Neutral Citation Number: **[2020] EWHC 525 (Comm)**

Case No: CL-2018-000572

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: **11 February 2020**

Before :

The Honourable Mr Justice Bryan

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Between :

DAIMLER AG

Claimant

- And -

(3) WALLENIUSREDERIERNA AKTIEBOLAG
(4) WALLENIUS WILHELMSEN ASA
(5) WALLENIUS LOGISTICS AB
(6) WILHELMSEN SHIPS HOLDING MALTA LIMITED
(7) WALLENIUS WILHELMSEN OCEAN AS
(11) NYK GROUP EUROPE LIMITED
(12) COMPAÑIA SUDAMERICANA DE VAPORES SA

Defendants

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

Hearing dates: **11 February 2020**

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APPROVED JUDGMENT

MR JUSTICE BRYAN:

A. Introduction

A.1 Applications

1. The parties appear before me today on the first case management conference. The first matter that arises for consideration is the application of the defendants for a split trial of issues going to liability and quantum against the Claimant ("the Split Trial Application"). The Split Trial Application is opposed by the Claimant which submits that the action can be tried most expeditiously and fairly by one trial of all issues as to liability and quantum.

2. There are further live issues before me for determination in relation to pre-trial case management directions which I will identify at this point because some of them are of relevance to the Split Trial Application before me:-
   (1) The scope of the Defendants' disclosure on liability issues and quantum issues.
   (2) The scope of the Claimant's disclosure. The Defendants seek disclosure from the Claimant of settlement agreements entered into by the Claimant with third parties who are said to be jointly and severally liable with the Defendants.
   (3) Disputes with regard to the provision of expert evidence:
   (a) whether the defendants should be required to share a single economic expert, and
   (b) whether expert economic evidence is necessary or appropriate for a trial of liability if the split trial applications are successful, or for the liability as opposed to quantum element of a full trial if they are not.
   (4) The timetable to trial. The Defendants have proposed directions to a liability only trial in March 2021. The Claimant has proposed directions to a trial of all issues in June 2021.

A.2 The Background Facts

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

4. Following several settlements, the remaining Defendants are the Third to Seventh Defendants ("the WWL Defendants") represented by Joshua Holmes QC and William Hooper, the Eleventh Defendant ("NYKE") represented by Marie Demetriou QC and Daniel Piccinin, and the Twelfth Defendant ("CSAV"), represented by Sarah Abram.

5. Daimler claims damages to compensate it for loss that it allegedly suffered as a result of the Defendants' participation in what it says was a serious price fixing and market

sharing cartel relating to the provisions of Ro-Ro services contrary to EU/EEA competition law, and alleged infringements of Article 101 TFEU and Article 53 EEA. The alleged infringements comprise agreements between the Defendants allegedly restricting competition to supply international shipping services for Roll-on Roll-off cargo ("the Alleged Unlawful Agreements").

A.3 The EC Settlement Decision

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

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

8. The settlement decision was addressed to various entities within WWL, NYKK and CSAV, amongst others, who settled the investigation by admitting to participating in unlawful cartel conduct. The conduct admitted was a single and continuous infringement of EU/EEA law from 18 October 2006 to whatever date is set out in the EC Settlement Decision. NYKE is not an addressee of the EC settlement decision. It is a subsidiary of NYKK.

9. The EC Settlement Decision deemed the start date for the infringement to be 18 October 2006. Prior to that date, tramp vessel services were expressly excluded from the scope of the EU/EEA competition rules (Regulation (EEC) 4056/86 Article 1 at subparagraph (2)). By choosing that start date, the EC did not need to examine whether the Ro-Ro services covered by the EC Settlement Decision were tramp shipping services or not. An issue in the present action is whether the services were tramp shipping. It was stated that therefore *"in order to reflect [this] jurisdictional change, the conduct is deemed to have started for all parties on 18 October 2006"* (Recital 42 EC Settlement Decision).

A.4 Daimler's Claims

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

11. Daimler claims that these alleged unlawful agreements encompassed Ro-Ro services on various routes around the world, including but not limited to routes between ports in the EU/EEA. A proportion of Daimler's claim relates to Ro-Ro services between non-EEA ports (e.g. shipping cars from Tokyo to Sydney ("non-EEA services")). Daimler also says that these alleged unlawful arrangements were in place from at least February 1997 (in the case of CSAV from at least January 2000) to at least 7 September 2012 ("the Alleged Relevant Period").

12. Daimler claims damages in respect of Ro-Ro services which Daimler and its relevant subsidiaries purchased during the Alleged Relevant Period. There are two primary heads of loss presently claimed: (1), overcharge losses estimated by Daimler at US$187 million or above, and (2) loss of profits/increased borrowing costs estimated by Daimler, also at US$187 million or above. The total value of the claim (including interest) is in excess of US$374 million.

13. There are two aspects of the overcharge losses:
    (1) follow-on damages: damages flowing from the period and geographical scope identified by the EC Settlement Decision, for which liability is not disputed. The volume of commerce relating to this period amounts to USD 921 million: approximately 54% of the total volume of commerce in these proceedings.
    (2) stand-alone damages: damages flowing from other periods and geographical scopes, for which liability *is* disputed. The volume of commerce relating to this period is approximately 46% of the total volume of commerce in these proceedings.

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

    (1) The EC decision. It is common ground on the pleadings between the parties that there were such unlawful arrangements insofar as found in the operative part of the EC Settlement Decision.
    (2) Various foreign regulatory materials, namely other decisions and actions of criminal and competition authorities around the world that Daimler alleges establish or evidence the unlawful cartel conduct. In particular admissions made by particular entities or Defendants in the context of those proceedings or investigations: for example, in the United States, defendants or other entities in their corporate groups entered into plea agreements, pleading guilty to criminal cartel offences, and accepted fines in excess of US$167 million. In the case of NYKK and WWL undertakings the admitted infringements dated back to as far as respectively February 1997 and February 2000. In Australia NYKE's parent admitted to similar

criminal offences and was fined AUD25 million in the context of what was described as an "extremely longstanding global cartel".

(3) Daimler wishes to rely on evidence of the effect that the cartel had on prices for Ro-Ro services in order to establish, amongst other matters, the geographical and temporal extent of the alleged cartel conduct. WWL, NYKE and CSAV allege that the cartel's purported effect on those prices is irrelevant on the question of whether they are liable in damages to Daimler.

A.5 The Defences

15. The WWL Defendants, NYKE and CSAV deny liability and join issue on the quantum of the claim. Their contentions can be summarised as follows: -

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

(2) The court has no jurisdiction to apply EU/EEA competition law to the conduct complained of insofar as it occurred before 18 October 2006 and concerns Ro-Ro services between ports outside the EEA.

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

(4) The alleged unlawful arrangements did not extend beyond the infringement admitted to in the EC Settlement Decision.

(5) NYKE did not in any event participate in the alleged unlawful arrangements and is not liable for any harm caused thereby.

(6) The claims are subject to German law in respect of damage which occurred on or before 11 January 2009 and are time barred under German law in respect of part of that period. This consists of claims arising (a) prior to 1 January 2002 for all claims, or (b) prior to 12 October 2006 for claims concerning the subject matter of the EC Settlement Decision, (c) prior to 2007/2008 for any claims outside the temporal or geographical scope of the EC Settlement Decisions.

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

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

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

<u>A.6 Procedural History</u>

17. Daimler's claim was issued on 1 August 2018. It took considerable time to serve the claim on CSAV. Daimler was granted permission to serve proceedings out on CSAV in Chile on 18 December 2018 and had served them by 29 November 2019 following several extensions of time for service.

18. Several of the Defendants are no longer parties to this action, having settled their claims with Daimler, namely MOL (Europe Africa) Limited, Mitsui OSK Lines Limited, Kawasaki Kisen Kaisha Limited, K Line Holding (Europe) Limited, Nippon Yusen Kabushiki Kaisha, and K Line Europe Limited.

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

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

    (2) I made a reference for a preliminary ruling to the CJEU under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The questions referred were as follows:

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

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

20. At the same hearing I considered that a stay of the proceedings pending determination of the preliminary reference was not appropriate. Whilst making clear that my findings did not impinge upon the case management decisions to be made by the judge at the envisaged first CMC, i.e. today's hearing, my reasoning on the issues that arose included at [125] and [136]:

    (1) "<u>All claims</u> should proceed together and to one trial which will minimise both the utilisation of court resources and costs" (emphasis added).

    (2) The aims of the CPR and the possibility of settlement were maximised *"if all the issues are prepared and tried together and there are not outstanding issues still to be determined, as experience shows that unresolved outstanding issues can be a hindrance to the overall resolution of the dispute and any settlement thereof"*.

21. On 2 January 2020 the WWL Defendants issued contribution claims against CSAV, NYKK and NYKE (NYKK, as already noted, being the Japanese parent company of NYKE). On 14 January 2020, Butcher J granted the WWL Defendants permission to serve those claims out of

the jurisdiction. WWL served the contribution claim on NYKE on 21 January 2020 and indicated that it does not intend to serve the claim on NYKK. Therefore, NYKK is not a party to these proceedings under CPR Rule 20.10(1).

22. Between 17 January and 21 January 2020, the WWL Defendants, CSAV and NYKE applied for an order that there be a split trial of liability and quantum. This CMC was first listed for 3 February 2020, but the parties failed to comply with the provisions of the Commercial Court Guide in relation to heavy applications and the time for lodging skeleton arguments, as a result of which the hearing was removed from the list. It proved possible, however, for the Court to relist the matter in short order today once the parties had complied with their obligations. A further one-day CMC is envisaged in May 2020.

23. I take the opportunity to remind parties of the importance of complying with the provisions of the Commercial Court Guide in relation to heavy applications. The timescales there envisaged apply to all such hearings. In future, parties may well face adverse cost orders and may also find that it is some time before the matter can be relisted if the Guide is not complied with.

24. Daimler filed its disclosure report on 20 January 2020 pursuant to CPR Rule 31.5(3). This was more than 14 days before the date of the first CMC. The WWL Defendants, NYKE and CSAV served their disclosure reports late, on 23 and 24 January 2020. This was in breach of CPR Rule 31.5(3) which requires parties to file and serve disclosure reports not less than 14 days before the first case management conference. The Defendants' disclosure reports also relate only to issues of liability and not quantum. The parties have not yet exchanged electronic document questionnaires, nor in the context of their application for a split trial have the Defendants fully engaged in Daimler's proposals for directions to trial. This is disappointing given the overall purpose of the case management conference. It appears that the context in which they have not done so is their focus upon their application to have a split trial of liability and quantum to which I will now turn.

<u>B. The Law relating to the Split Trial Application</u>

25. The court's power to order a split trial is part of its general powers of case management set out in CPR Rule 3.1. CPR Rule 3.1(2) specifically provides that the Court may:

    "... (e) direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings: ...
    (i) direct a separate trial of any issue
    (j) decide the order in which issues are to be tried ..."

26. In the competition context the leading cases are *Leaflet Company Limited v Royal Mail Group Limited* [2008] EWHC 3514 (Ch), [2009] UKCLR 323, and *Electrical Waste Recycling* [2012] EWHC 38 (Ch). *Electrical Waste Recycling* was recently applied outside of the context of competition law by Norris J in *Hook v Sumner,* 9 November 2016, unreported at [49] and following.
27. In *Electrical Waste Recycling*, Hildyard J provided guidance in the form of a non-exhaustive list of relevant factors to take into account in considering whether to split the trial at [6]. The bracketed comments which follow are my own:

> "Where the issue of case management that arises is whether to split trials, the approach called for is an essentially pragmatic one and there are various (some competing) variations. These considerations seem to me to include:
> [Factor 1] whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary;
> [Factor 2] what are likely to be the advantages and disadvantages in terms of trial preparation and management;
> [Factor 3] whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials;
> [Factor 4] whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues or place an undue burden on the judge hearing the case;
> [Factor 5] whether a split trial may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages);
> [Factor 6] whether there are difficulties in defining an appropriate split or whether a clean split is possible;
> [Factor 7] what weight is to be given to the risk of duplication, delay, and the disadvantage of bifurcated appellate process;
> [Factor 8] generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.
> Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a common sense and pragmatic approach, may include:
> [Factor 9] whether a split trial would assist or discourage mediation and/or settlement and [Factor 10] whether an order for a split late in the day after the expenditure of time and cost might actually increase cost.

28. The judge must undertake a "pragmatic balancing exercise" which requires assessing "how a case is likely to unfold according to whether or not there is a split" (*Electrical Waste Recycling* at [7]).

29. If a split trial is ordered it is important that there should be a careful demarcation of the boundary between the two in terms of the issues to be dealt with at each stage- see *Electrical Waste Recycling* at [9], and with regard to factor 4, one example of the "excessive complexity" that a single trial can lead to is where a large number of possible permutations of loss and damage may arise depending on the judge's conclusions as to liability - see *Leaflet Company* at [7]:

    > "The evidence on damage would have to cover all eventualities of the judge's factual conclusions. Given 16 allegations of infringement, they could produce an overlarge number of possible permutations. It would be productive of saving of both time and money [for] the evidence on those issues [to] be deferred until the judge's conclusion on infringements are known."

30. The Chancellor in that case also noted that *"the issues on infringement are heavy enough without adding evidence on damages based on a large number of hypotheses"*.

31. Further, the Court's power under CPR Rule 3.12(i) to direct a split trial must be exercised in accordance with the overriding objective in each case. Relevant considerations under CPR Rule 1.1 include *"ensuring that the parties are on an equal footing"*, *"saving expense"*, *"ensuring*

that [the case] is dealt with expeditiously and fairly", and *"allotting to it an appropriate share of the court's resources whilst taking into account the need to allot resources to other cases".*

32. Relevant considerations under CPR 1.4, in addition to those set out previously by *Waste Recycling* at [6] include giving directions to ensure that the trial of a case proceeds quickly and efficiently and the importance of the court dealing with as many aspects of the case as it can on the same occasion.

33. Factor 6 feeds into multiple other factors. If the issues cannot neatly be demarcated, this places a greater burden on witnesses in many cases where they will be required to give evidence at both trials and it is also a significant disadvantage in terms of trial preparation and management. In particular it can mean that parties are allotted more than an appropriate share of the Court's resources.

C. Application of the law to the facts of the Split Trial Application

34. The Defendants make two proposals, in the alternative, for the way in which the trial could be split:
    (1) The First Proposal: Issues 1-17 from the Agreed List of Issues ("Issues relevant to liability") should be determined at the liability trial; the remaining issues ("Issues relevant to causation and quantum of loss") should be tried at the quantum stage. I should note that the above division of issues was not made clear in the application notice, which only refers to "Issues [XX-XX] be tried first in the liability trial, and Issues [XX-XX] be tried second in the quantum trial": the division proposed appears from the witness statements and skeleton arguments the Defendants served in support of the application. This may be because the Defendants' Application notices were served between 17 January 2020 and 21 January 2020 whilst the Agreed List of Issues is dated 28 January 2020.
    (2) The Second Proposal: Issues 1, 9-11 and 15-17 from the Agreed List of Issues ("Issues relevant to Jurisdiction") should be determined at the first trial; the remaining issues should be determined at the second trial. The Second Proposal was referred to in Mr. Seay's Fourth Witness Statement at [13] ("Seay-4", adduced in reply to the Claimant's responsive evidence by the WWL Defendants, and dated 5 February 2020) and in the WWL Defendants' Skeleton argument at [53]-[55] (dated 7 February 2020). The proposal was also developed in oral submissions before me by counsel for the WWL Defendants. Other Defendants did not comment on the proposal in their witness statements or skeleton arguments.

35. I deal with each proposal in turn.

C.1 The First Proposal

36. I address the issues that arise in the parties' respective arguments in detail below. However, for the reasons that I will elaborate upon, and articulate as I address the parties' submissions, I am in no doubt that applying the factors identified above in *Electrical Waste Recycling*, the

overriding objective is best furthered by one trial of all issues and that a split trial would only be likely to result in delay, increased expense, and result in the overuse of scarce judicial resources.

37. In particular: -

(1) *A clean split?* I do not consider that it is possible cleanly to split the determination of issues of liability from issues of quantum. In particular, Daimler proposes to rely on expert economic reports based on data for the full period of 1992 to 2012 and onwards as part of its case that there was infringing conduct in addition to establishing any case on quantum in relation to each period. As such, it is admissible, and is likely to be reasonably necessary, depending on the disclosure provided by the Defendants (and in relation to early periods there is a likelihood that the documentation may not be complete). In this regard Mr Holmes, on behalf of the WWL Defendants, identified to me that disclosure in relation to earlier periods may be, in his words, "patchy".

(2) *Savings in time and expense?* I do not consider that there would be significant savings in terms of time or expense in splitting the trials into two. The scope of disclosure (i.e. which documents are relevant and admissible) in respect of quantum are likely to be similar regardless of the periods identified in any liability trial. I am also satisfied that the number of quantum periods are not likely to affect the amount of time taken to prepare expert evidence. Finally, splitting the trial is likely to cause further delays due to the high possibility of an appeal in respect of findings on liability (for the reasons set out below).

(3) *Trial Preparation and Management:* It is an important aspect of the overriding objective that matters are dealt with expeditiously and without undue delay. From a case management perspective, I consider that such advantages as would be offered by a split trial are outweighed by the downsides. The Commercial Court is experienced in managing shipping and other trials involving complex issues relating to liability and quantum and its case management powers can be deployed to ensure that all issues can be tried together as expeditiously as possible, ensuring that there is not undue delay. Any addition in complexity at trial can be managed, and is in any event outweighed, in my view, by the delay which is likely to be produced if there is a split trial due to a high likelihood that any findings of liability from the first trial will be appealed, as well as the additional use of Court resources by such split trials and intermediate appellate proceedings. Not only would there be a delay whilst appellate proceedings took place, but the Defendants would also no doubt advocate no disclosure on quantum in the meantime, resulting in a standing start and further delay after any appeal. The Court of Appeal would also not have all issues and findings before it, including as to quantum, and would not be able finally to determine all matters with the benefit of all findings on liability and quantum to assist it in this regard. This could result in false starts, setbacks and overall delay in the resolution of the litigation as a whole.

(4) *Prejudice to Daimler:* A split trial would be likely to prejudice Daimler, not least in respect of the follow-on damages claim where liability is not in issue. Such prejudice cannot simply be recompensed in costs and interest. I consider that a factor of particular importance is the likely prejudice caused to Daimler by the delay of any ultimate award of damages which would likely result from a split liability trial, particularly in view of the high likelihood that any liability findings from such a trial would be appealed that

would result in delay. I consider this, along with the negative consequences of such a delay for trial management and the lack of quantifiable savings in time and expense by having two trials, to be key factors in the reaching of my decision.

(5) *Settlement:* A split trial would not assist in mediation and/or settlement, very much the reverse, given the sums at stake and the issues raised. I consider it inherently unlikely that any settlement will be possible until the parties have a clear idea as to both liability and quantum.

(6) *CSAV and NYKE:* For the reasons I identify in due course below, I do not consider that any of the matters relied upon by the Defendants generally, or CSAV and NYKE in relation to their own situation, justifies a separate liability trial.

(1) A clean split?

38. The Defendants argue that the division of issues is straightforward. Issues 1 to 17 would be determined at the first trial and Issues 18 to 27 would be determined at the second trial. Daimler contends that issues of causation and quantum cannot cleanly be separated from liability because in order to prove its case that there was a worldwide cartel between 1997 and 2012, Daimler will need to rely on both contemporary documentary evidence and expert evidence in respect of pricing. In order to obtain this economic expert evidence, Daimler contends that it would need disclosure of documents and matters that go to causation or quantum: namely, the effect that the cartel had on prices for Ro-Ro services. Mr Kennelly also draws my attention to the way Daimler pleads its case, including the fact that it pleads that there was an overall respect agreement which applies across the world and across the services.

39. In my view, there is not a clean split between evidence that must be adduced to determine issues of liability and issues of quantum. In any event, in the context of a case in which the precise contours of contemporary documentary disclosure have not yet been drawn and I do not consider that it would be appropriate to make a case management decision on the assumption that there will be no expert evidence in relation to the determination of liability as well as quantum. As is common ground, pursuant to CPR Rule 35.1, the Court may permit expert evidence which is "reasonably required to resolve the proceedings".

40. In my view, there is scope for economic evidence which Daimler wishes to adduce as to the effect that the cartel had on prices for Ro-Ro services. Certainly, such evidence would be admissible at trial because at its lowest it is relevant to the question of whether the Defendants committed infringements in respect of the period before October 2006. The extent to which it will be reasonably required will depend on the extent of disclosure that is given and the available documentation, but I consider it likely that it will be reasonably required and that the trial judge will be assisted by it. Certainly, I consider that it is appropriate for me to proceed on the basis that it may well be reasonably required and that therefore there will be expert evidence in relation to both liability and quantum.

41. Expert evidence based on cartel pricing is *capable* of being helpful to the court in determining whether there has been a cartel infringement. In this regard, put at its highest, the Defendants' case is that there is no case in which liability has been determined purely by reference to pricing effects and economic analysis, and that the Commission normally uses contemporaneous

documentary evidence and admissions to prove infringement. That is of course correct. However, it is also clear that economic analysis can be used to establish that there has been infringement. Economic evidence may be resorted to in order to establish that a prior concentration took place between competitors where that cannot be established through material evidence of actual contracts and it may be a type of corroborating material or it may be useful in evaluating the strength of the documentary material. This is particularly so if there are gaps in the documentation. In case *C114/85 Re Wood Pulp* [1993] 4 CMLR 407, the CJEU annulled the Commission's decision on the grounds that the parallel conduct by itself could not provide concentration because collusion was not the "only plausible explanation". Therefore, if the only evidence of concentration is pricing data, and collusion is the only possible explanation, then that pricing data is probative as to whether there has been a breach.

42. Further, there is a *heightened likelihood* of such expert evidence being required in this case. Daimler makes the point that contemporaneous documentary evidence may be lacking, and witness evidence may be more difficult to obtain, in the context of a long running cartel, and as I have already noted, there is already some material before me in that regard to the effect that disclosure in terms of documentation for the early period may be patchy, and Mr. Noble (Daimler's economics expert) states that there may not be contemporaneous communications for each and every route that was affected by the cartel. It is just that sort of situation where expert evidence may be reasonably necessary to assist the Court.

43. It was put to me in oral submissions by counsel for NYKE that Daimler seeks to rely on the EC Settlement Decision and various foreign regulatory materials to establish or reveal good evidence of a global cartel, and will therefore not need any expert pricing evidence. However, the Defendants do not agree that those regulatory materials establish what Daimler alleges in a root-and-branch attack on liability and in circumstances where full disclosure has not yet been given of those regulatory findings it is difficult to reach firm conclusions as to how much reliance could be placed upon them by Daimler to the exclusion of expert pricing evidence. Furthermore, there is some overlap between issues of quantum and liability on different routes. It is Daimler's case that there was a global cartel on the basis of a single agreement governing how the cartelists operated worldwide. Therefore, even if Daimler cannot claim damages in respect of certain routes because they are barred from doing so by, for example, the German law of limitation, what happened on the barred routes may well remain probative as to what happened on the routes pursuant to which Daimler can still claim damages.

44. Even if it could not be said definitively at this point in time that Daimler will "need to adduce expert evidence on pricing effects and economic analysis", I do not consider that this is a factor which points particularly towards a split trial in the context of the issues that I have already identified: -

    (1) In this regard I am conscious not only of the points I have made in relation to delay and increased cost, but also the fact that at the moment there is an information asymmetry between Daimler and the Defendants. It is the Defendants that know what their own disclosure will reveal and how far back the contemporaneous documentary evidence of cartel behaviour extends. Daimler cannot currently know this.

    (2) Whilst Daimler does rely on several foreign regulatory decisions and admissions that are made in relation to that, that is unlikely to cover the whole picture in terms of the extent of the cartel and anti-competitive behaviour, given the allegations that it was global in scope and took place over a long period of time.

(3) The current position, as I have said in relation to disclosure reports, is that although the Defendants have provided disclosure reports, they are not detailed enough at this stage to enable Daimler to determine the extent to which economic experts will be needed in addition. I consider that in those circumstances the Defendants have not established that there will not be a need for expert evidence at the liability stage, and for the reasons that I have given, I in fact consider that such evidence is likely to be reasonably necessary.

45. I cannot lose sight, in this regard, that there has been something of a lack of engagement by the Defendants with the disclosure exercise to date, in circumstances where the necessity or lack thereof of disclosure from the Defendants on the effect of the cartel on prices is a central pillar of their argument that a split trial is a more efficient way of dealing with the issues. Ultimately the utility of such evidence, will be a matter for the trial judge. But I consider that this is a factor which I should take into account when adopting a pragmatic approach and weighing the pros and cons of a split trial versus a full trial. In that regard, and although I cannot say with certainty that the trial of all issues will benefit from expert evidence in relation to liability, even on the material currently before me, it seems likely that it will be reasonably necessary. Certainly, it will be necessary on this CMC to consider whether it is appropriate at the present time to make such an order. That may be the case (or may well be a matter for consideration at a subsequent CMC if not ordered at this CMC).

(2) Savings as to Time and Expense

46. The Defendants have argued that a split trial would lead to significant cost savings in potentially cutting down the cost of the quantum investigation primarily by excluding certain temporal and geographical parts of the Defendants' liability to the claimant. Specifically, the following possibilities were noted:

    (1) Issue 3: "Were entities within MOL, NYK, K-Line or WWL/EUKOR or was CSAV, involved in the "Respect Agreement" alleged in [75]?"

    If the answer is no, then Defendants have no liability over and above that found to be within the scope of the infringements.

    (2) Issue 9: "[…] does the court have jurisdiction to apply article 101 TFEU and Article 53 EEA to the Alleged Unlawful Agreements, insofar as they occurred before 18 October 2006?" This question also relates to whether the relevant services were "international tramp vessel services" within the meaning of Regulation 4056/86.

    If the answer is no, then WWL have no liability in respect of matters occurring before October 2006.

    (3) Issue 10: "Does the court have jurisdiction to apply article 101 and article 53 EEA to the Alleged Unlawful Agreement, insofar as they concern RoRo Services between ports outside the EU ad EEA provided during the periods (i) prior to 1 May 004 and (ii) between 1 May 2004 and 18 October 2006"

    If the answer is no, - Defendants have no liability in respect of matters concerning roro services between ports outside the EU and the EEA prior to 1 May 2014. This question has already been referred to the CJEU.

    (4) Issue 11: "Do the Alleged Unlawful Arrangements fall outside the territorial scope of EU/EEA competition insofar as they concern (i) RoRo services provided on routes that commence and terminate outside the EEA; or (ii) insofar as they concern services provided on such routes that were produced and paid for by entities domiciled outside the EEA?"

If the answer to issue 11 is no - WWL has no liability in respect of matters concerning Ro-Ro services provided on routes which commence and terminate outside the EEA or which concern roro services paid for by entities domiciled outside the EEA.

(5) Issue 15: "Does German law apply in respect of the events alleged to have given rise to damage which is alleged to have occurred on or before 11 January 2009"? Issue 16: "If German law does so apply, is Daimler's claim time-barred as a matter of German law, and if so prior to what date?"

(a) If the answer to issue 15 and the first part of issue 16 is "yes", WWL has no liability in respect of claims arising before either:

(i) 1 January 2002 for all claims;

(ii) 12 October 2006, alternatively 6 September 2002 for claims within the subject matter of the EC settlement decision; or

(iii) 23 January 2007 for claims outside the territorial scope of the EC Settlement Decision.

(6) Issue 17: "Is the claim time-barred pursuant to ss.2-9 of the Limitation Act 1980 insofar as it relates to the period before 30 August 2012, as the remaining Defendants maintain, or is such a limitation defence unavailable having regard to s.32(1)(b) of that Act, as Daimler Maintains? […]"

If the answer to the first part of issue 17 is "yes", WWL has no liability in respect of claims arising before 30 August 2012.

(7) Issues 6-8 concern the alleged Joint Service Agreement between CSAV and MOL

(a) Issue 6: "Was there a horizontal co-operation agreement between CSAV and MOL enabling the provision of a joint service for RoRo services on certain routes ("the Joint Service Agreement)? If so, did the said agreement infringe Article 101(1) TFEU?"

(b) Issue 7: "If the Joint Service Agreement infringed Article 101(1) TFEU, did it satisfy the conditions for individual exemption under Article 101(3) TFEU?"

(c) Issue 8: "If the Joint Service Agreement did not infringe Article 101(1) TFEU, what (if any) effect does that have on Daimler's entitlement to claim in respect of RoRo Services provided pursuant to the said agreement?"

(d) If the answer to one of issues 6 to 8 is no, then CSAV is not liable in infringement to Daimler for services provided pursuant to that agreement.

47. The Defendants note that there are therefore a large number of different permutations and possible outcomes which affect the period for which the Defendants may be held liable and the range of routes in which such liabilities may be found. Therefore, the Defendants argue that determining some of these issues in a split trial would lead to savings in three main areas:

(1) Disclosure, as it is said that no quantum disclosure will be needed in respect of time periods and routes which are excluded on liability;

(2) Expert evidence, as it is said, the experts will not be required to consider quantum by reference to each of the permutations;

(3) Savings in cost and trial time as the court will not have to consider quantum in each of the possible permutations

48. Daimler argues that a liability trial would not produce significant cost savings overall. This is essentially for two main reasons. Firstly, the collection of data for the purposes of quantum is not determined by the scope of the liability trial, and secondly that a clean split between liability

and quantum issues is not possible because Daimler will adduce economic expert evidence using the same data in order to establish liability as would be revealed for quantum.

49. In my view, a liability trial would not produce significant savings as to the amount of disclosure required, the number of permutations which the experts must consider for determining quantum, or in the total amount of court time used. I identify below seven reasons why I consider this to be so.

50. Firstly, whatever the outcome on particular liability issues raised by the Defendants, there is no possibility, absent settlement, that a further trial on quantum will be unnecessary. Approximately 54% of the volume of commerce is in follow-on damages pursuant to infringements identified in the EC Settlement Decision which the Defendants accept occurred. Therefore, liability is not in issue in relation to such (potentially very substantial) damages. It is, at least at first blush, somewhat unattractive, given such admitted breaches, that the determination of quantum in respect of these breaches would be deferred for some considerable time, potentially at least three years or even up to five years from the commencement of the proceedings. This also means that I am not weighing the possibility of no trial at all on quantum issues depending on the outcome of a liability trial. The split trial proposal will delay the determination of certain quantum issues that will have to be determined anyway and will result, therefore, on any view, in two trials absent settlement.

51. Secondly, the defences presented by most of the Defendants do not amount to a finding that there was no price fixing or market sharing cartel in the period from 1997. The Defendants may fail in relation to the liability issues they raise at the first instance trial. Given this possibility, it makes little or no sense for the Court not to be determining at the same liability trial the questions that arise as to whether in fact a cartel was operating in respect of such a time and such routes. Put another way, it cannot be assumed that the Defendants will succeed in respect of their discrete liability points. If they fail on such points, the issues as to whether there was collusion and price fixing would be determined for all time periods and all routes at the liability hearing.

52. Thirdly, it is likely that data from the periods in question will in any event be relevant when considering the quantum of overcharge. Such periods may be taken into consideration either as providing "clean data" from before the cartel infringement, or as evidence of collusion and operation of the cartel if Daimler wins the liability issues. In this regard:

    (1) The period before the cartel infringement could then be used to provide "clean data" to measure the impact of the cartel. In this regard Daimler's economic expert, Mr Noble, proposes an overcharge analysis which compares the period *before* the cartel, the period *during* the cartel, and *after* the cartel. By contrast, the letter of the Defendants' expert attached to Mr Seay's fourth witness statement advocates comparison of the period *during* the cartel with the period *after* the cartel only. It is said that a before, during, after analysis would require the Court to determine when the cartel began *as a matter of fact*, regardless of what conclusions the court reached on which periods of liability are excluded *as a matter of law* (e.g.: due to German law and limitation periods applying to them). This would necessitate the inclusion of all data regarding the cartel and nullifying any cost savings of a split trial. By contrast, it was submitted that a during/after analysis may not require full disclosure of data in relation to the periods that lie outside of the liability analysis.

(2) Some issues with the before, during, after analysis have been highlighted by Charles Rivers Associates under Mr Seay's fourth witness statement. I bear well in mind the points that were made, but ultimately by the end of the submissions the difference between the parties was not as black and white as it had first appeared. In this regard Daimler is not saying that it intends to prove its case on liability purely based on expert evidence. It is saying that where the evidence is patchy it may need to supplement the evidence. Ultimately, in the absence of evidence, it also says that if the only conclusion is that the overpricing was the result of collusive behaviour, then it would be possible to determine the case based on the expert evidence.

(3) I consider the advantage, certainly for present purposes, of adopting a before, during and after analysis is that there is alleged, here, to be a long-term cartel whose effects may not have dissipated immediately after its conclusion. Without in any way prejudging the utility of such evidence, which would be a matter for the trial judge, I consider that a before, during, after model may well be of utility in determining quantum, particularly where the court has a relatively early liability start date for the cartel, and this model will require the disclosure of data for the whole alleged cartel duration on all routes. Whether or not ultimately a court is assisted by such evidence would be a matter for the trial judge.

53. Fourthly, as I have already identified, I also consider that expert evidence on such matters in terms of price fixing is admissible and may be reasonably necessary when considering at the liability stage whether there was collusion on pricing at particular points in time and on particular routes. One difficulty is that disclosure has not yet taken place and it is not yet clear what disclosure there will be in respect of the early periods of time, although, as I have already identified, Mr Holmes identified that data may be patchy in terms of documentation for earlier periods. That accords with what one might expect, that there might be less disclosure for earlier periods due to historic loss of documentation with the passage of time or changing or archiving of any systems that were in place. Of course, since the allegations were made, no doubt appropriate measures are in place to protect such documentation as still exists. If that is the case, however, and there are gaps in the material, expert evidence based on price comparison may well have a role in supplementing and filling the gaps, and in that context such documentary evidence as exists may not provide the whole picture even if all the disclosure is given.

54. Fifthly, it is said on behalf of the Defendants that there would be savings in expert evidence in a split trial as the expert would not have to consider each possible permutation on liability. Set against that is the evidence of Mr Noble where it appears from his evidence that different calculations of loss for each period essentially amount to the running of a different set of data through the same economic model. On the basis of his evidence it would not appear to be unduly onerous for such a model to run for different periods. Furthermore, I consider that cross-examination is likely to focus on the construction of the model or the quality of the data. I consider that the difficulties and alleged complexities from an expert perspective have been somewhat overstated. In saying that, I do not lose sight of the matters identified by the Defendants' own expert and drawn to my attention during the course of the hearing, but I am not in a position to, nor would it be right for me to, determine at this hearing and in the context of what ultimately is a case management decision, whether the approach that Mr Noble adopts or that the Defendants’ expert advocates is one which will ultimately find favour with the court.

55. Sixthly, turning to the alleged savings in court time between a liability trial and a combined trial, I am far from convinced that such savings exist.
    (1) It is a surprising submission, even in the abstract, that two trials (one on liability and one on quantum) would take less court time than one combined trial. For the reasons set out above, the quantum trial would not necessarily advance faster as a result of certain issues being determined at the liability stage: disclosure of the period before the infringement would still be needed if a before-during-after analysis was required to determine quantum, and the difference in expert evidence that might be needed does not seem to me to be very great.
    (2) I am not convinced, based on the information available to me, that there would be a substantial saving of time overall in relation to having a split trial. In contrast, the great advantage of a combined trial is that is produces one judgment that can be appealed and the appellate court has all relevant factual findings on all issues and can so determine matters once and for all and has the relevant factual and expert evidence before it and associated findings of the judge. That would not be the position if there was a split trial of liability and quantum.

56. Seventhly, I am also not convinced that there would be a cost saving if there was a split liability trial versus a combined trial. The Defendants have not in fact quantified any such alleged saving, a point that Mr Kennelly made to me. I consider that the reality is obvious that with two trials, and likely appeals between the two, and separate disclosure exercises followed by separate expert evidence, the costs are likely to increase. It is not appropriate for me at this stage to attempt to assess the merits of the liability defences. Even if those liability defences are potential shortcuts, they could be treacherous shortcuts in terms of delay and expense once appeals and the separate disclosure exercises and separate trials are taken into account.

57. Accordingly, in relation to the question of the costs of a split trial versus cost of a combined trial, I consider that the likelihood is that a split trial will in fact lead to increased costs, as well as potentially cause delay, which is contrary to the overriding objective.

(3) Trial Preparation and Management

58. It is submitted by the Defendants that a split trial would be more convenient in terms of trial preparation and management (in addition to suggesting, as already addressed, that a split trial would cost less and take less time than a combined trial). Daimler submits, however, that trial and case management would be significantly undermined by such a split, that there are unlikely to be savings in trial time, and that a split trial would delay the determination of the claim in follow-on damages. The Defendants' riposte is to submit that a split trial would be more manageable than a trial of liability and quantum together: it is said that there are a number of complex issues of liability in addition to the various permutations on quantum. Daimler in turn submits, however, that a split trial would not be any more manageable than the whole trial due to the risk of satellite litigation and the need to balance two sets of disclosure with possible appeals and two separate trials.

59. As I have already foreshadowed. I am of the clear view that considerations of trial preparation and trial management weigh strongly in favour of a combined trial. This is for several reasons.

60. Firstly, in my view a split trial in these circumstances is not inherently more manageable than a combined trial, and any alleged difficulties of a combined trial do not weigh heavily in the overall balance.

    (1) The Commercial Court is well used to dealing with large and complex commercial disputes without adopting split trials for quantum and liability.
    (2) It is clear that there are significant issues with splitting the claim between the two trials. In particular, the issues as to duration of the cartel and the potentially relevant expert evidence in that regard. A split trial, in my view, is likely to increase costs in that regard.
    (3) The Defendants refer to the *Leaflet Company* case in which it is said that a concern for an unmanageable combined trial led the Chancellor to conclude that a split trial should be ordered. However, ultimately every case turns on its own facts and I consider that that case is distinguishable. In *Leaflet Company*, the defendant, Royal Mail, had been inclined to agree to a split trial in correspondence, and that the detailed issues as to quantum should be left to a subsequent trial. Daimler argued that all issues of damages should be left to the trial in November. In this regard: -
        (a) The "effective dispute" was as to where the dividing line between the two trials should fall (see [1]), and the submissions from the parties appear to have been based on which questions should be held over to the second trial, rather than for or against a split trial in principle (see [5]). In contrast, in the present case, the central question is as to whether to have a split trial at all, which is hotly contested.
        (b) It appears that in the *Leaflet Company* case, the infringements were substantively different. The claimant alleged that Royal Mail abused the dominant position it had held in the market by reducing the commission paid to the claimant limiting opportunities for price competition. The charges imposed were excessive, the credit periods were too short, and there was a restriction on the quantities that could be delivered at any time. In the present case, the question as to whether infringement occurred between 2006 and 2012 has already been determined by the EC decision in respect of a large part of the claim. The issues on liability which do have to be determined largely concern the nature and extent of the alleged unlawful arrangements and whether the joint service agreement infringed Article 101(1) of TFEU, various jurisdictional issues, including the geographical and temporal scope of the infringements over which the court has jurisdiction, and the law applicable to the infringements. The breaches are all similar in character, and the permutations largely concern for what time period and what geographical scope the breaches ran.

61. Secondly, a split trial also impacts on judicial resources especially once possible appeals are taken into account. In this regard CPR Rule 1.1(2)(e) is to be taken into account as part of the overriding objective, namely the need to allot an appropriate share of court resources to a particular matter. Each of the trials which are contemplated would be a significant trial. Each would take part some time apart. There must be likely to be appeals in the meantime, as I will address in the next section. It might not be possible for the same judge to try both liability and quantum, particularly if there was a significant gap as a result of appeals and the need for disclosure not given at the liability stage. Judges might have been elevated or have retired. It would be an additional burden on court resources for there to be two trials with potentially more than one set of appeals and the potential of a second trial with a different judge and additional reading and preparation time. There is also the fact that splitting the trial and

allocating two trials, one for liability, one for quantum, would also tie up limited available judicial resources in the Commercial Court over an extended period of time.

62. Thirdly, I attach significant weight to the fact that a large proportion is follow-on damages, which is likely to be significantly delayed by the splitting of the trial:

(1) A split trial on liability would, on any view, significantly increase the period of time between now and that quantum trial. The Defendants' trial timetable is largely silent on the time that would elapse between the liability trial and the quantum trial, but this is likely to be significant, given the fact that (for reasons set out below), disclosure for quantum, consideration of that disclosure by experts, and preparation of submissions would have to be done from a standing start at the completion of the liability trial. The date for the liability trial would be at the earliest 1 March 2021, compared to Daimler's proposed date of June 2021 for a trial of liability and quantum. There is not a great deal of difference between those two dates, particularly once one takes into account whether it is appropriate for a trial to take place as early as 1 March 2021 having regard to the issue which has been referred to the CJEU.

(2) I consider that such delay as would result from separate trials is further compounded by the strong likelihood that a ruling on liability would result in appeal, however decided. The Defendants bring several defences which are essentially disputed points of law: inter alia, the Defendants seek to plead that the law of Germany is applicable in respect of events giving rise to alleged damage occurring on or before 11 January 2009 (and therefore that certain parts of the claim are time-barred pursuant to the German law of limitation) and that certain services in the period of the claim are outside the remit of EU competition law. The Defendants also contend that the court lacks jurisdiction to find an infringement in respect of services between ports outside the EU/EEA prior to 18 October 2006 (which has already been referred to the CJEU), and that the services to which the alleged unlawful infringements relate were "international tramp services" within the meaning of Regulation 4067/86: this is a mixed question of law and fact. This is not to say that a trial on liability will involve legal issues only: if Daimler wins on the legal points, they still have to prove that the price-co-ordination did occur in respect of the relevant periods.

(3) Any appeal, assuming permission to appeal was granted (which in itself would take time to be considered) would take considerable time to be determined, in reality at least a year, if not longer, by the time of a reserved judgment. The likelihood is that the delay would therefore be at least 18 months in the context of any appeal.

(4) The Defendants would no doubt advocate no disclosure on quantum in the meantime. When the appeal was determined, there would be a standing start on such matters, and it might be up to a further 18 months before a quantum trial came to fruition. The Defendants themselves accept that disclosure on quantum would take a significant amount of time, noting the *Trucks* follow-on litigation in which the quantum disclosure was ongoing 15 months after the CMC. On the Defendants' proposal, this disclosure would not be done alongside liability disclosure and it would have to be paused until liability had been finally determined and no doubt in reality until after any likely appeals. That would mean that the Defendants' proposal could result in quantum not being dealt with until at least three years from when a combined trial could be determined. One possible permutation of the facts is that much of the disclosure required for quantum will have already been done during the

liability trial, because this was required to prove Daimler's case on liability (as Daimler has argued during the course of this hearing). However, if this is the case, then the asserted cost and time savings of having separate trials will not occur.

(5) Furthermore, as I have already foreshadowed, the Court of Appeal would only have issues of liability before them, not issues of quantum. The result is that a quantum trial would remain inevitable (in the context of the follow-on damages claim), and depending on the findings of the Court of Appeal issues of liability might remain to be resolved. By contrast, if there was one trial, then the Court of Appeal would have all the appealed issues of liability and quantum before it, and this would bring certainty and finality.

(6) What is more, a delay of up to three years in determining issues of quantum would also relate to follow-on damages, in circumstances where liability is not disputed. I do not regard that to be either satisfactory or appropriate, having regard to the overriding objective and the need to resolve matters expeditiously. In this regard it is important to bear in mind that follow-on damages are claimed in relation to circa 54% of the total volume of commerce in the claim. As I have already pointed out, issues of liability are irrelevant to the follow-on claim. The consequence, on any view, is that a split trial would not deal with the follow-on claims expeditiously pursuant to the overriding objective in CPR Rule 1.1(2)(d) and CPR Rule 1.4(2)(l). Calculation of the quantum of those damages would likely be "paused" for several years which I do not regard as satisfactory or consistent with, still less in furtherance of, the overriding objective. It was submitted in oral submissions that in fact the quantum of the stand-alone claim was actually slightly larger than the follow-on damages, because the stand-alone claim relates to earlier periods in time and includes a claim for interest and loss of profits, which means that losses incurred at an earlier point in time will weigh more heavily. Whether this is so or not is not clear at the present time (not least in circumstances where evidence on quantum has yet to be received). In any event, and on any view, the follow-on damages claimed represent a substantial portion of the claim, and a substantial claim.

(7) The WWL Defendants proposed to give an undertaking that no points would be taken on appeal in relation to the trial of issues of liability at the time the liability judgment was given, and that any appeals would be rolled up for determination after the quantum trial. I do not consider that this assists the split trial proposal. If such an undertaking was given, then the quantum trial would still have to deal with all possible permutations of liability, even those excluded by any findings of law in the first trial: this would nullify any purported savings in disclosure, expert evidence and court time which the Defendants allege that a split trial would achieve. If the quantum trial was not based on all possible permutations of liability, the findings of the Court of Appeal could lead to a necessity for a further quantum hearing (or any rehearing of quantum if it proceeded on a reversed basis. This merely serves to underline the fact that it would be better if any appeal concerned all issues of liability as well as quantum.

63. A split trial would not take place long before a full trial on liability and quantum. I also consider it unattractive for liability issues to be scheduled to be determined at a time, and in advance of, when it is anticipated a ruling from the CJEU will be available. That is envisaged to be around May 2021 based on the average time from a reference to a decision. It is in my view desirable that the ruling is available to the parties in advance of the trial. In this regard, Daimler proposes a trial on liability and quantum after the CJEU ruling. Though the trial date envisaged of June 2021 may not be achieved, or indeed may not be the trial date arrived at, at the CMC this

afternoon, having heard further submissions from all the parties, it is in my view at least a more realistic start date, even if it requires adjustment when dealing with the case management issues on the CMC.

64. Fourthly, I bear in mind that (for reasons identified above), it is not clear that there would in fact be significant time or cost savings from having one trial as to liability and a further trial for quantum, as opposed to a combined trial.

65. Overall, I consider that a properly case managed trial of liability and quantum is preferable to a trial of liability alone.

(4) Potential Prejudice to Daimler

66. This is a point which I have already considered under other headings, but I consider that it is, in its own right, a factor to be given particular weight. I consider that a split trial resulting in delay would cause prejudice to Daimler in the delay caused in obtaining a judgment on follow-on quantum damages. For the reasons I have already identified, it is likely that splitting the trial will delay the determination of the quantum of the whole claim (that is, follow-on damages and contested damages) by a significant margin. In circumstances where Daimler has a substantial follow-on claim in respect of the liability of several of the Defendants, as has already been established, it would in my view be highly prejudicial to Daimler that they be prevented from obtaining damages in relation to this admitted infringement of competition law by a split trial in order to make some alleged savings in relation to disclosure and expert evidence for the contested claims. As I say, such savings may or may not in fact transpire. It is notable that in the *Leaflet Company* case, there were no such follow-on claims: at [1] it was stated:

> "There have been no finding of infringement by the European Commission ... issues include liability as well as causation and damages."

67. The Defendants make the point that prejudice to Daimler can be, to some extent, compensated in interest or that there could potentially be an interim payment in respect of a minimum perceived liability amount. However, the sums claimed are large, in excess of US$350 million, and the delay would be for a significant period of time (up to three years due to the high probability of appeals). Furthermore, I consider it would be difficult to calculate a "minimum liability" to make an interim payment without hearing evidence on quantum.

(5) Settlement

68. The Defendants also submit that a trial on liability taking place in advance of a trial on quantum would encourage the parties to settle, by defining the scope of the relevant commerce and therefore defining more clearly the total value of the claim. Daimler argue that such a split would not lead the parties towards settlement, and that probable delays before all issues were determined would remove any immediate incentive on the Defendants to settle.

69. As I have already foreshadowed, I consider that settlement is more likely to be hindered than helped by a split trial. In my view, the possibility of settlement is maximised if all the issues are prepared and tried together. As I said in my previous judgment at [136(5)]:

> "(5) In terms of the overall resolution of the dispute, and the possibility of settlement, such aims are maximised if all the issues are prepared and tried together and there are not outstanding issues still to be determined as experience shows that unresolved outstanding issues can be a hindrance to the overall resolution of the dispute and any settlement thereof"

70. I consider it is improbable that settlement will be possible until the true quantum of the claim or the various permutations on quantum is apparent. The sums at stake in this case are very large. It is true that most competition claims settle, but the prospects of this competition claim settling will be maximised at a time when all parties are aware of the likely quantum of any damages That is particularly so in the context of the fact that a large part of this claim is follow-on damages and on the timetable that would result from a split trial, it would be many years from now before that quantum would be known, which is no incentive to the Defendants to settle the overall proceedings in the meantime.

(7) CSAV and NYKE.

71. CSAV and NYKE both make arguments that there are factors which are specific to them which they submit militate in favour of a split trial, whilst also supporting the arguments advanced on behalf of the WWL Defendants:
    (1) CSAV note that the Court will have to rule on the scope of the Commission's findings against CSAV in the EC Settlement Decision. The Commission held that CSAV was not involved in the whole infringement found in the decision, but was only liable for its limited participation in the single and continuous infringement. Further, the court will have to make specific findings with regard to the Joint Services Agreement ("JSA") and whether (a) the JSA infringed 101(1) of TFEU or (b) that JSA satisfied the requirements of the individual exemption in Article 101(3) TFEU.

    (2) NYKE noted that it was not an addressee of the EC Settlement Decision or involved in the proceeds giving rise to the foreign regulatory materials. Daimler's case against NYKE is premised on the idea that NYKE exercised a decisive influence over other entities. A single trial on liability and quantum would require NYKE to address the substantial quantum issues raised by Daimler which would be entirely unnecessary if this specific allegation was determined in favour of NYKE.

72. I do not consider that any of the points raised by NYKE or CSAV amount to a sufficient justification for a split trial:-
    (1) I have had drawn to my attention the relevant parts of the pleadings in relation to, for example, the position of NYKE and the factual allegations that arise in that regard. Those involve, for example, questions as to whether or not NYKE were involved in the implementation of matters for which NYKK is implicated in the context of the EC Settlement Decision and also involvement of individuals within NYKE in relation to such matters.
    (2) I have to bear in mind that there is the question of a joint and several liability if the requisite matters are determined. That is also true for CSAV, although the volume of relevant trade is limited. Again, the potential joint and several liability of CSAV is substantial. The circumstances are that there is a pleaded case of liability firstly against NYKE for the same period as the other Defendants, with joint and several

liability for the same loss. Equally, CSAV's evidence in support of the application relates to the assertion that it is less important in the overall proceedings. However, there is still a pleaded case in liability against CSAV in respect of an overlapping period with the other Defendants, and if that case is made out, then there is also the possibility of joint and several liability. I consider that CSAV cannot characterise itself as a minnow in the context of the action as a whole, and it potentially faces similar liability to Daimler as other Defendants if Daimler establishes their case.

(3) Equally, NYKE faces a substantial claim in this action. I do not consider the distinguishing features identified by Ms Demetriou in relation to the position of NYKE and the non-involvement of the parent company, NYKK, mean that NYKE should be considered any differently from any of the other Defendants. Putting it another way, it is my view that there are no factors which are specific to NYKE or CSAV which, when put in the overall balance, sway that balance in favour of there being a split trial as opposed to a trial of all issues.

73. In the alternative, it is submitted that if the Court were to find the economic expert evidence to be relevant to the liability investigation, or that such matters needed to be explored at the liability stage, the Court could split off into a separate trial those questions which relate to liability and involve the expert evidence.

74. I consider that to be an unattractive submission. Firstly, it is in reality an application for partial preliminary issues which would divide the trial not only into liability and quantum, but some issues on liability followed by a trial on some issues of liability and quantum. It would carry with it all the vices that a split trial would carry. Indeed, given that there could be difficulties in demarcation as to what was being dealt with at the first trial in relation to liability and the subsequent trial, it could raise additional problems of its own.

75. Secondly, and in any event, I am satisfied that such an alternative application to split out the issues further is only likely to increase cost and expense, and be of little assistance to the overall resolution of the dispute. It would also not assist the Court of Appeal in the event that an appeal was made, because not all liability issues would be before the Court of Appeal. Further, I note that there is some overlap between the factual issues that must be determined for the purposes of substantive liability, and the preliminary points which the WWL Defendants propose to hive off into the First Trial. In particular, Mr. Kennelly for Daimler drew my attention to the fact that the question of whether German law applies raises some factual issues: under sections 11 and 12 of the Private International law (Miscellaneous Provisions) Act, the question determining governing law is the country in which the most significant element of the tort occurred, or whether it is substantially more appropriate for another law to apply. I did not hear submissions on whether this Act is the appropriate legislation for determining governing law in this case: however, even if the Rome II Regulation applied the law applicable will be the law of the country in which the damage occurred, or the law of a different country if the tort or delict is manifestly more closely connected to it (Articles 4(1) and (3), RIIR).

76. Thirdly, it would also not assist settlement because, again, not all liability issues would have been determined at the first trial.

<u>D. Conclusion</u>

77. Accordingly, and for the reasons that I have given, I consider that the application to split the trial is inappropriate, and that the matter should proceed to a trial on liability and quantum. Accordingly, I dismiss the applications for a split trial. I will in the second part of this hearing, to take place this afternoon, consider the case management directions that can be given at this stage in relation to the furtherance of this action.