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For the Registrar  
Cecilia Strömholm  
Administrator



Claim No. CL-2018-000572

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

**BEFORE: The Hon. Mr Justice Bryan**

**DATED: 16 December 2019**

**B E T W E E N:**

**DAIMLER AG**

**Claimant/Respondent**

**-and-**

- ~~(1) MOL (EUROPE AFRICA) LTD~~
- ~~(2) MITSUI O.S.K. LINES, LTD.~~
- (3) WALLENIUSREDERIERNA AKTIEBOLAG
- (4) WALLENIUS WILHELMSSEN ASA
- (5) WALLENIUS LOGISTICS AB
- (6) WILHELMSSEN SHIPS HOLDING MALTA LIMITED
- (7) WALLENIUS WILHELMSSEN OCEANAS-
- ~~(8) KAWASAKI KISEN KAISHA, LTD.~~
- (9) "K" LINE HOLDING (EUROPE) LIMITED
- ~~(10) NIPPON YUSEN KABUSHIKI KAISHA~~
- (11) NYK GROUP EUROPE LIMITED
- (12) COMPAÑIA SUDAMERICANA DE VAPORES SA
- (13) "K" LINE EUROPE LIMITED

**Defendants/Applicants**

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**CONSENT ORDER**

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**UPON** applications by: (i) the Third to Seventh Defendants ("**WWL**"), by notice dated 10 July 2019; (ii) the Ninth and Thirteenth Defendants ("**K- Line**"), by notice dated 30 July 2019; (iii) the Eleventh Defendant ("**NYKE**"), by notice dated 5 August 2019; and (iv) the Twelfth Defendant ("**CSAV**"), by notice dated 27 September 2019 (the "**Applications**"), and the supporting evidence



**AND UPON** hearing Leading Counsel for the Claimant (“**Daimler**”), for WWL, for NYKE, and Counsel for CSAV on 14 and 15 November 2019

**AND UPON** the Court having handed down judgment on 22 November 2019 (the “**Judgment**”)

**AND UPON** the Order of Mr Justice Bryan dated 27 November 2019

**IT IS HEREBY ORDERED THAT:**

1. The Court makes a reference to the Court of Justice of European Union pursuant to Article 267 TFEU on the terms set out at the Schedule to this Order.
2. Costs reserved pending the outcome of the Reference.
3. Liberty to apply.
4. This Order shall be served by NYKE on Daimler, WWL, K-Line and CSAV.



**SCHEDULE TO ORDER FOR REFERENCE**

1. **Commission Decision** On 21 February 2018, the European Commission<sup>1</sup> adopted a decision in relation to transport services provided by maritime car carriers.<sup>1</sup> This Decision found that a number of undertakings infringed Article 101(1) TFEU and Article 53(1) EEA by participating in a single and continuous infringement consisting of the coordination of prices and the allocation of customers with regard to the provision of roll-on, roll-off deep sea car carriage of new motor vehicles (cars, trucks and high and heavy vehicles) on various routes to and from the European Economic Area in the period from 18 October 2006 to 6 September 2012.<sup>2</sup>
2. As to the nature of the conduct with which the Decision is concerned, recitals (29) to (33) stated:

“(29) With regard to deep sea shipments to and from the EEA, the parties were involved to varying degrees in conduct that sought to: (i) coordinate the prices of certain tenders, (ii) allocate the business of certain customers and (iii) reduce capacity by coordinating the scrapping of vessels.

(30) The conduct followed the so-called “rule of respect”. According to that principle, shipments of new motor vehicles related to already existing businesses on certain routes for certain customers would continue to be carried by the undertaking traditionally carrying it (the incumbent).

(31) The evidence shows that the parties engaged in the following behaviours, with varying intensity:

*4.1.1. The rule of respect*

(32) The parties applied the rule of respect as a guiding principle for their practices. Some carriers were considered to be incumbents concerning specific routes and/or specific customers. In order to

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<sup>1</sup> Commission Decision AT.40009 - Maritime Car Carriers, C(2018) 983 final.  
<sup>2</sup> See Article 1 of the Decision.

maintain the *status quo* in the market, the carriers would respect the business of the incumbent carrier, by either providing a quote above the incumbent's rates, or refraining from quoting. The conduct also covered single and general Requests for Quotations ("RFQs") (or tenders) issued by certain vehicle manufacturers. In return, the other carriers would generally be reassured that they would secure other specific routes/business on which they were the incumbent. In some cases, the carriers followed the rule of respect only in order to avoid possible conflicts among themselves.

(33) The affected EEA inbound shipments concerned, for example, certain shipments from Asia, South Africa, and the Americas to the EEA. The affected EEA outbound shipments concerned, for example, certain shipments from the EEA to Asia, Oceania, South African, and to the Americas."

3. As to the geographical scope of the conduct with which the Decision is concerned:

- a. recital 4 stated:

"This Decision focuses on the deep sea car carriage services which started or ended in the EEA."

- b. Further, recital (41) stated:

"The geographic scope of the conduct concerned covered at least shipments into and from the EEA (hereafter "inbound" and "outbound" shipments)"

4. As to the temporal scope of the Decision, and specifically, the deemed start date of the conduct concerned, recital 42 stated:

"The rules for the implementation of competition law apply to all maritime transport services, including to *cabotage* and international tramp services since the entry into force of Council Regulation (EC) No 1419/2006 of 24 September 2006 repealing Regulation (EEC) No 4056/86 on 18 October 2006. That date is the earliest date from which the Commission can exercise its jurisdiction to sanction the conduct of the parties. In order to reflect this jurisdictional change and for the purposes of the present decision, the conduct is **deemed to have started** for all parties on 18 October 2006." (emphasis added)

5. **National proceedings** The claim before the referring court includes an allegation that the defendants infringed Article 101(1) TFEU (previously Article 85(1) EEC/Article 81(1) EC) and Article 53 EEA, between 1997 (in respect of the 12th Defendant, CSAV, 2000) and 17 October 2006 in respect of the provision of international maritime roll-on, roll-off deep-sea car carriage services on routes worldwide, including between non-EEC/non-EC/non-EEA ports. Daimler AG claims under Article 101(1) in relation to roll-on, roll-off deep-sea car carriage services between ports outside the EU and EEA on the basis that it was in Germany that:
- a. it operated a central tendering process for maritime transport services and procured framework agreements pursuant to which these services were provided;
  - b. the unlawful conduct was implemented by the submission of uncompetitive bids pursuant to that process and/or the omission to submit competitive bids to that process; and
  - c. Daimler was harmed.
6. **EEC Treaty** The initial implementing rules for Articles 85 and 86 EEC were set out in Articles 87, 88 and 89 EEC.
7. Article 87(1) EEC provided that the Council should adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86.
8. Article 88 EEC provided:
- "Until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86."
9. Under Article 89 EEC, the Commission had jurisdiction to investigate and adopt reasoned decisions in relation to infringements of Articles 85 and 86 EEC.
10. **Regulation 17** The first regulation implementing Articles 85 and 86 EEC adopted by the Council pursuant to Article 87 EEC was Council Regulation No 17, in 1962.<sup>3</sup> Article 1 of Council Regulation No 141 exempted transport

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<sup>3</sup> OJ 13, 21.2.62, p.204.

from the application of Regulation No 17.<sup>4</sup> At that stage, the application of Articles 85 and 86 EEC in the maritime sector was therefore governed by Articles 88 and 89 EEC.

11. **Regulation 4056/86** Council Regulation 4056/86 established detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport services;<sup>5</sup> see Article 1(1). Regulation 4056/86 came into force on 1 July 1987; see Article 27. Article 1(2) of Regulation 4056/86 defined the subject-matter and scope of the Regulation as follows:

"It shall apply only to international maritime transport services **from or to one or more Community ports**, other than tramp vessel services." (Emphasis added.)

12. Regulation 4056/86 did not establish any implementing rules for international maritime transport services between non-Community ports.

13. **Regulation 1/2003** Council Regulation 1/2003<sup>6</sup> repealed Regulations 17 and 141,<sup>7</sup> with effect from 1 May 2004, replacing them with a new regime for the enforcement of Articles 101 and 102 TFEU. As regards this regime:

- a. Chapter I of Regulation 1/2003 sets out certain "Principles". Pursuant to Article 1(1), all agreements, decisions and concerted practices caught by Article 101 TFEU, and not satisfying the conditions of Article 101(3) TFEU, were prohibited without any prior decision to that effect being required. Pursuant to Article 1(2) TFEU, all such agreements, decisions and concerned practices that did satisfy the conditions of Article 101(3) TFEU were not prohibited without any prior decision to that effect being required.
- b. Chapter II of Regulation 1/2003 provides for "Powers" of the Commission and Member States to apply EU competition rules. Pursuant to Article 4, for the purposes of applying Articles 101 and 102 TFEU, the Commission shall have the powers provided for by the Regulation. Pursuant to Article 5, the competition authorities of the Member States shall have the power to apply Articles 101 and 102 TFEU in individual cases. Pursuant to Article 6, national courts shall have the power to apply Article 101 and 102 TFEU. As regards the role of national courts, Recital (7) provides that:

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<sup>4</sup> OJ 124, 28.11.62, p.2751.

<sup>5</sup> OJ 1986 L 378, p.4.

<sup>6</sup> OJ 2003 L 1, p.1.

<sup>7</sup> See Article 43 of Regulation 1/2003.

“National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the **subjective rights** under Community law, for example by awarding damages to the victims of infringements. The role of national courts here complements that of competition authorities of the Member States. They should therefore be allowed to apply Articles [101 and 102 TFEU] in full.” (emphasis added)

- c. Chapter X of Regulation 1/2003 contains certain “General Provisions”. These include Article 32 (headed “Exclusions”).
- d. Chapter XI of Regulation 1/2003 contains “Transitional, Amending and Final Provisions”. These include Article 38 (headed “Amendment of Regulation (EEC) No 4056/86”) as to which, see further below.

14. As enacted, Article 32 of Regulation 1/2003 provided as follows:

“This Regulation shall not apply to:

- (a) international tramp vessel services as defined in Article 1(3)(a) of Regulation (EEC) No 4056/86;
- (b) a maritime transport service that takes place exclusively between ports in one and the same Member State as foreseen in Article 1(2) of Regulation (EEC) No 4056/86;
- (c) air transport between Community airports and third countries.”

15. Article 32 does not expressly exclude other maritime transport services, including international maritime transport services between ports outside the Community that are not tramp vessel services as defined in Article 1(3)(a) of Regulation 4056/86. Article 32(c) of Regulation 1/2003 was repealed with effect from the same day that Regulation 1/2003 came into force.

16. Article 38 of Regulation 1/2003 provided for the deletion of the procedural provisions in Articles 10 to 25 of Regulation 4056/86 (with the exception of Article 13(3)) (which were replaced by the new procedures set out in Regulation 1/2003), and amended certain of the other provisions of Regulation 4056/86. Regulation 1/2003 did not otherwise amend Regulation 4056/86, the substantive provisions of which remained in

force. Those substantive provisions comprise in summary the provision for certain exemptions in the cases of technical agreements and liner conferences (Articles 2 to 7 of Regulation 4056/86) and the provision for abuse of a dominant position (Article 8 of Regulation 4056/86). The material scope of those substantive provisions remained as set out in Article 1 of Regulation 4056/86.

**17. Regulation 1419/2006** As from 18 October 2006, Council Regulation 1419/2006<sup>8</sup> repealed Regulation 4056/86<sup>9</sup> and Article 32 of Regulation 1/2003.<sup>10</sup>

18. It is not clear to the referring court whether Regulation 1/2003, as enacted, established implementing rules for international maritime transport services between non-Community ports, or whether those services remained subject to the transitional provisions until Article 32 of Regulation 1/2003 and Article 1 of Regulation 4056/86 were repealed by Regulation 1419/2006.

19. It is also not clear to the referring court whether national courts have jurisdiction to apply Article 85 EEC (as it then was) to conduct taking place during the period to which the transitional provisions applied. That is so in the light of the differing analyses of the CJEU's case law (as referred to in paragraphs 20 to 22 below) that have been adopted by the English and Dutch Courts (by the decisions referred to in 24 and 25 below).

**20. Case 127/73 *Belgische Radio en Televisie v SV SABAM*** The Court of Justice held in Case 127/73 *SABAM* (judgment of 30 January 1974) that the jurisdiction of national courts to apply Article 85 and 86 EEC, in particular in disputes governed by private law, derives from the direct effect of those provisions, which create direct rights for individuals, which rights national courts must safeguard (paras 15-16). The Court of Justice further held that Article 9 of Regulation 17 did not deprive national courts of such jurisdiction (paras 17-20). As regards the significance for national courts of proceedings before the European Commission under Regulation 17, the Court of Justice assessed this from the perspective of legal certainty, as follows:

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<sup>8</sup> OJ 2006 L 269, p.1.

<sup>9</sup> See Article 1 of Regulation 1419/2006.

<sup>10</sup> See Article 2 of Regulation 1419/2006.

- a. **Paragraph 21** "... if the Commission initiates a procedure in application of Article 3 of Regulation 17 such a court may, if it considers it necessary for reasons of legal certainty, stay the proceedings before it while awaiting the outcome of the Commission's action".
- b. **Paragraph 22** "On the other hand, the national court should generally allow proceedings before it to continue when it decides either that the behaviour in dispute is clearly not capable of having any appreciable effect on competition or on trade between Member States, or that there is no doubt of the incompatibility of that behaviour with Article [102 TFEU]"

21. **Joined Cases 209 to 213/84 *Asjes*** In Joined Cases 209 to 213/84 *Asjes*, the Court of Justice considered whether a national court could apply Article 85 EEC to concerted tariff practices in relation to air transport services, as regards which no implementing rules were in place at the time, in circumstances where no decision had by taken pursuant to Articles 88 or 89 EEC regarding those practices. The Court of Justice held as follows:

- a. **Paragraph 55** "... the term 'authorities in Member States' in Article 88 refers to either the administrative authorities entrusted, in most Member States, with the task of applying domestic legislation on competition subject to the review of legality carried out by the competent courts, or else the courts to which, in other Member States, that task has been especially entrusted."
- b. **Paragraph 60** "The question therefore arises whether, in the absence of regulations or directives applicable to air transport adopted by the Council pursuant to Article 87, a national court which is not one of the authorities in the Member States referred to in Article 88 none the less has jurisdiction to rule, in proceedings like the main proceedings, that concerted tariff practices between airlines are contrary to Article 85 although no decision has been taken pursuant to Article 88 by the competent national authorities and no decision has been taken by the Commission pursuant to Article 89, in particular Article 89(2), regarding those concerted practices."
- c. **Paragraph 61** "It should be borne in mind that, as the Court held in [Case 13/61 *Bosch v Van Rijn*] "Articles 88 and 89 are, however,

not of such a nature as to ensure a complete and consistent application of Article 85 so that their mere existence would permit the assumption that Article 85 had been fully effective from the date of entry into force of the Treaty.”

- d. **Paragraph 62** “In fact Article 88 envisages a decision by the authorities of Member States on the admissibility of agreements, decisions and concerted practices only when these are submitted for their approval within the framework of laws relating to competition in their countries. Under Article 89 the Commission is empowered to record any infringement of Articles 85 and 86 but it does not have the power to declare Article 85(1) inapplicable within the meaning of Article 85(3).”
- e. **Paragraph 63** “In those circumstances the fact that an agreement, decision or concerted practice may fall within the ambit of Article 85 does not suffice for it to be immediately considered to be prohibited by Article 85(1) as consequently automatically void under Article 85(2).”
- f. **Paragraph 64** “Such a conclusion would be contrary to the general principle of legal certainty, which, as the Court held in [Case 13/61 *Bosch v Van Rijn*], is a rule of law that must be upheld in the application of the Treaty, since it would have the effect of prohibiting and rendering automatically void certain agreements, even before it is possible to ascertain whether Article 85 as a whole is applicable to those agreements.”
- g. **Paragraph 65** “However, it must be recognised that, as the Court stated in [Case 13/61 *Bosch v Van Rijn*], until the entry into force of a regulation or directive giving effect to articles 85 and 86 within the meaning of Article 87, agreements and decisions are prohibited under Article 85(1) and are automatically void under Article 85(2) only in so far as they have been held by the authorities of the Member States, pursuant to Article 88, to fall under Article 85(1) and not to qualify for exemption from the prohibition under Article 85(3) or in so far as the Commission has recorded an infringement pursuant to Article 89(2).”
- h. **Paragraph 68** “It must therefore be concluded that in the absence of a decision taken under Article 88 by the competent national

authorities ruling that a given concerted action on tariffs taken by airlines is prohibited by Article 85(1) and cannot be exempted from that prohibition pursuant to Article 85(3), or in the absence of a decision by the Commission under Article 89(2) recording that such a concerted practice constitutes an infringement of Article 85(1), a national court such as that which has referred these cases to the Court does not itself have jurisdiction to hold that the concerted action in question is compatible with Article 85(1)."

22. **Case 66/86 Ahmed Saeed** In Case 66/86 *Ahmed Saeed*, the Court of Justice, following *Asjes*, held (at paragraphs 20-21) that agreements to fix tariffs with respect to domestic air transport services and international air transport to and from non-EC States were not liable to be automatically void under Article 85(2) EEC because they remained subject to Article 88 and 89 EEC, no implementing rules for such services having at that stage been adopted under Article 85 EEC. The Court of Justice held that, by contrast, Article 86 EEC fully applied to such services without the need for implementing rules:

- a. **Paragraph 32** "... the sole justification for the continued application of the transitional rules set out in Articles 88 and 89 is that the agreements, decisions and concerted practices covered by Article 85(1) may qualify for exemption under Article 85(3) and that it is through the decisions taken by the institutions which have been given jurisdiction, under the implementing rules adopted pursuant to Article 87, to grant or refuse such exemption that competition policy develops. In contrast, no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty and it is for the competent national authorities or the Commission, as the case may be, to act on that prohibition within the limits of their powers."
- b. **Paragraph 33** "It must therefore be concluded that the prohibition laid down in Article 86 of the Treaty is fully applicable to the whole of the air transport sector."

23. **National authority in the United Kingdom** United Kingdom domestic law<sup>11</sup> entrusted the duty arising under Article 88 EC to the Secretary of

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<sup>11</sup> The EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996, SI 1996/2199; The EC Competition Law (Articles 84 and 85) Enforcement Regulations

State, acting with the former Director General of Fair Trading and the former Monopolies and Mergers Commission.

24. **English courts** In *La Gaitana Farms SA & Others v British Airways plc*,<sup>12</sup> the English Courts (Rose J at first instance, upheld by the Court of Appeal) concluded, in the context of a dispute between private parties, in relation to air transport services, in which damages are claimed for breach of EU/EEA competition rules, that national courts have no jurisdiction to apply such rules to such conduct taking place during the period covered by the transitional provisions unless and until either the national competition authority or the Commission had decided there had been an infringement of Article 85 EEC.

25. **Dutch courts** In a judgment dated 18 September 2019, in case *Stichting Cartel Compensation v KLM NV & Others*, involving a similar dispute to that in issue in *La Gaitana*, the Amsterdam District Court has provisionally concluded that it does have jurisdiction to apply Article 85 EEC to such conduct during the period covered by the transitional provisions. Given the different conclusion reached by the English Courts in *La Gaitana*, the Amsterdam District Court decided to seek a preliminary ruling from the CJEU under Article 267 TFEU. The question which the Amsterdam District Court referred has not yet been published in the Official Journal (although it appears to have been registered with the case number C-819/19). However, the referring court has seen a copy of a certified translation of the judgment of the Amsterdam District Court, according to which the question was as follows:

"In a dispute between injured parties (in this case the shippers, recipients of airfreight services) and airlines, does the national court have jurisdiction - either because of the direct effect of Article 101 TFEU, at least Article 53 EEA, or based on the immediate effect of Article 6 Regulation 1/2003 - to apply in full Article 101 TFEU, at least Article 53 of the EEA Agreement in respect of agreements/concerted practices on the part of the airlines in respect of airfreight services on flights operated before 1 May 2004 on routes between airports within the EU and airports outside the EEA, and before 19 May 2005 on routes between Iceland, Liechtenstein, Norway and airports outside the EEA, or on flights operated before 1 June 2002 between airports within the

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2001, SI 2001/2916; The EC Competition Law (Articles 84 and 85) Enforcement (Revocation) Regulations 2007, SI 2007/1846.

<sup>12</sup> [2017] EWHC 2420 (Ch) (Rose J) [2019] EWCA Civ 37 (Court of Appeal).

EU and Switzerland respectively, also in respect of the period during which the transitional regime laid down in Articles 104 and 105 TFEU applied, or is it precluded by the transitional regime?"

**26. Reference for a preliminary ruling** In the light of the above, the referring court has decided that it should make an order for a reference for a preliminary ruling under Article 267 TFEU. In particular:

- a. The issue which has been referred by the Amsterdam District Court in *Stichting*, as to whether national courts can apply Article 101 TFEU (and its predecessors) or Article 53 EEA to agreements in respect of periods during which the transitional regime applied, also needs to be decided for the referring court to give judgment in these proceedings. In the proceedings before the referring court, the question arises in the context of maritime transport rather than air transport.
- b. It is desirable that the parties to these proceedings, who may have different perspectives from those of the parties in *Stichting*, should have the chance to make submissions to the CJEU on that issue.
- c. It is possible that the relevant claim before the Amsterdam District Court could be settled by agreement between the parties and withdrawn before the CJEU has given its ruling. In that case, in absence of the present reference, the referring court would not have the benefit of the CJEU's answer to that question.
- d. An additional issue arises in these proceedings that does not arise in *Stichting*, namely whether Regulation 1/2003, as enacted, had the effect of establishing implementing rules for international maritime transport services between non-Community ports, or whether those services remained subject to the transitional regime.

27. It would be desirable if the reference from the referring court could be heard in conjunction with the reference from the Amsterdam District Court referred to above, as there will be a substantial overlap between the arguments and issues in relation to the period prior to 1 May 2004.

28. On this basis, this Court requests that the Court of Justice of the European Union provide an answer to the following questions under Article 267 TFEU:

"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/EC ports in the period prior to 1 May 2004 and the national court was not a relevant authority in a Member State for the purposes of Article 88 EEC/Article 84 EC?

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?"