommateurs*, 2013 SCC 59. That concerned an application for certification of a follow-on competition damages case, arising out of a three-year price cartel between major manufacturers of dynamic random-access memory chips ("DRAM"), which are commonly used in a wide range of electronic devices such as personal computers, cellular telephones and digital cameras. The manufacturers were subject to decisions and fines for infringement of both US and EU competition law (see COMP/38511 – *DRAMs,* Commission Decision of 19 May 2010). They sold DRAMs through a number of complex distribution channels to equipment manufacturers such as Dell,

[26] The quoted passages are *obiter* since the decision to certify class proceedings for some of the claims but not others did not turn on any consideration of conflicts. The decision was largely upheld on final appeal by the Supreme Court of Canada, 2011 SCC 24.

Hewlett-Packard, Apple and IBM, who in turn sold either to intermediaries in the distribution chain or direct to end users.

238. Option consommateurs (a consumer organisation) started class action proceedings in Quebec for a class defined as comprising any person who purchased in Quebec either DRAM or a product containing DRAM in the relevant period, whether as a consumer or a relatively small business (specified as a business employing no more than 50 people). The proposed class therefore comprised both direct purchasers from the defendants and indirect purchasers who acquired DRAM or a product containing DRAM either from a direct purchaser or from another indirect purchaser at a different level of the distribution chain.

239. At first instance, the judge refused to authorise the class action on a number of grounds, including that the interests of the class representatives conflicted with those of the non-consumer members of the proposed class. His decision was reversed on appeal, and the further appeal by some of the defendants to the Supreme Court of Canada was dismissed.[27]

240. Art. 1003 of the Quebec Code of Civil Procedure ("CCP"), which incorporated the province's class action regime, provides insofar as relevant:

> "The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> (a) the recourses of the members raise identical, similar or related questions of law or fact;
>
> …
>
> (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately."

Further, art. 1048 states:

> "A legal person established for a private interest, partnership or association defined in the second paragraph of article 999 may apply for the status of representative if

[27] All but the two Infineon companies discontinued their appeals, apparently following settlements: judgment fn 1.

(a) one of its members designated by it is a member of the group on behalf of which it intends to bring a class action; and

(b) the interest of that member is linked to the objects for which the legal person or association has been constituted."

241. In its motion for authorisation of the action, Option consommateurs designated pursuant to art. 1048(a) a Ms Cloutier, who was a private consumer who had purchased a personal computer on-line directly from Dell. On appeal, the defendants argued that there was an inherent conflict of interest between Ms Cloutier as an indirect purchaser and the proposed class members who were direct purchasers, and more generally that direct and indirect purchasers have opposing interests in that each such group will contend that its members absorbed the full amount of the overcharge resulting from the price-fixing conspiracy. After referring to art. 1003(d) of the statute, the Court quoted from a book on consumer class actions (by P-C Lafond) which stated that adequate representation requires consideration of three factors: interest in the suit, competence and absence of conflict with the group members. The judgment of the Court continued:

> "[149] … In determining whether these criteria have been met for the purposes of art. 1003(d), the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.
>
> [150] Even if a conflict of interests can be established, the court should be reluctant to take the extreme action of denying authorization. As Lafond states, at p. 423, [translation] "[i]n the event of a conflict, denying authorization is in our opinion an overly radical step that would harm the absent members, especially given that the judge sitting at the stage of the motion for authorization has the power to ascribe the status of representative to a member other than the applicant or the proposed member." Given that the purpose of the authorization stage is merely to screen out frivolous claims, it follows that the purpose of art. 1003(d) cannot be to deny authorization if there is only a possibility of conflict. This position is supported by the case law, as authorization appears to have been denied under art. 1003(d) on the basis of a conflict of interests only where prospective representative plaintiffs had failed to disclose material facts or were undertaking the legal proceedings purely for personal gain [citing authorities].
>
> [151] It would accordingly be contrary to the spirit of art. 1003(d) of the C.C.P. to deny authorization for the proposed group of purchasers of DRAM on the basis of a potential conflict of interests between members of the group. The record does not suggest that Option consommateurs and Ms. Cloutier are undertaking and conducting the proceedings dishonestly or that they have failed to disclose material facts that would reveal a conflict with other members. Further, the class members clearly share a common interest in

> establishing the aggregate loss and in maximizing the amount of this loss. As the British Columbia Supreme Court astutely pointed out in its decision at trial in *SunRype*, "[t]he only parties at this time that have an interest in having the direct and indirect purchasers in a conflict of interest are the defendants" (2010 BCSC 922 (CanLII), at para. 194)."

242. Addressing the defendants' further submission that Option consommateurs should not be permitted under art. 1048 to represent both direct and indirect purchasers because its mandate of advocating for consumers runs counter to the interests of direct purchasers, the Court stated:

> "[153] We see no reason to prevent Option consommateurs from continuing to represent the interests of both the direct and the indirect purchasers at this stage of the litigation. Much like art. 1003, art. 1048 is intended to be a flexible gatekeeper. As the Superior Court pointed out in *Association des résidents riverains de la Lièvre inc. v. Canada (Procureur général),* 2006 QCCS 5661 (CanLII), at paras. 180-81, the purpose of art. 1048 is to enable a legal person with no direct interest in an action to be granted the status of representative. And as Kasirer J.A. correctly pointed out in his reasons in the case at bar, at para. 133, "[t]he Code does not direct that the legal person who applies to represent the class have a mission connected to all the members of the class, but merely to the interest of one of its members." Since Ms. Cloutier is a member of Option consommateurs and of the proposed group, art. 1048 does not prohibit Option consommateurs from representing the interests of the members in this case.
>
> [154] In summary, we see no conflict between the direct and indirect purchasers at this stage of the proceedings that would bar either Ms. Cloutier or Option consommateurs from representing the interests of the class. It would be more appropriate to deal with any actual conflict between the direct and indirect purchasers at subsequent stages of the proceedings, once any aggregate loss has been established."

243. The OEMs pointed to what the Court said at [154], and similarly earlier at [74] in the judgment, that any conflicts of interest could be addressed at trial. They emphasised that *Infineon* was a case seeking aggregate damages from the defendants, such that the conflict concerning whether the overcharge was passed-on, and if so to what extent, by direct to indirect purchasers did not arise until the distribution stage once aggregate damages had been determined. On that basis, they submitted that *Infineon* was distinguishable, since here the RHA is seeking individual awards of damages based on what will be a common method of quantification, but conducted separately for PCMs who acquired new trucks and for those who acquired used trucks.

244. We think that there is force in the submissions of the OEMs on the Canadian authorities. Moreover, as the Tribunal observed in *Gutmann* at [108(2)], in Canada it is not uncommon for the class action to proceed on the basis that there will be a "common issues trial", resulting in an aggregate award of damages, leaving individual issues to be resolved subsequently.

245. However, we consider that there are two important and related distinguishing features of the RHA action which are very relevant in this regard.

246. First, the RHA seeks certification of opt-in proceedings. All the Canadian authorities concern opt-out proceedings: opt-in class actions do not feature in Canada. In our judgment, this distinction is fundamental. In opt-out proceedings, the class representative has no direct engagement with the class members it is representing; and they will nonetheless be bound (subject to any contrary direction by the Tribunal) by the judgment in the action: s. 47B(12). That is a feature which opt-out collective proceedings shares with representative actions pursuant to CPR r. 19.6. By contrast, in opt-in proceedings, each class member has expressly decided to have their claim included in the action, and for the purpose of taking that decision they can be expected to have regard to the information provided by the class representative. Here, PCMs who acquired new trucks and PCMs who acquired used trucks have the same common interest in seeking to maximise the overcharge claimed on the original sale of the trucks by the OEMs. Their interests may then diverge on the quantification of pass-on by resale of the truck. But as the RHA explained, the position which it adopts on the level of pass-on for the purpose of the action will be governed by the expert advice which it receives from Dr Davis, who will be considering the matter on the data, without a predisposition one way or the other. We note that Dr Davis states, in his second report:

> "I do not understand how PCMs' different incentives would in practice affect the practical application of economics and econometrics in these proceedings so that a subset of PCMs would succeed in influencing the economic and econometric evidence in my and Defendants' Experts reports to the benefit of themselves and to the cost of other PCMs."

247. In our view, it is not difficult for the RHA to explain this in its notice to PCMs and to provide that if a PCM opts in to the proceedings it agrees to accept the

determination of the RHA, following expert advice, as to the appropriate or acceptable level of new-used pass-on. In our judgment, such informed consent to the position avoids the RHA and its professional advisors being placed in a position of conflict and enables them to act in the interests of the class as a whole.

248. The OEMs pointed out that the information currently provided by the RHA on its dedicated website does not draw attention to, still less explain, this aspect. That may be so, but that is distinct from the notice which has to be given to PCMs of the collective proceedings once a CPO is granted. That notice has to be approved by the Tribunal: r. 81. The Tribunal would expect that notice to explain the position "in easily understood language" (r. 81(2)(c)).

249. Mr Jowell, who led on this issue for the OEMs, submitted that this will not work in practice, arguing that there were manifold ways in which conflicts could arise in the course of pursuing the claim for an overcharge on used trucks:

> "The RHA, like any client, has to make a series of decisions and take actions or fail to take actions that are capable of influencing the outcome, so at its most fundamental, the RHA must decide who to instruct. They could continue to instruct Dr Davis or they could instruct another expert. They must give the expert instructions and relevant documents, and they must give instructions to their lawyers, for example, to seek or not to seek particular documents and data and evidence that are relevant to the analysis, and where the empirical and econometric evidence is consistent with a range of arguable outcomes, the lawyers must cross-examine and advocate for a particular outcome and how all of those tasks are carried out depends on whose cause the lawyers are seeking to advance -- what outcome they are instructed to seek to advance, …."

However, we do not think it is appropriate to base our decision on speculation as to potential conflicts that might occur. As the Canadian Supreme Court said of the class representative in *Infineon*, there is no suggestion that the RHA is not acting in good faith or that they are bringing the proceedings for personal gain. We would expect it to be able to resolve such matters on a sensible and proportionate basis should they arise.

250. Secondly, we think it is very relevant that there is a substantial overlap between PCMs who acquired new trucks and PCMs who acquired used trucks: these are not two discrete categories. Mr Flynn explained that of the many PCMs who had signed up or registered for the proposed proceedings with the RHA, about

a quarter acquired only used trucks, a third acquired only new trucks, and about 40% purchased both new and used trucks. Mr Jowell submitted that within the 40% group there was still a conflict as the interests of those who bought a preponderance of new trucks and of those who bought a preponderance of used trucks "are diametrically opposed". In other words, if PCM X and PCM Y both purchased 5 trucks, but X bought 3 new and 2 used whereas Y bought 3 used and 2 new, then the interest of X would be to establish a low pass-on whereas the interest of Y would be to establish a high pass-on.

251. However, in our view this serves to highlight the practical unreality of these submissions. In the first place, as the OEMs emphasised in other parts of their arguments, trucks are heterogeneous and far from being fungible goods. It cannot be assumed that all of the new and all of the used trucks in the above example are of equal value. Secondly, the application before the Tribunal must be assessed on the basis that there is an arguable claim as regards both new and used trucks (and none of the OEMs sought to argue the contrary). Mr Jowell submitted:

> "What is required is a separate class and a separate representative for used truck buyers."

To that, Mr Pickford would add, as we understood his submissions, a separate third-party funder, since he contended that the funder too could face a conflict if it was funding both proceedings. But a very substantial number of claimants (including X and Y in the above example) would come within both classes. The hypothetical class representative of the "buyers of new trucks" class, would, on the OEMs' approach, be conflicted since many of the persons it represented would also be members of the "buyers of used trucks" class: the interests of those claimants would then differ from the class members who purchased only new trucks. The same issue of course arises conversely when considering the position of the hypothetical class representative of the "buyers of used trucks" class. The logic of the approach urged by the OEMs would therefore equally preclude the pursuit of parallel collective actions, one for new and one for used trucks, an outcome which is of course very much in the OEMs' interests.

252. All PCMs share a common interest in establishing that there was an overcharge on the sale of new trucks at as high a level as possible, since if there was no overcharge on a new truck, there is no potential pass-on leading to an overcharge on resale of that truck. Altogether, if the underlying divergence of interest as regards the level of resale pass-on is fairly disclosed such that those opting-in give consent as discussed above, we consider it would be contrary to the objective of the collective proceedings regime to find that the RHA cannot fairly represent the whole class.

253. Moreover, as part of its response to this point, the RHA states in its Reply:

> "To the extent the Tribunal has any concerns as to a potential conflict arising during the Proposed Collective Proceedings in respect of new and used Relevant Trucks, the RHA would be willing to commit to having a separate team of lawyers who have not otherwise worked on this matter and a second economic expert providing independent advice to those class members who purchased used Relevant Trucks in respect of the regression analyses aimed at determining the overcharge on used Relevant Trucks as compared with the regression analyses aimed at determining the overcharge on new Relevant Trucks."

254. We note that among its proposed sub-classes (see para 127 above), the RHA includes a sub-class defined as: PCMs who purchased used trucks from any sales channel in the UK. The *Guide* states at para 6.35:

> "The use of sub-classes may be appropriate where there is a potential conflict between the interests of members of the broader class. For example in cartel damages claims, different categories of purchasers may have conflicting interests that require separate representation."

255. As we proceed to explain, we do not think it appropriate to identify sub-classes at this initial stage. We have also stressed that claimants for new trucks and claimants for used trucks do not fall into discrete categories. Nonetheless, all collective proceedings require active case management and r. 88 gives the Tribunal extensive powers in that regard, including the power to direct the class representative to give notice to represented persons of any step it is taking in the proceedings: r. 88(2)(d). If the Tribunal considered in the course of the proceedings that diverging interests as regards new and used trucks caused problems, the Tribunal would have the option at that stage to vary the CPO to define a sub-class covering used trucks: see para 256 below; and it could consider authorising a person other than the RHA to act as the class

representative for that sub-class: r. 78(4). But we rather doubt that course should prove necessary and it would, in any event, be necessary to hear submissions from the defendants to the proceedings and any represented persons who wished to be heard before taking that decision.

N. SUB-CLASSES

256. Pursuant to r. 80(1)(c), a CPO must "describe or otherwise identify the class and any sub-classes." However, r. 85(1) gives the Tribunal a general power subsequently to vary the CPO, taking account of "all the relevant circumstances". That includes a variation by alteration of the description or identification of class members: r. 85(4); and we think it clearly also includes power to introduce sub-classes which were not identified in the CPO when it was made. That, as we understood it, was common ground between all the parties. Indeed, since any CPO will be made at a very early stage of the proceedings, whereas as the proceedings develop the information available to the parties and the Tribunal will considerably increase, such variation may prove necessary in the parties' interests.

257. In its Claim Form, the RHA, in reliance on the opinion of Dr Davis, proposed six sub-classes: para 127 above. UKTC, in reliance on the opinion of Dr Lilico, proposed nine very different sub-classes: para 145 above. The difference does not merely reflect the different scope of the two proposed proceedings and the different methods the two experts proposed to deploy for quantification. It also results from the different views they have taken at this preliminary stage of the appropriate categories that require separate economic analysis.

258. However, as Volvo/Renault pointed out, identifying the wrong sub-classes at the certification stage could be detrimental to the economic assessment of the overcharge and related losses. Volvo/Renault made a number of points, based on the views of its expert, Mr Biro, including that:

(1) Sub-classes should be limited to those which are useful and appropriate. It is neither practicable nor appropriate to define a large number of sub-

classes in an attempt to ensure that all possible distinctions between transactions are specifically catered for.

(2) Neither Dr Davis nor Dr Lilico has had access to data from the OEMs, so their views on sub-classes are necessarily very preliminary.

(3) There are many factors which distinguish transactions, and it is difficult to determine on the basis of the limited evidence currently available which of these characteristics are most relevant for the purpose of distinguishing, if necessary, between transactions for the purpose of identifying useful sub-classes from a factual or economic perspective.

(4) The parties, their economists and the Tribunal will be in a much better position to assess the need for any sub-classes and what those sub-classes should be, once they have had the opportunity to consider disclosure and/or factual evidence.

259. Dr Davis recognised that flexibility in relation to sub-classes should be preserved so that the damages analysis could combine data across sub-classes or further distinguish between different types of transactions. But he said that he considered that the six sub-classes he had proposed made sense in terms of analysis and he would be surprised if the fundamental distinction which he saw in terms of analysis as between (a) new trucks and used trucks, and (b) truck purchase transactions and non-purchase (i.e. lease/rental) transactions would change. Therefore he considered that it was sensible to define these sub-classes at the outset, even if further refinement and possibly additional sub-classes might be needed. That might include, for example, the treatment of 'spot hire' contracts, as to which MAN had served factual evidence which Dr Davis acknowledged made it unclear at this stage whether such contracts could be accommodated within his categorisation or might need separate analysis as a sub-class.

260. We have not found this particular question an easy one to decide, but on balance we think there is force in the points made by Volvo/Renault. Accordingly, we

will not identify sub-classes in the CPO, but the Tribunal will keep this matter under review as part of its active case management of the proceedings.

O. CONCLUSION

261. For the reasons set out above:

(1) we find that both UKTC and the RHA meet the criteria for authorisation to act as a class representative in the collective proceedings covered by their respective applications pursuant to s, 47B(8)(b) and r. 78, save that

(2) in our judgment, only one class representative should be authorised for one set of proceedings, and we consider that, having regard to the differences between the two applications, in all the circumstances the RHA would be the more suitable.

262. Evaluating all the factors we regard as relevant, as explained above, including those set out in r. 79(2), we find that the claims included in the RHA application are eligible for inclusion in the proposed collective proceedings pursuant to s.47B(6) and r 79, save that:

(1) claims in respect of trucks registered outside the UK should not be included;

(2) the run-off period should not extend to 17 May 2019, and the relevant period should cover only contracts entered into by 31 January 2014 for new trucks and by 31 January 2015 for used trucks;

(3) operators of trucks who supplied their services by pricing on a cost-plus basis should be excluded; and

(4) the class definition requires further minor amendments.

263. Accordingly, we conclude that:

(1) the RHA application for a certification should be granted to bring collective proceedings on an opt-in basis:

(i) with respect to claims in respect of trucks registered in the UK; and

(ii) provided that:

(a) the "Relevant Period" in the class definition is amended so as to cover contracts that were entered into between 17 January 1997 and, as regards new trucks, 31 January 2014, or as regards pre-owned trucks, 31 January 2015;

(b) the class definition is amended to take account of paras 105, 111 and 115 of this judgment.

(2) the UKTC application for certification is dismissed.

264. As well as opposing both applications for a CPO, Daimler brought an application to strike out or alternatively have reverse summary judgment on the claims in the UKTC application for damages by reason of the extra costs alleged to flow from the delayed introduction of trucks compliant with the EURO standards. Since we have refused UKTC's application, and in any event found that such claims would not be eligible for inclusion in UKTC's proposed proceedings, it is unnecessary to rule separately on Daimler's application.

POSTSCRIPT

265. The annex to this judgment lists the plethora of expert reports served by all the parties to these two applications. Under r. 55(1)(d) concerning claims under s. 47A, the Tribunal gives directions as to whether the parties are permitted to provide expert evidence for the hearing of the claim, and when a party wishes to adduce such evidence permission is accordingly sought at a case management conference. The same approach applies to appeals heard in the Tribunal: r. 21(1)(d). The hearing of a CPO application is not a battle of the experts and is

not assisted by a large number of expert reports, reply reports and response reports. The collective proceedings regime is still developing, and we think it is important that, in future, where a respondent or objector to an application for a CPO wishes to serve expert evidence, they should seek the permission of the Tribunal which can then consider whether expert evidence should be allowed in response to the application and, if so, give directions as to the nature and number of expert reports that may be adduced.

The Hon Mr Justice Roth
Chairman

Dr William Bishop

Professor Stephen Wilks

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 8 June 2022

ANNEX

Expert Evidence

Party	Expert Report	Date
UKTC	Preliminary Expert Report of Dr Andrew Lilico	16.5.2018
UKTC	Response Expert Report of Dr Andrew Lilico	3.5.2019
UKTC	Third Expert Report of Dr Andrew Lilico	1.2.2021
UKTC	Fourth Expert Report of Dr Andrew Lilico	1.4.2021
RHA	First Expert Report of Dr Peter Davis	11.7.2018
RHA	Reply Expert Report of Dr Peter Davis	3.5.2019
RHA	Supplemental Expert Report of Dr Peter Davis	1.2.2021
RHA	Supplemental Expert Report of Dr Peter Davis	31.3.2021
DAF	First Expert Report of Professor Damian Neven	22.3.2019
DAF	Joint Expert Report of Professor Damian Neven and Professor Georges Siotis	12.4.2019
Daimler	Joint Expert Report of Robin Noble and Andrew Grantham	22.3.2019
Daimler	Expert Report of Robin Noble	15.3.2021
Iveco	First Expert Report of Dr John Thomas Durkin Jr	21.3.2019
Iveco	Second Expert Report of Dr John Thomas Durkin Jr	12.3.2021

MAN	First Expert Report of Dr Mark Israel	22.3.2019
MAN	Second Expert Report of Dr Mark Israel	11.4.2019
Volvo/Renault	First Expert Report of Zoltan Biro	12.4.2019
Volvo/Renault	Supplemental Expert Report of Zolan Biro	12.3.2021