



Neutral citation [2024] CAT 27

Case No: 1435/5/7/22 (T)

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

22 April 2024

Before:

JUSTIN TURNER KC  
(Chair)  
SIR IAIN McMILLAN CBE FRSE DL  
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

- (1) PSA AUTOMOBILES SA
- (2) GIE PSA TRÉSORERIE
- (3) STELLANTIS NV
- (4) OPEL AUTOMOBILE GMBH
- (5) FCA ITALY SPA
- (6) FCA SRBIJA D.O.O. KRAGUJEVAC
- (7) FCA POLAND SA
- (8) MASERATI SPA
- ~~(9) SOCIETA EUROPEA VEICOLI LEGGERI (SEVEL) SPA~~
- (10) VAUXHALL MOTORS LTD
- (11) STELLANTIS ESPAÑA SLU

Claimants

- v -

- (1) AUTOLIV AB
- (2) AUTOLIV, INC.
- (3) AUTOLIV JAPAN LTD
- (4) AUTOLIV B.V. & CO. KG
- (5) AIRBAGS INTERNATIONAL LTD
- (6) ZF TRW AUTOMOTIVE HOLDINGS CORP.
- (7) ZF AUTOMOTIVE SAFETY GERMANY GMBH
- (8) ZF AUTOMOTIVE GERMANY GMBH
- (9) TRW SYSTEMS LTD
- (10) ZF AUTOMOTIVE UK LTD
- ~~(11) TOKAI RIKKA CO., LTD~~
- ~~(12) TOYODA GOSEI CO., LTD~~

Heard at Salisbury Square House on 15 April 2024

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**RULING (EXPERTS)**

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## **APPEARANCES**

Colin West KC and Sean Butler (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimants.

Robert O'Donoghue KC (instructed by White & Case LLP) appeared on behalf of the First to Fifth Defendants.

Sarah Ford KC (instructed by Macfarlanes LLP) appeared on behalf of the First to Tenth Defendants.

## A. INTRODUCTION

1. On 2 November 2023<sup>1</sup> we granted permission for a single expert in the field of competition economics to be instructed by the Defendants jointly. At that time there were three defendant groups comprising: the First to Fifth Defendants (“Autoliv”), the Sixth to Tenth Defendants (“ZF”) and the Eleventh Defendant. The limitation to a single expert was opposed by Autoliv and ZF. Permission to appeal our decision was granted by an order of Popplewell LJ on 6 February 2024 and we understand that appeal will take place on 30 April 2024. Proceedings against the Eleventh Defendant have now been discontinued.
2. This is an application by the remaining Defendants for us to revisit the question of the number of experts with a request that permission be granted for separate experts for Autoliv and ZF relating to the issue of overcharge. The Defendants advance three material changes of circumstance which, they say, justify revisiting this issue.
3. The first is the reasoning of Popplewell LJ in granting permission to appeal. It was indicated that if we agreed to the Defendants’ request to revisit our order for a single expert the appeal would not need to proceed. This is an unusual submission. We do not see this as a reason for revisiting our earlier decision and we do not consider it appropriate to second guess what the result of the appeal will be.
4. The second change relied upon is the withdrawal of the claim against the Eleventh Defendant. We do not see that as a reason for increasing the number of expert witnesses from one.
5. The third change is that the Claimants have made amendments to their pleadings and have now served an expert report from Mr Hughes of Alix Partners UK LLP. In our ruling of 2 November 2023, we recognised that conflicts *might* emerge. The service of Mr Hughes’s report has brought clarity to the case the

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<sup>1</sup> See, also, paragraph 19 of the Tribunal’s order made on 15 May 2023.

Defendants have to meet, and we have therefore revisited the question of conflicts in the light of this evidence.

6. We refer to our ruling of 2 November 2023 for the background to these proceedings and the approach we have taken to the issue of the joint instruction of experts by the Defendants.
7. The Claimants put their case two ways. First they contend that Autoliv and ZF formed a cartel or were part of a cartel in respect of the sale of OSS products to the Claimants. Second, they have a follow on claim from the Commission decisions OSS1 and OSS2. These decisions did not concern supplies to the Claimants but it is said that the impact of the cartels identified by the Commission was to reduce competition and increase prices in the market generally.

**B. THE CLAIMANTS' EVIDENCE**

8. The evidence relied upon by the Claimants comprises factual evidence, including email communications, which it is said directly evidences the existence of a cartel between Autoliv and ZF operating against the Claimants.
9. The Claimants' expert economic evidence purports to show - in respect each of airbags, seatbelts and steering wheels - that the prices charged were higher during the period of alleged cartel activity than during a later period when the cartel activity had been wound down. This overcharge is said to support the existence of a cartel. Mr Hughes's analysis uses data from supplies to PSA and comprises a multivariate regression analysis which seeks to isolate overcharges from other demand and cost factors which also influence price. Such evidence does not purport to identify the cause of the overcharge: it is not capable of distinguishing whether an overcharge is caused by a cartel, an umbrella effect, or any other cause which has not been controlled for.

### **C. THE DEFENDANTS' EVIDENCE**

10. The Defendants were asked what it is they intend to show with their expert evidence. That evidence is to be served on 24 May 2024 and must be developed to a degree. The Defendants were unable to inform the Tribunal other than to observe that they were not in a position to prejudge the outcome of any analysis. We asked whether during the course of preparation of that evidence specific conflicts between the Defendant groups had arisen and none were identified.
11. In broad terms the Defendants' expert evidence will share similarities with the Claimants' expert evidence in that it will be seeking to identify the presence or absence of an overcharge using some form of multivariate regression analysis to control for variables. We recognise there may well be a dispute as to the particulars of the methodology used and which analysis is superior.
12. One difference which has been identified is the data set which will be used. The Claimants' expert has identified an overcharge by reference to the prices paid by PSA whereas the Defendants wish to identify an overcharge by reference to their own data sets. This may or may not produce materially different results.
13. Importantly it is not suggested that the Defendants' expert evidence will do anything other than identify the presence or absence of an overcharge during different periods.

### **D. CONFLICTS OF INTEREST**

14. The Defendants submit that the expert evidence they intend to adduce may be relevant to apportionment. As we have pointed out in our earlier ruling apportionment does not arise on the pleadings and no contribution notices have been served. The Defendants will, if the claim is successful, be jointly and severally liable for the Claimants' loss.
15. The Defendants point to Table 1.5 of Mr Hughes's expert report in which he identifies overspend by reference to Autoliv and TRW (TRW being part of the ZF group). Mr Hughes explains that this is done for convenience and that he is

working on the basis that the parties are jointly and severally liable. All this table is doing is recording whether the sale was made by Autoliv or ZF. If it was made by Autoliv it goes into the Autoliv column and if the sale was made by ZF it goes into the ZF column. Insofar as this division becomes relevant to apportionment it is a question of fact who made the sales not a matter of expert opinion.

16. The other matter which the Defendants raised was to point to the period covered by OSS1. ZF was not party to the cartels identified by the Claimants during this period whereas it was found by the European Commission that Autoliv was a party to cartels which date from 28 March 2006. The OSS2 cartels did not commence until 4 January 2007.
17. The fact that ZF was not a party to the OSS1 decision does not mean that justice requires that it adduces separate expert evidence for the following reasons:
  - (a) In investigating matters prior to 4 January 2007, the Tribunal will be presented with fact evidence and expert evidence. The expert evidence is not capable of informing the Tribunal as to whether the overcharge is arising from cartel activity involving ZF and Autoliv or an umbrella effect.
  - (b) The Defendants' positive case is that there is no umbrella effect arising from the OSS1 and OSS2 decisions. It is not suggested by ZF that they intend to argue that any overcharge in the period prior to their participation in OSS2 (4 January 2007) is caused by an umbrella effect arising from OSS1 (a cartel which they did not play a part in).
  - (c) Although theoretical conflicts could be contrived, it is necessary to keep in mind the scope of the expert evidence. As we have said all the expert evidence can do is identify the existence of an overcharge. It is a blunt tool and is not capable of distinguishing causes of that overcharge. It follows that if, which seems unlikely, and which is unpleaded by ZF, a conflict arises as to whether an overcharge in the

period 28 March 2006 to 4 January 2007 was caused by an umbrella effect from certain OSS1 cartels or a cartel operating directly against the Claimants, the expert evidence will not be relevant to the resolution of that issue.

18. It was suggested that there may be a benefit to ZF in having different periods analysed. It was not really explained which periods or for what purpose. Nor was it explained why a single expert could not be requested to analyse different periods using their preferred model and data sets.

**E. THE BENEFITS OF A SINGLE EXPERT**

19. As we have already explained in our ruling of 2 November 2023 the quality of justice will be impacted if the Tribunal is faced with the task of having to resolve different methodologies using different data sets from the Defendants. If both Defendant groups are providing different regression models to prove the same thing – that there was no overcharge – this is introducing unnecessary complexity. It is of note that it has not been proposed that in the event that the Defendants did have different experts that they would be applying the same methodology.
20. The complaints that the Defendants’ interests may be different appear at most abstract and theoretical and do not impact the nature of the expert evidence which is to be adduced. We decline to vary our order drawn on 2 November 2023.

**F. A FURTHER MATTER**

21. When this judgment was first handed down in draft, we had observed that there was no case being advanced by the Claimants that Autoliv was liable for a follow on claim arising from OSS1, prior to the periods considered by OSS2. The earliest OSS1 cartel involving Autoliv commenced on 28 March 2006 and the earliest OSS2 cartel which involved both Autoliv and ZF commenced on 4 January 2007.



22. When invited to make corrections to the draft judgment, the Claimants stated that they *did* have an alternative follow on claim for this period against Autoliv alone, in the event that they failed on their principal case.
23. It is not clear to us that this is a matter which has been pleaded. The Claimants accept, as they must, that a pure follow on claim cannot be made against ZF for the period of 28 March 2006 to 4 January 2007. The claim form however asserts joint and several liability of the Defendants and does not identify a period for which Autoliv is solely liable. Further, paragraph 44 the Fourth Amended Particulars, which pleads the alternative umbrella case, states that, “Autoliv and ZF/TRW are liable for those losses”.
24. We have not heard argument on this matter and therefore make no ruling as to what has and has not been pleaded but this is a matter which may require addressing at the next CMC.

Justin Turner KC  
Chair

Sir Iain McMillan  
CBE FRSE DL

Professor Anthony Neuberger

Charles Dhanowa OBE, KC (*Hon*)  
Registrar

Date: 22 April 2024