In the name of the King

Judgment

DISTRICT COURT OF AMSTERDAM

Private Law Division

Judgment in the main action and the ancillary proceedings of 12 May 2021

In the matters with case numbers / cause list numbers:

C/13/639718 / HA ZA 17-1255
C/13/640200 / HA ZA 17-1345
C/13/645758 / HA ZA 18-325
C/13/651492 / HA ZA 18-738
C/13/649757 / HA ZA 18-617
C/13/656143 / HA ZA 18-1077
C/13/656293 / HA ZA 18-1097
C/13/656508 / HA ZA 18-1118
C/13/658179 /HA ZA 18-1231
C/13/659129/ HA ZA 18-1330
C/13/659995 / HA ZA 19-34
C/13/661078 / HA ZA 19-127
C/13/661079 / HA ZA 19-128
C/13/661080 / HA ZA 19-129
C/13/672474 / HA ZA 19-993

between

1. **RETAIL CARTEL DAMAGE CLAIMS S.A.**,
a legal entity incorporated under foreign law,
with its registered office in Luxembourg, Luxembourg,
Claimant in case C/13/639718 / HA ZA 17-1255,
Claimant in the ancillary proceedings pursuant to Article 843a of the Dutch Code of Civil Procedure ("**DCCP**") in case C/13/639718 / HA ZA 17-1255
hereinafter referred to as "**CDC**",
lawyers: J.A. Möhlmann and M.R. Fidder, practising in Utrecht,

2. **CHAPELTON B.V.**,
a private limited company,
with its registered office in Amsterdam, the Netherlands
Claimant in case C/13/640200 / HA ZA 17-1345,
hereinafter referred to as "**Chapelton**",
lawyers: M.H.J. van Maanen and J. de Jong, practising in The Hague,

3. **STICHTING TRUCKS CARTEL COMPENSATION**,
a foundation with its registered office in Schiphol, the Netherlands,
Claimant in cases C/13/645758 / HA ZA 18-325, C/13/651492 / HA ZA 18-738 and C/13/659995 / HA ZA 19-34,
hereinafter referred to as "**STCC**",
lawyers: J. van den Brande and J.T. Verheij, practising in Rotterdam,

4. **KONING & DRENTH B.V.**,
a private limited company,
with its registered office in Beerta, the Netherlands,

5. **JVB TRANSPORT B.V.**,
a private limited company,
with its registered office in Bosschenhoofd, the Netherlands,

6. **HILVERSUMSE VERHUISSERVICE**,
a general partnership,
with its registered office in Hilversum, the Netherlands,

7. **NOOTEBOOM TRANSPORT B.V**.,
a private limited company,
with its registered office in Maasland, the Netherlands,

8. **AUTOMOBIELBEDRIJF VIANEN B.V.**,
a private limited company,
with its registered office in Vianen, the Netherlands,

9. **TRANSPORTBEDRIJF BLOTENBURG B.V.**,
a private limited company,
with its registered office in Lunteren, the Netherlands,

10. **JAN WILLEM TIMMERMANS HANDEL EN TRANSPORT**,
a sole trader,
with its registered office in Veen, the Netherlands,
Claimants in case C/13/649757 / HA ZA 18-617,
hereinafter jointly referred to as "**Koning & Drenth**",
lawyer: A.L. Appelman, practising in Zwolle, the Netherlands,

11. **STEF S.A.**
a legal entity incorporated under foreign law,
with its registered office in Paris, France,
along with 91 other legal entities,
Claimants in case C/13/656143 / HA ZA 18-1077,

hereinafter jointly referred to as "**STEF**",
lawyers E.J. Zippro and R. Meijer, practising in Amsterdam,

12. **BALTRANS ÁRUFUVAROZÁSI KFT**,
a legal entity incorporated under foreign law,
with its registered office in Százhalombatta, Hungary,
13. **ROGER AMSTUTZ TRANSPORTS SA**,
a legal entity incorporated under foreign law,
with its registered office in La Tène, Switzerland,
Claimants in case C/13/656293 / HA ZA 18-1097,
hereinafter jointly referred to as "**Baltrans**",
lawyers E.J. Zippro and R. Meijer, practising in Amsterdam,

14. **KLACSKA ÁSVÁNYOLAJTERMÉK SZÁLLÍTÁSI KFT.**,
a legal entity incorporated under foreign law,
with its registered office in Budapest, Hungary,
Claimant in case C/13/656508 / HA ZA 18-1118,
hereinafter jointly referred to as "**Klacska**",
lawyers E.J. Zippro and R. Meijer, practising in Amsterdam,

15. **VIA LOCATION SAS,**
a legal entity incorporated under foreign law,
with its registered office in Courbevoie, France,
16. **VL FINANCES SAS,**
a legal entity incorporated under foreign law,
with its registered office in Paris, France,
17. **VIA TRUCK LEASE BENELUX SA**,
a legal entity incorporated under foreign law,
with its registered office in Woluwe-Saint-Lamert, Belgium,
18. **LOCATION TRANSPORTS BRIOCHINS SAS**,
a legal entity incorporated under foreign law,
with its registered office in Paris, France,
Claimants in case C/13/658179 / HA ZA 18-1231,
hereinafter jointly referred to as "**Via Location**",
lawyers M.J. van Joolingen and M.W.J. Jongmans, practising in ‘s-Hertogenbosch,

19. **CARTEL DES CAMIONS B.V.**,
a private limited company,
with its registered office in Amsterdam, the Netherlands,
Claimant in case C/13/659129 / HA ZA 18-1330,
hereinafter referred to as "**Cartel des Camions**",
lawyers E.J. Zippro and R. Meijer, practising in Amsterdam,

20. **EB TRANS SA**,
a legal entity incorporated under foreign law,
with its registered office in Luxembourg, Luxembourg,
Claimant in case C/13/661078 / HA ZA 19-127,
hereinafter referred to as "**EB Trans**",
lawyers E.J. Zippro and R. Meijer, practising in Amsterdam,

21. **NLTRUCKKARTEL B.V.**,
a private limited company,
with its registered office in Amsterdam, the Netherlands,
Claimant in case C/13/661079 / HA ZA 19-128,
hereinafter referred to as "**NLTruckkartel**",
lawyers E.J. Zippro and R. Meijer, practising in Amsterdam,

22. **CARLSBERG DEUTSCHLAND GMBH**,
a legal entity incorporated under foreign law
with its registered office in Hamburg, Germany,
23. **CARLSBERG DEUTSCHLAND LOGISTIK GMBH**,
a legal entity incorporated under foreign law,
with its registered office in Hamburg, Germany,
Claimants in case C/13/661080 / HA ZA 19-129,
hereinafter jointly referred to as "**Carlsberg**",
lawyers E.J. Zippro and R. Meijer, practising in Amsterdam.

24. **STICHTING ANTITRUST ACTION TRUCK CARTEL**,
a foundation with its registered office in Utrecht, the Netherlands,
hereinafter referred to as "**SAATC**",
Claimant in case C/13/672474 / HA ZA 19-993,
lawyers: K. Rutten and X.D. van Leeuwen, practising in Utrecht,

versus

1. **DAF TRUCKS N.V.**,
a public limited company,
with its registered office in Eindhoven, the Netherlands,
2. **DAF TRUCKS DEUTSCHLAND GMBH**,
a legal entity incorporated under foreign law
with its registered office in Frechen, Germany,
3. **PACCAR INC.,**
a legal entity incorporated under foreign law,
with its registered office in Bellevue (Washington), United States of America,
Defendants,

hereinafter jointly referred to as "**DAF**",

lawyers: M.V.E.E. de Monchy and J.K. de Pree, practising in Amsterdam,

4. **MAN SE**,
a legal entity incorporated under foreign law
with its registered office in Munich, Germany,
5. **MAN Truck & Bus SE**, formerly known as **MAN TRUCK & BUS AG**,
a legal entity incorporated under foreign law
with its registered office in Munich, Germany,
6. **MAN TRUCK & BUS DEUTSCHLAND GMBH**,
a legal entity incorporated under foreign law,
with its registered office in Munich, Germany,
Defendants,
hereinafter jointly referred to as "**MAN**",
lawyer: J.S. Kortmann, practising in Amsterdam,

7. **AB VOLVO**,
a legal entity incorporated under foreign law,
with its registered office in Gothenburg, Sweden,
8. **VOLVO LASTVAGNAR AB**,
a legal entity incorporated under foreign law
with its registered office in Gothenburg, Sweden,
9. **RENAULT TRUCKS SAS**,
a legal entity incorporated under foreign law
with its registered office in Saint-Priest, France,
10. **VOLVO GROUP TRUCKS CENTRAL EUROPE GMBH**,
a legal entity incorporated under foreign law,
with its registered office in Ismaning, Germany,
Defendants,
hereinafter jointly referred to as "**Volvo/Renault**"
lawyers: A. Knigge and H.M. Cornelissen, practising in Amsterdam,

11. **CNH INDUSTRIAL N.V.**,
a public limited company,
with its registered office in Amsterdam, the Netherlands,
12. **STELLANTIS B.V.**, formerly known as **FIAT CHRYSLER AUTOMOBILES N.V.**,
a public limited company,
with its registered office in Amsterdam, the Netherlands,
13. **IVECO S.P.A.**,
a legal entity incorporated under foreign law,
with its registered office in Turin, Italy,
14. **IVECO MAGIRUS AG**,

a legal entity incorporated under foreign law,
with its registered office in Ulm, Germany,
Defendants,
and Respondents in the ancillary proceedings under case number C/13/639718 / HA ZA 17-1255 raised by CDC pursuant to Article 843a DCCP,
hereinafter jointly referred to as "**CHN/Iveco**",
lawyers: J.H. Lemstra and M.N. van Dam, practising in Amsterdam,

15. **DAIMLER AG**,
a legal entity incorporated under foreign law,
with its registered office in Stuttgart, Germany,
Defendant,
and Respondent in the ancillary proceedings under case number C/13/639718 / HA ZA 17-1255 raised by CDC pursuant to Article 843a DCCP,
hereinafter referred to as "**Daimler**",
lawyers: W. Heemskerk and E.H. Pijnacker Hordijk, practising in The Hague,

and

1. **SCANIA AB**,
a legal entity incorporated under foreign law,
with its registered office in Södertälje, Sweden,
2. **SCANIA CV AB**,
a legal entity incorporated under foreign law,
with its registered office in Södertälje, Sweden,
3. **SCANIA DEUTSCHLAND GMBH**,
a legal entity incorporated under foreign law
with its registered office in Koblenz , Germany,
hereinafter jointly referred to as "**Scania**",
Joined parties,
lawyer: C.E. Schillemans, practising in Amsterdam,

The aforementioned Defendants are not all parties to each individual case.

The Claimants are hereinafter collectively referred to as the Claimants. The Defendants are hereinafter collectively referred to as the Truck Manufacturers.

1. The Proceedings

1.1. In the interlocutory judgment of 15 May 2019 (ECLI:NL:RBAMS:2019:3574; hereinafter referred to as the “Duty of Assertion Judgment”), this Court ordered the Claimants to supplement their assertions and to substantiate them in more detail (with documents) where possible. In short, this means that sufficient facts have to be asserted to be able to assess per owner, rental agency, lessee or user of truck(s) whether they suffered damage as a result of the Cartel during the Cartel period or the lag period, so that the plausibility of the possibility of damage can be determined.

1.2. In the case C/13/672474 / HA ZA 19-993, SAATC brought a case against the Truck Manufacturers by way of a summons of 13 June 2019. SAATC asserts in the summons that in its Decision the Commission found that the cartel participants, including the Truck Manufacturers, intentionally violated the cartel prohibition of Article 101 TFEU during the period from 17 January 1997 to 18 January 2011. SAATC seeks a declaratory judgment that the Truck Manufacturers acted in violation of Article 101 TFEU by forming and participating in the cartel, acted unlawfully towards each of the claimant customers, represented by SAATC, and are jointly and severally liable for the damages of these customers, with a joint and several order for the Truck Manufacturers to pay damages, to be assessed in follow-up proceedings. This case is joined to the cases already pending.

Following the summons, SAATC submitted a further writ of summons submitting exhibits, also containing an additional offer of proof and also containing an increase of claim.

1.3. The other Claimants supplemented their assertions after the Duty of Assertion Judgment and substantiated them with documents as follows.

1.3.1. In the case C/13/639718 / HA ZA 17-1255 (CDC):
- CDC's deed of deposit of 2 July 2019 with deed number 13/2019,
- the motion for an increase of the claim and submitting exhibits of 3 July 2019,
- CDC's deed of deposit of 17 September 2019 with deed number 17/2019,
- the motion for an increase and decrease of the claim and submitting exhibits of 18 September 2019,
- CDC's document supplementing the assertions and containing exhibits of 18 September 2019.

1.3.2. In the case C/13/640200 / HA ZA 17-1345 (Chapelton):
- the document submitting exhibits also containing an increase of claim of 10 July 2019,
- the document submitting data and an increase of claim of 18 September 2019.

1.3.3. In the case C/13/645758 / HA ZA 18-325 (STCC I):
- STCC's motion following the interlocutory judgment of 18 September 2019.

1.3.4. In case C/13/651492 / HA ZA 18-738 (STCC II):
- STCC's motion following the interlocutory judgment of 18 September 2019.

1.3.5. In case C/13/659995 / HA ZA 19-34 (STCC III):
- STCC's motion following the interlocutory judgment of 18 September 2019.

1.3.6. In the case C/13/649757 / HA ZA 18-617 (Koning & Drenth):
- Koning & Drenth's motion following the interlocutory judgment of 18 September 2019.

1.3.7. In the case C/13/656143 / HA ZA 18-1077 (STEF):
- Document supplementing assertions under Article 22 of the Dutch Code of Civil Procedure ("DCCP") by STEF of 18 September 2019.

1.3.8. In the case C/13/656293 / HA ZA 18-1097 (Baltrans):
- Document supplementing assertions under Article 22 DCCP by Baltrans of 18 September 2019.

1.3.9. In the case C/13/656508 / HA ZA 18-1118 (Klacska):
- Document supplementing assertions under Article 22 DCCP by Klacska of 18 September 2019.

1.3.10. In case C/13/658179 / HA ZA 18-1231 (Via Location):
- Document supplementing assertions under Article 22 DCCP by Via Location of 18 September 2019.

1.3.11. In the case C/13/659129 / HA ZA 18-1330 (Cartel des Camions):
- Document supplementing assertions under Article 22 DCCP by Cartel des Camions of 18 September 2019.

1.3.12. In the case C/13/661078 / HA ZA 19-127 (EB Trans):
- Document supplementing assertions under Article 22 DCCP by EB Trans of 18 September 2019.

1.3.13. In the case C/13/661079 / HA ZA 19-128 (NL Truckkartel):
- Document supplementing assertions under Article 22 DCCP by NL Truckkartel of 18 September 2019.

1.3.14. In the case C/13/661080 / HA ZA 19-129 (Carlsberg):
- Document supplementing assertions under Article 22 DCCP by NLTruckkartel dated 18 September 2019.

1.4. After filing a motion for joinder under article 214 DCCP of 18 September 2019, Scania joined the side of the Truck Manufacturers in all cases (with the exception of Case C/13/672474 / HA ZA 19-993 (SAATC)).

1.5. After consulting with the parties, the cause list judge ruled in an order of 30 October 2019 that the Truck Manufacturers should file their statement of defence on 1 July 2020.

1.6. In an order of April 15, 2020, the cause list judge, having heard the parties, denied CDC's request for an increase of the claim in a motion of 18 March 2020. The court did allow some additional information attached to this motion (the "end of use documentation") to be brought into the proceedings.

1.7. On 1 July 2020, the Truck Manufacturers submitted the following (substantially similar) statements of defence in all cases:

- DAF's Statement of Defence, also containing a motion contesting jurisdiction, or at least a motion for a stay of proceedings due to *lis pendens* and connexity, and containing a motion to join as a third party,

- CNH/Iveco's Statement of Defence, also containing a motion contesting jurisdiction, or at least a motion for a stay of proceedings due to *lis pendens* and connexity, and containing a motion to join as a third party,

- Daimler's Statement of Defence, also containing a Defence to the interlocutory application under Article 843a DCCP, and a motion contesting jurisdiction, or at least a motion for a stay of proceedings due to *lis pendens* and connexity, and containing a motion to join as a third party,

- MAN's Statement of Defence, also containing a motion for a stay of proceedings due to *lis pendens* and connexity, and containing a motion to join as a third party

- Volvo/Renault's Statement of Defence, also containing a motion contesting jurisdiction, or at least a motion for a stay of proceedings due to *lis pendens* and connexity, and containing a motion to join as a third party,

- Scania's Statement of Defence (not in the case C/13/672474 / HA ZA 19¬993 (SAATC)).

1.8. Prior to the hearing on 24, 25 and 26 November 2020, the parties submitted the following further documents:

on behalf of the Claimants:
- CDC's deed of deposit of 26 October 2020 with deed number 38/2020,
- CDC's deed of deposit of 28 October 2020 with deed number 39/2020,
- CDC's motion submitting exhibits for the hearing, received by this Court on 28 October 2020,
- Chapelton's motion submitting exhibits for the hearing, also containing an interlocutory application under Article 843a DCCP, received by this Court on 26 October 2020,
- STCC's motion submitting exhibits for the hearing, also containing an interlocutory application under Article 843a DCCP, received by this Court on 29 October 2020,
- STEF's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- Baltrans's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- Klacska's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- Via Location's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- Cartel des Camions' motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- EB Trans's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- NL Truckkartel's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- Carlsberg's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- SAATC's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- SAATC's motion containing an interlocutory application under Article 843a DCCP,
on behalf of the Truck Manufacturers:
- Daimler's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- DAF's motion submitting exhibits for the hearing, received by this Court on 26 October 2020,
- MAN's motion submitting exhibits for the hearing, received by this Court on 27 October 2020,
- Scania's motion submitting exhibits for the hearing, received by this Court on 27 October 2020,
- Volvo/Renault's motion submitting exhibits for the hearing, received by this Court on 27 October 2020,
- CNH/Iveco's motion submitting exhibits for the hearing, received by this Court on 27 October 2020.

1.9. An official report of the hearing on 24, 25 and 26 November 2020 was drawn up, which, together with the documents referred to therein, including the written arguments, forms part of the procedural documents.

1.9.1. Finally, a date was scheduled for judgment in all cases.

1.9.2. Then, on 31 March 2021, a motion containing an exhibit was received from CHN/Iveco in all cases in which it was a defendant. CNH/Iveco announced that the name of Fiat Chrysler Automobiles N.V. according to its Articles of Association had been changed to Stellantis N.V. as a result of a merger. This Court will henceforth in principle proceed on the basis of the amended name according to the Articles of Association, albeit that it will continue to use the name CNH/Iveco in what follows.

1.9.3. On 14 April 2021, this Court received a motion containing an exhibit from MAN in all cases in which it is a defendant. MAN informed the court that the legal form of MAN Truck & Bus AG had been converted from a German Aktiengesellschaft to a European company in line with Regulation (EC) No. 2157/2001 (an "SE"). MAN Truck & Bus AG is therefore now called MAN Truck & Bus SE. This

Court will henceforth proceed on the basis of the amended legal form and name, albeit that it will continue to use the name MAN in what follows.

1.9.4. For the record, this Court notes that the header of the official report of the hearing of 24, 25 and 26 November 2020 did not mention Scania as one of the parties to the proceedings. As is evident from the proceedings, Scania was already a joined party in all cases at that time (except in case C/13/672474 / HA ZA 19-993 (SAATC)).

2. The facts

2.1. The Duty of Assertion Judgment of 15 May 2019 already contained some facts that were relevant to that judgment. The following facts are also relevant to the present assessment.

2.2. DAF, MAN, Volvo/Renault, CNH/Iveco, Daimler and Scania manufacture trucks for the European market.

2.3. On 20 September 2010, MAN approached the European Commission (the "Commission"), informing it of the existence of a cartel in the truck industry and requesting immunity by invoking Article 14 of the Commission's Leniency Notice. On 17 December 2010, the Commission conditionally exempted MAN from fines.

2.4. Between 18 and 21 January 2011, the Commission conducted investigations at the Truck Manufacturers' business locations and elsewhere. In response, Volvo/Renault, Daimler and CNH/Iveco also submitted applications for immunity.

2.5. On 20 November 2014, the Commission initiated proceedings under Article 11(6) of Regulation (EC) 1/2003 against the Truck Manufacturers based on a Statement of Objections prepared by the Commission, which was then disclosed to the Truck Manufacturers. Thereafter, the Truck Manufacturers were granted full access to the Commission's file.

2.6. All Truck Manufacturers, with the exception of Scania, then contacted the Commission to request that the case be continued under what is known as the Settlement Procedure of Article 10a of Regulation (EC) No. 773/2004 (the "Settlement Procedure"). The Commission agreed, after which settlement negotiations were initiated between the individual manufacturers on the one hand and the Commission on the other hand, during which the manufacturers were able to put forward their views on the Statement of Objections.

2.7. Scania did not submit a request for settlement. The Commission initiated proceedings against Scania under Articles 7 and 23(2) of Regulation (EC) No. 773/2004.

2.8. By decision of 19 July 2016 (the "Decision")[1], the Commission applied the mitigations provided for in the Settlement Notice and imposed fines of up to more than EUR 1 billion on Daimler, CNH/Iveco, Volvo/Renault and DAF for participating in a cartel in the market for medium and heavy trucks (the "Infringement", the "Truck Cartel" or the "Cartel") in the European Economic Area ("EEA") between 17 January 1997 and 18 January 2011 (the "Infringement Period" or the "Cartel Period"). MAN was found, put briefly, to have participated in the Cartel between 17 January 1997 and 20 September 2010. No fine was imposed on MAN.

[1] 39824_8750_4.pdf (europa.eu)

2.9. In addition to an introduction, the Decision comprises a total of 7 chapters, divided into a total of 136 individually numbered recitals. The introduction reads as follows:

(1) This Decision relates to a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and Article 53 of the Agreement on the European Economic Area ("EEA Agreement").

(2) The infringement consisted of collusive arrangements on pricing and gross price increases in the EEA for medium and heavy trucks; and the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards. The infringement covered the entire EEA and lasted from 17 January 1997 until 18 January 2011.

(3) The facts as outlined in this Decision have been accepted by MAN, Daimler, Iveco, Volvo and DAF (the "Addressees") in the settlement proceedings.

(...)

Chapter 1 of the Decision provides a description of the truck market. It begins at 5 with a description of the products concerned:

(5) The products concerned by the infringement are trucks weighing between 6 and 16 tonnes ("medium trucks") and trucks weighing more than 16 tonnes ("heavy trucks") both as rigid trucks as well as tractor trucks (hereinafter, medium and heavy trucks are referred to collectively as "Trucks"). The case does not concern aftersales, other services and warranties for trucks, the sale of used trucks or any other goods or services sold by the addressees of this Decision.

Chapter 2 sets out the procedure that was followed. The practices of the Addressees are described in Chapter 3 (under nos. 46-63) of the Decision. In essence, all of the Addressees are alleged to have exchanged gross price lists, while some also exchanged computerised truck configurators. In the Commission's view, this constituted an exchange of commercially sensitive information. Not only did discussions take place on gross pricing, but also on the introduction of new technologies. This was coordinated (no. 50). This exchange took place at headquarters level between managers, not only in face-to-face meetings but also by telephone and email.

Chapter 4 of the Decision contains the Commission's legal assessment of the Addressees' actual practices.

Chapter 5 establishes the duration of the Cartel Period and Chapter 6 of the Decision assesses the Addressees' liability. Finally, Chapter 7 deals with the measures to be taken. At the end of the Decision, the `operative part' contains the final decision of the Commission. It states as follows:

Article 1

By colluding on pricing and gross price increases in the EEA for medium and heavy trucks; and the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards, the following undertakings infringed Article 101 TFEU and Article 53 of the EEA Agreement during the periods indicated:

(a) MAN SE, from 17 January 1997 until 20 September 2010; MAN Truck & Bus AG, from 17 January 1997 until 20 September 2010; MAN Truck & Bus Deutschland GmbH, from 3 May 2004 until 20 September 2010

(b) AB Volvo (publ), from 17 January 1997 until 18 January 2011; Volvo Lastvagnar AB, from 17 January 1997 until 18 January 2011; Volvo Group Trucks Central Europe GmbH, from 20 January 2004 until 18 January 2011; Renault Trucks SAS, from 17 January 1997 until 18 January 2011

(c) Daimler AG, from January 17, 1997 to January 18, 2011

(d) Fiat Chrysler Automobiles N.V., from January 17, 1997 until December 31, 2010; CNH Industrial N.V., from January 1, 2011 until January 18, 2011; Iveco S.p.A., from -17 January 1997 until January 18, 2011; Iveco Magirus AG, from June 26, 2001 until January 18, 2011

(e) PACCAR Inc., from January 17, 1997 until January 18, 2011; DAF Trucks N.V., from 17 January 1997 until 18 January 2011; DAF Trucks Deutschland GmbH, from January 20, 2004 until January 18, 2011

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

(a) EUR 0 jointly and severally on MAN SE, MAN Truck & Bus AG and MAN Truck & Bus Deutschland GmbH

(b) EUR 670 448 000 jointly and severally on AB Volvo (publ), Volvo Lastvagnar AB and Renault Trucks SAS of which, Volvo Group Trucks Central Europe GmbH is held jointly and severally responsible for the amount of EUR 468 855 017.

(c) EUR 1 008 766 000 on Daimler AG.

(d) EUR 494 606 000 on Iveco S.p.A., of which:

(1) Fiat Chrysler Automobiles N.V. is held jointly and severally responsible for the amount of EUR 156 746 105,

(2) Fiat Chrysler Automobiles N.V. and Iveco Magirus AG are held jointly and severally responsible for the amount of EUR 336 119 346 and

(3) CNH Industrial N.V. and Iveco Magirus AG are held jointly and severally responsible for the amount of EUR 1 740 549.

(e) EUR 752 679 000 jointly and severally on PACCAR Inc. and DAF Trucks N.V. of which DAF Trucks Deutschland GmbH is held jointly and severally responsible for the amount of EUR 376 118 773.

2.10. By decision of 27 September 2017, the European Commission found that Scania had infringed the prohibition of Article 101 TFEU in the EEA in respect of medium and heavy trucks during the period 1997-2011 (the “Scania Decision”). Scania has lodged an appeal against the Scania Decision with the Court of First Instance of the European Union. The appeal proceedings are still pending (Case T-799/17 (Scania and Others v. Commission)). On 30 June 2020, the Commission published the provisional and non-confidential version of its decision regarding Scania.[2]

[2] 39824_8754_5.pdf (europa.eu)

3. The further assessment

What this Court needs to assess in this judgment

3.1. The documents submitted by the Claimants after the Duty of Assertion Judgment show, *inter alia*, that, according to the Claimants, the proceedings at issue in this judgment relate to more than 200,000 trucks where damage was sustained as a result of the Infringement. In response, the Truck Manufacturers submitted a full Statement of Defence on the merits. In addition, three Claimants (Chapelton, STCC and SAATC) each submitted a motion under article 843a DCCP.

3.2. With a view to the step-by-step approach to the cases, this Court then decided that the hearing in November 2020 would be confined to a limited number of issues. They were the following:
1. the question of the scope of the Decision (Chapter 4 of the Truck Manufacturers' Statement of Defence),
2. the Truck Manufacturers' defence that the Claimants did not suffer any damage as a result of the Infringement (Chapter 6 of the Truck Manufacturers' Statement of Defence),
3. the question of the stage of the proceedings at which the interlocutory applications under article 843a DCCP will be decided.
The first two questions are addressed in this judgment. A separate judgment will be handed down at a later stage to decide on the interlocutory applications under Article 843a DCCP.

3.3. At the hearing (on 26 November 2020), the merits of CDC's claim under article 843a DCCP were also discussed. A date was also scheduled for the ruling on that application. A separate judgment will be handed down at a later stage to decide on the interlocutory application.

The scope of the Decision

3.4. In the Duty of Assertion Judgment, this Court already held that the dispute in all cases concerns follow-on proceedings relating to the alleged damage suffered by the customers and users of medium and heavy trucks as a result of the Truck Cartel whose existence was established by the European Commission. This also applies to the SAATC case that was added subsequently. It is common ground that these are proceedings concerning follow-on claims for damages .

The parties' assertions

3.5. In all cases, the basis of Claimants' claim is unlawful conduct by the Truck Manufacturers. According to Claimants, that unlawful conduct consists of the Infringement established by the Commission in its Decision and laid down in the operative part: "(...) colluding on pricing and gross price increases in the EEA for medium and heavy trucks; and the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards (...)."

3.6. The Truck Manufacturers argue that the scope of the Decision is limited. In their Statement of Defence, they argue that the infringement at the heart of the Decision is essentially information exchange. The Commission did not establish that the Addressees of the Decision (the Truck Manufacturers minus Scania) had engaged in price fixing. Thus, according to the Truck Manufacturers, there was also no question of a classic price and/or market sharing cartel. The Claimants' assumption that the possible harmful effects of an information exchange correspond to those of a price or market sharing agreement is fundamentally flawed, according to the Truck Manufacturers.

3.6.1. While it is true that the Commission included in the Decision at para. 51 that the Addressees also occasionally engaged in other types of practices, such as agreements regarding increases in gross list prices, the exchange of commercially sensitive information was at the heart of the Infringement. Information exchange can lead to damage if it enables competitors to achieve a coordinated result leading to higher prices. However, the Commission did not identify any coordinated effects in the Decision.

3.6.2. The Truck Manufacturers argue that only the operative part and the recitals from the body of the Decision that constitute the essential basis for the operative part have binding legal effect. This cannot be ignored by the civil courts. Moreover, the Commission did not establish effects in any market. Therefore, the Claimants cannot rely on the Decision as evidence of the damage suffered by them or the Underlying Parties.

3.6.3. The Commission emphasises that the information exchange mainly concerned changes in gross list prices and the timing and passing on of costs for implementing the European emission standards EURO III to VI. According to the Truck Manufacturers, the Commission recognised that the information on gross list prices referred to certain truck models and some available options. The information that was exchanged on gross list prices did not enable the Addressees to find out their competitors' transaction prices. Exchange of the gross list prices did not lead to agreement on or implementation of a common (pricing) policy by the Addressees. Nor did the Commission find that the information exchanged was actually used to estimate the selling prices of competitors. With respect to the exchange of truck configurators, the Commission did not find that any Truck Manufacturer had access to the configurators of more than one competitor. Nor did the Commission establish that the Addressees all had access to a competitor's configurator that contained gross list price information. The Commission did find that some configurators did not contain any price information at all.

The Commission also indicated in para. 51 of the Decision that the Addressees occasionally agreed on increases to their gross prices in the period from 1997 to the end of 2004. But this was incidental, as the Commission itself points out. The Commission did not specify this in more detail and did not find that such agreements were actually implemented.

3.6.4. Furthermore, according to the Commission, there were incidental contacts that went further than just (prohibited) exchanges of information about gross prices in the period from 1997 to the end of 2004. The Truck Manufacturers refer to para. 52 of the Decision. Even what is described there has to be interpreted as an ‘arrangement’ on the implementation of EURO III, the facts show that the Addressees never implemented it. With regard to EURO IV and V, the Commission stated that the Addressees discussed the timing and additional costs, but the Decision does not mention any actual agreements on the pricing of EURO IV and V. EURO VI is mentioned in the operative part, but the Decision does not establish any specific prohibited practices in this regard. What the Commission says about those agreements in para. 53 of the Decision is explicitly geographically limited to France. Besides, the Commission did not identify any arrangements on pricing in the operative part in connection with the introduction of the euro. Nor was it established that the Truck Manufacturers implemented this alleged agreement or that it had any effect.

3.6.5. Finally, in para. 61 of the Decision, the Commission stated that prices for some countries were occasionally discussed, which would qualify as net prices. However, this was not detailed: the exchanges of information were incidental, limited in time and geographically restricted. Discussing

prices is not the same as making arrangements on pricing, let alone reciprocally implementing those arrangements.

The Truck Manufacturers conclude that in the Decision the Commission did not establish that any prices and/or policies were actually aligned on the basis of any exchanged information or that the information exchange otherwise had an effect on the markets for medium and heavy trucks in the EEA, far less did it examine such effects.

3.7. The Claimants submit the following defence against this.

3.7.1. On the basis of the Decision, the (continuous) unlawful act of the Addressees is established. The Commission established the existence of a cartel, of a single and continuous infringement, and of intentional exchanges of information, agreements and concerted practices with an anti-competitive objective. A proper understanding of how exactly the Cartel led to damage requires an insight into its modus operandi; for example, exactly what agreements were made and how they were implemented. The Decision, however, is a settlement that was reached between the Commission and MAN, Daimler, Volvo/Renault, DAF and CNH/Iveco (the `settling parties') following negotiations on, *inter alia*, the content of the Decision. The Decision therefore only provides limited insight into the precise modus operandi of the Cartel. The Claimants argue that the Truck Manufacturers are hiding behind the perfunctory text of the (operative part of the) Decision with their defence that the Cartel did not cause damages.

3.7.2. Meanwhile, new information has become available to the Claimants. They rely on the following documents:
- the provisional non-confidential version of the Scania Decision (submitted by all Claimants except Koning & Drenth);
- the public version of the report for the hearing regarding Scania's appeal against the Scania Decision before the Court of First Instance (the "Scania Hearing Report", submitted by all Claimants except CDC and Koning & Drenth);
- the Amended Particulars of Claim (non-confidential version) in the case *of Ryder Ltd. and Hill Ltd. v MAN SE* and other truck manufacturers before the English Competition Appeal Tribunal, case 1291/5/7/18(T) (the “Ryder Trial Document”). This document was submitted by CDC.

3.7.3. The Claimants argue that the Scania Decision is much more extensive and detailed than the Decision. The Scania Decision and the Decision both ensue from the same Statement of Objections. They therefore relate to the same practices, which the Scania Decision sheds more light on. The Ryder Trial Document contains important details about the cartel's modus operandi that cannot be found in either the Decision or the Scania Decision. The Scania Decision shows that the Cartel went beyond an exchange of information on gross list prices and price increases. Information was exchanged on many more subjects. In the Scania Decision, the Commission found that there was also an exchange of information on net prices. The Scania Decision and the Ryder Trial Document also show that price agreements and other arrangements were made. They also show that agreements were made and implemented for the EURO IV and V standards. The same applies to the EURO VI standard. Based on the new information, the Claimants conclude that there was a hardcore price fixing cartel, aimed at price fixing.

3.7.4. The Claimants point out that the Decision was reached through the settlement procedure. The text of the Decision was the result of a careful negotiation process between the Commission and the Truck Manufacturers. The Truck Manufacturers did not contest the factual findings in the Decision. On the contrary, the Decision explicitly mentions in para. 3 that the factual findings were

acknowledged by the Truck Manufacturers. The Truck Manufacturers cannot now dispute those facts; they should have done so in the proceedings that led to the settlement. The Claimants refer to the decision of the Competition Appeal Tribunal (CAT) of 4 March 2020 (*Royal Mail Group Ltd and Others v DAF Trucks Ltd and Others*, [2020] CAT 7), in which the CAT ruled, briefly put, that the Truck Manufacturers were bound by their acknowledgment of the facts in the settlement procedure, as set out in para. 3 of the Decision. This decision of the CAT has since been upheld by the Court of Appeal in a decision of 11 November 2020 ([2020] EWZA Civ 1475).

3.8. The Truck Manufacturers, in turn, argue that the Decision should be taken as the starting point when assessing the civil damage claims. This Court is bound by the findings in the Decision (or in its operative part). In these cases, this Court can assume no more and no less than what follows from the Decision. This follows, *inter alia*, from the judgment of the Court of First Instance of the European Union in the case of *Martinair Holland v Commission*[3]:

> (…)
>
> 34. In accordance with Article 16(1) of Regulation No 1/2003, when national courts rule on agreements, decisions or practices under Article 101 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to that decision.
>
> 35. In that respect, it must be considered, contrary to the Commission's assertions at the hearing, that a national court would take a decision contrary to that adopted by the Commission not only if it gave a different legal classification to the anticompetitive conduct examined, but also if its decision differed from that of the Commission as regards the temporal or geographic scope of the conduct examined or as regards the liability or non-liability of persons investigated in relation to the conduct at issue and whose liability was examined in the Commission's decision..
>
> 36. The national courts are therefore bound by the decision adopted by the Commission, provided that it has not been annulled or invalidated, and consequently the meaning of the operative part of that decision must be unambiguous.
>
> (…)

3.8.1. In addition, there are certain passages in the Decision that the Truck Manufacturers do not subscribe to, and they even claim that there are "assertions" with which they disagree. Nor is the Decision the result of months of negotiations, as the Claimants claim. The wording of the Decision was not a matter of discussion. The Truck Manufacturers also disagree with certain statements in the Scania Decision. That Decision is not yet final, so the findings of the Scania Decision cannot be argued against the Truck Manufacturers. The Ryder Trial Document contains only the assertions made by one party in English proceedings. The Truck Manufacturers can (and will) still put forward a defence against it, so no evidentiary value can be attached to that document in these proceedings.

3.8.2. According to the Truck Manufacturers, the Infringement set out in the Decision cannot have resulted in damage. They are of the opinion that the Claimants are trying to construct an infringement that is of a completely different nature than what was established by the Commission. The Infringement consisted essentially of the exchange of information on gross list prices. The Decision deliberately contains no indications that this Infringement actually impacted on transaction

[3] EU General Court, 16-12-2015, T-67/11, ECLI:EU:T:2015:984.

prices and resulted in damage. Nor did the Commission investigate this. It treated the exchange of future prices in itself as an infringement of the competition rules, without considering whether they actually impacted on competition or prices. Contrary to Claimants' assertion, there was no question of price fixing. Nor did the Commission establish this, according to the Truck Manufacturers.

This Court's assessment

3.9. The decision of the Commission is a settlement decision according to the procedure under Article 10a of Commission Regulation (EC) No. 773/2004 of 7 April 2004, relating to the conduct of procedures by the Commission pursuant to Articles 81 and 82 of the EC Treaty. The rules that apply to settlement procedures are laid down in the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases. The result of the settlement procedure was that the Commission adopted the Decision based on Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (the "Cartel Regulation"). As part of the settlement procedure, the Truck Manufacturers (with the exception of Scania, as it did not wish to settle) acquiesced in the Commission's conclusions.

3.10. This Court does not follow the Truck Manufacturers in their argument that there were no negotiations with the Commission about the substance of the Decision and that it was merely a matter of "signing on the dotted line". The aforementioned Commission Notice prescribes the following:

> (…)
> 23. Pursuant to Article 10(1) of Regulation (EC) No 773/2004, the notification of a written statement of objections to each of the parties against whom objections are raised is a mandatory preparatory step before adopting any final decision. Therefore, the Commission will issue a statement of objections also in a settlement procedure.
> 24. For the parties' rights of defence to be exercised effectively, the Commission should hear their views on the objections against them and supporting evidence before adopting a final decision and take them into account by amending its preliminary analysis, where appropriate. The Commission must be able not only to accept or reject the parties' relevant arguments expressed during the administrative procedure, but also to make its own analysis of the matters put forward by them in order to either abandon such objections because they have been shown to be unfounded or to supplement and reassess its arguments both in fact and in law, in support of the objections which it maintains.
> 25. By introducing a formal settlement request in the form of a settlement submission prior to the notification of the statement of objections, the parties concerned enable the Commission to effectively take their views into account already when drafting the statement of objections, rather than only before the consultation of the Advisory Committee on Restrictive Practices and Dominant Positions (hereinafter the 'Advisory Committee') or before the adoption of the final decision.
> 26. Should the statement of objections reflect the parties' settlement submissions, the parties concerned should within a time-limit of at least two weeks set by the Commission in accordance with Articles 10a(3) and 17(3) of Regulation (EC) No 773/2004, reply to it by simply confirming (in unequivocal terms) that the statement of objections corresponds to the contents of their settlement submissions and that they therefore remain committed to follow the settlement procedure. In the absence of such a reply, the Commission will take note of the party's

> breach of its commitment and may also disregard the party's request to follow the settlement procedure.
>
> (…).

This shows that the settlement procedure provides for the possibility of raising a defence against the Statement of Objections formulated by the Commission. And that procedure was followed in this case, as evidenced by paras. 39 to 43 of the Decision. There may not have been any negotiations about the exact wording of the Decision, but it follows from the above that the Truck Manufacturers did have the opportunity to raise a defence in the settlement discussions. In this respect, this Court also refers to the CAT's ruling of 4 March 2020, which sets out the settlement procedure in detail. The CAT concluded, *inter alia*, that the findings in the Decision were acknowledged by the Truck Manufacturers in a structured process, in which their rights were fully protected, in a quasi-criminal procedure (para. 132 of the CAT ruling).

3.11. This Court therefore disregards the fact that the Truck Manufacturers wish to cast doubt on the accuracy of passages of the Decision. In that context, the CAT found as follows in para. 130 of its judgment of 4 March 2020:

> DAF submitted in its skeleton argument that the Tribunal cannot know the terms on which the "acceptance" by the Addressees recorded in recital (3) was given as that was part of the confidential settlement process. As we acknowledge above, that is of course correct. But if that is intended to mean that the acceptance somehow does not mean what it says, we reject that submission. Of course, the admission was for the purpose of settlement and obtaining the benefits we have referred to. But the defendants' contention that they can admit a fact to the Commission for the purpose of obtaining those benefits in the Decision but then not admit the same fact for the purpose of resisting consequent damages claim based on the Decision, simply begs the question whether the latter conduct constitutes an abuse.

The CAT answered the latter question in the affirmative. This Court concurs. It is unacceptable to acknowledge the facts, as laid down in the Decision in the settlement procedure with the Commission, and then call them into question in subsequent civil proceedings for damages before another (national) court.

3.12. This Court's assessment is therefore based on the findings in the Decision, including the actions and conduct it describes. Subsequently, the content and purport as well as the scope of the Decision are at issue. In the operative part, the Commission found that the Infringement consisted of two elements:

1. colluding on pricing and gross price increases in the EAA for medium and heavy trucks,
2. colluding on the timing and passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards.

3.13. The Truck Manufacturers point to the provisions of Article 16(1) of Regulation 1/2003, which provides that this Court, as a national court, when interpreting (the operative part of) the Decision, may not issue a decision that is in conflict with the Commission’s opinion set out in the Decision. According to the Truck Manufacturers, by referring to the Scania Decision and the Ryder Trial Document, the Claimants are now trying to base their claims on something other than the two infringing practices established by the Commission in the Decision. This Court holds that in these proceedings it must limit itself to the two infringing practices that the Commission established in the operative part of its Decision, since the Claimants are basing their claim for damages on that

Decision. As a side note, the Court finds that the Commission did not establish any infringing practices in the operative part of the Scania Decision apart from those established in the operative part of the Decision.[4]

3.14. The situation is different with regard to the actual practices underlying the two infringements by the Truck Manufacturers, as described in the Decision (such as where, when and how they colluded). The Decision shows that the infringements were not limited to the actual actions and practices set out by the Commission (and acknowledged by the Truck Manufacturers). On the contrary, the Commission explicitly refers in paras. 52, 54 and 59 to `examples' in relation to meetings when the introduction of the EURO 3 standard (para. 52), EURO 4 standard (para. 54) and information on gross price increases (para. 59) were discussed. The Commission used these practices to illustrate the infringing conduct. The CAT ruled as follows on this:

> 85. Further, we do not consider that all the other details and examples of occasions when and how the collusion took place that are set out in recitals (49)-(60), which go beyond what is set out above, are covered by the obligation in Article 16. Once the general position as set out above is established, these details are essentially evidence, and indeed merely illustrative evidence, in support. Other than in an evidential sense, no individual instance is an essential basis of elements (1) and (2) above.

3.15. This Court reaches the same conclusion. Against the background of the *Otis* judgment of the European Court of Justice[5] and in light of the provisions of Article 16(1) of Regulation 1/2003, this Court considers the entire Decision as binding, and in determining the precise content and purport of the operative part, will take into account that the Commission's findings serve to substantiate and adduce evidence for the infringements identified in the operative part. In other respects too, the Infringement established in the Decision can and must be interpreted and fleshed out in the light of the claims for damages. This Court is therefore not bound by the perfunctory representation of concrete, actual practices in the Decision. There can and will no doubt be more actual practices than those listed by the Commission, which, if established, could be relevant to the assessment of the damage caused by the Infringement established in the operative part. This is also apparent from para. 73 of the Decision, in which the Commission indicated that there was an ongoing process rather than isolated, sporadic events. The fact that it was a settlement decision also means that it was not necessary for the Commission to include the specific practices in great detail. The settlement procedure is intended to be a swift procedure for reaching a settlement, unlike the proceedings that resulted in the Scania Decision. Where a party does not accept the Commission's (final) findings, it will have to explain and substantiate what any other infringing conduct consisted of or why the conduct did not result in an infringement. Simply mentioning a few examples does not suffice.

3.16. Against this background, it should be noted that in accordance with the rules of civil procedure on the burden of proof, it would have been for the Truck Manufacturers to provide a reasoned (and documented) rebuttal of the findings in the Decision, if and insofar as they were of the opinion that these were incorrect. They failed to do so. It is not sufficient for the Truck Manufacturers to state that they do not agree with certain passages of the Decision and that not all

[4] See also the *Martinair* judgment of the CJEU (footnote 3) and the Arnhem-Leeuwarden Court of Appeal, 26 November 2019, ECLI:NL:GHARL:2019:10165 (*Alstom v TenneT*).
[5] CJEU 6 November 2012, C-199/11, ECLI:EU:C:2012:684.

the findings in the Decision are binding, without specifying this. This Court will therefore assume that the findings in the Decision are correct.

3.17. This Court does not agree with the Truck Manufacturers' argument that, contrary to the *Martinair* judgment, the Claimants partly adopted new positions at the hearing by submitting more examples of actual practices based on the Scania Decision and the Ryder Trial Document. This amounts to a more detailed factual interpretation of the infringing conduct. By supplying this, the Claimants were keen to demonstrate that there had indeed been a cartel that had deliberately and effectively influenced the (end) prices of trucks. Since the Truck Manufacturers dispute that this conclusion can be drawn from the Decision, it makes sense that the Claimants would assert more facts. As Mr. Fanoy put it during the hearing, the Claimants may state (further) facts that "colour what the Commission established in the Decision".

3.18. Moreover, contrary to what the Truck Manufacturers argued, the Ryder Trial Document and the Scania Decision do not constitute new assertions that are no longer permitted according to the Duty of Assertion Judgment. They simply substantiate in more detail the positions previously adopted. The Claimants base their claims on the Infringement that the Commission established in the Decision. They submitted these documents - which were only made available to them in the course of 2020 - in order to further substantiate the extent and nature of the Infringement. This is permissible. These documents and the Claimants' submissions based on them may be relevant to the further substantiation, as noted earlier, of the Infringement established by the Commission. They may therefore be discussed in more detail at a later stage of the procedure. If so, the Truck Manufacturers will be given sufficient time to study them and, where necessary, to dispute them. At that point it can be decided whether this is a case of "colouring" the Infringement, as the Claimants assert, or an (impermissible) attempt to extend the established Infringement or - as Mr Kortmann stated at the hearing – to search for another infringement on the basis of the same evidence that the Commission has already examined.

3.19. Finally, this Court rejects the Truck Manufacturers' defence that the Infringement was essentially just an exchange of information, but that no arrangements were made apart from intermittent discussions about increases of gross list prices and net prices, and that it has not been established that these arrangements were implemented. The Commission found in the operative part that the Truck Manufacturers were guilty of "colluding on pricing and gross price increases". `Collusion' means secret understandings, collusion, conspiracy. The Addressee Truck Manufacturers acquiesced in this description of the Infringement. The use of the term `collusion' to describe the actual conduct of the Truck Manufacturers implies that the Commission believes that this went beyond the mere sharing of innocent information about gross list prices; there were apparently concerted practices and arrangements too. The conduct was also found to infringe Article 101 TFEU which prohibits '... all agreements between undertakings, decisions by associations of undertakings and concerted practices ...'. In para. 71 of its Decision, the Commission also described what the Truck Manufacturers' objective was:

> (...) The single anti-competitive economic aim of the collusion between the Addressees was to coordinate each other's gross pricing behaviour and the introduction of certain emission standards in order to remove uncertainty regarding the behaviour of the respective Addressees and ultimately the reaction of customers on the market. The collusive practices followed a single economic aim, namely the distortion of independent price setting and the normal movement of prices for Trucks in the EEA.

The use of the term `coordinate' makes it clear that the Commission was of the opinion that the arrangements were coordinated. This Court will also proceed from this assumption, while pointing out once again that the Truck Manufacturers (with the exception of Scania) acquiesced in this. This passage also shows that it related to information about gross prices, which the Commission singled out as the basis for the pricing mechanism in the truck sector in para. 27 of its Decision:

> The pricing mechanism in the truck sector generally follows the same steps for all of the Addressees. Like in many other industries, pricing starts generally from an initial gross list price set by the Headquarters. Then transfer prices are set for the import of trucks into different markets via wholly owned or independent distributor companies. Furthermore there are prices to be paid by dealers operating in national markets and the final net customer prices. These final net customer prices are negotiated by the dealers or by the manufacturers where they sell directly to dealers or to fleet customers. The final net customer prices will reflect substantial rebates on the initial gross list price. Not all steps are always followed, as manufacturers also sell directly to dealers or to fleet customers.

3.20. Nor does this Court agree with the Truck Manufacturers' defence that they did not implement the arrangements they made during the consultations at issue here. That implementation is evident from the Decision (paras. 49-57, 59). There were periodic consultations, several times a year, both at meetings and by telephone and information was exchanged by email. It is hard to see why there was such a frequent and intensive exchange of information and arrangements if nothing was subsequently done about it. This is also inconsistent with the fact that this all lasted from at least 1997 to 2010 (the Infringement period). This long duration indicates that all parties involved had a real interest in the exchange.

The substantive scope of the Decision

3.21. The Truck Manufacturers assert that the Claimants are claiming damages based on truck transactions that fall outside the substantive scope of the Decision. This Court finds, first of all, that the substantive scope of the Decision is delineated in the Decision itself, i.e. in para.. 5:

> The products concerned by the infringement are trucks weighing between 6 and 16 tonnes ("medium trucks") and trucks weighing more than 16 tonnes ("heavy trucks") both as rigid trucks as well as tractor trucks (hereinafter, medium and heavy trucks are referred to collectively as "Trucks"). The case does not concern aftersales, other services and warranties for trucks, the sale of used trucks or any other goods or services sold by the addressees of this Decision.

In other words, it covers trucks weighing between 6 and 16 tonnes and trucks weighing more than 16 tonnes. The Decision does not cover after-sales services, other services and guarantees, or the sale of used trucks or any other goods or services sold by the Addressees.

3.22. Added to that, the Truck Manufacturers assert that the term truck does not include:

- light commercial vehicles or commercial trucks,

- used trucks,

- special vehicles, including military vehicles,

- fire engines.

3.23. The Claimants rightly state that 'light' commercial vehicles or company cars do not automatically fall outside the scope of the Decision. What matters is the weight. This is clearly defined in the Decision. Depending on the weight, it will therefore have to be decided in due course which 'light' commercial vehicles and commercial vehicles fall within or outside the scope of the Decision. It would be going too far to exclude these vaguely defined vehicles at this stage.

3.24. With regard to special vehicles, this Court finds that footnote 5 of the Decision explicitly excludes trucks for military use. The Decision does not comment on other special vehicles. According to the Claimants, the Hannover *Landgericht* referred a preliminary question about this category to the European Court of Justice in the *Daimler* case (C-588/20). In that case, the CJEU will most likely also answer the question of whether fire trucks fall within the scope of the Decision. This Court will therefore stay the decision on this point for the time being.

3.25. The Claimants acknowledge that used trucks fall outside the scope of the Decision as far as their sale by Addressees of the Decision is concerned. They do however assert that the Decision does not indicate whether this would not be the case if a third party had purchased a used truck from an Addressee and subsequently resold it to the Claimants (or one of their Underlying Parties).

3.26. The Commission found that the Infringement relates to the sale of new trucks by the Addressees. It follows from para. 25 of the Decision that 'sales' means more than just direct sales by an Addressee to a customer. Contrary to the Truck Manufacturers' assumption, sales through (independent) dealers are also included:

> (...) All of the Addressees sell their products through distributors and their respective networks of authorised dealers or, in certain particular cases/regions, directly to key customers. Some of the distributors and dealers are owned by the Truck Manufacturers as part of their sales organisation, others are independent.

However, the mere fact that the Decision also covers the sale of new trucks by an (independent) dealer does not mean that the sale of used trucks by a dealer also falls within the scope of the Decision. It is sufficiently clear from the Commission's findings that the Decision relates to the sale of new trucks, either by Addressees or by a dealer. It contains no indications for the conclusion that the Commission also had in mind a distortion of the market for used trucks, especially where it is common ground the Commission wanted to exclude the sale of used trucks by the Truck Manufacturers. It should also be borne in mind that very different factors influence the pricing of used trucks as opposed to new trucks, e.g. age, mileage, possible damage and maintenance as well as the state of repair. The effects of the Infringement will therefore in any case be more limited. This Court is therefore of the opinion that used second-hand trucks fall outside the scope of the Decision.

3.27. The parties also disagree on the question of whether rented and leased trucks fall within the scope of the Decision. The Claimants argue that they do because the Decision contains no indications that collusion on list prices only constitutes an Infringement if the trucks are sold by Addressees. The price-increasing effect of the Infringement also influences rental and lease contracts that are subsequently concluded for the trucks. It is not clear from the Decision that such transactions would not be covered. The Truck Manufacturers dispute this, referring to the text of the Decision.

3.28. There is no reason why new trucks that were purchased from either the Truck Manufacturers or a dealer, after which they were rented or leased, should not fall within the scope of the Decision. It goes without saying that the level of the purchase price is reflected in any rental and lease contracts. What the exact effect of this was and whether the hire companies and lessors were able to

fully pass on their losses to their customers may become an issue when this Court reaches the stage of assessing the (plausibility of) damage. The same essentially applies to claims that arise from rental or lease contracts concluded directly with the Truck Manufacturers: price fixing for trucks would have an impact on the rental and lease prices as they are directly related to the value of the object that is rented or leased. Here too, the extent to which (it is plausible that) the price increase has caused damage to the Claimants (or the Underlying Parties), may become an issue at a later stage of the proceedings.

The geographical scope of the Decision

3.29. The Commission limited the geographical scope of the Infringement in the Decision to the EEA. The Truck Manufacturers point out that new Member States joined the EU and the EEA during the Infringement period. According to the Truck Manufacturers, the Commission therefore made a distinction between countries that were EEA members at a certain point in time: 18 countries on 18 January 1997, 28 countries as from 1 May 2004 and 30 countries as from 1 January 2007. The Truck Manufacturers assert that the Claimants cannot base claims for damages on the Decision if they resulted from transactions that took place in a country that was not yet a member of the EEA at the time of the transaction. The Claimants have responded to this. They point out that a distinction should be made between the scope of the Cartel and the scope of the Commission's enforcement power. The latter is limited to the EEA, but that does not mean that the Cartel kept to the borders of the EEA during the cartel period and expanded its activities as more countries joined. This is implausible and not apparent from the Decision. The Claimants argue that it is irrelevant where exactly a truck was purchased. What matters in the end is whether the transaction price a customer paid for his truck can be traced back to the list prices about which the Truck Manufacturers made arrangements and exchanged information.

3.30. This Court finds as follows. In the Decision, the Commission does not base its assessment of the infringing practices on the size of the EEA at any point in time. The Commission simply refers to "the EEA" (see, *inter alia*, paras. 2, 61 and Article 1 of the operative part). The Truck Manufacturers base their position on para. 111 of the Decision:

> The Commission will also take into account the evolution of the EEA territory during the infringement period following the accessions of new Member States to the Union in 2004 and 2007. Regarding the assessment of the fine for the infringement before 1 May 2004, only the proxy for the value of sales within the then 18 Contracting Parties to the EEA agreement will be taken into account. From 1 May 2004 until 31 December 2006 the proxy for the value of sales within the then 28 Contracting Parties to the EEA agreement will be taken into account. From 1 January 2007 until the end of the infringement the proxy for the value of sales within the then 30 Contracting Parties to the EEA agreement will be taken into account.

This shows that the Commission only took account of the increased size of the EEA in determining the level of the fine. The Claimants rightly state that it is not clear from the Decision that the Commission did the same with regard to the infringing conduct. This Court therefore concurs with the Claimants' view that the distinction in terms of the EEA size relates solely to the Commission's enforcement power and does not say anything about the scope of the Infringement. However, this does not mean that a claim for damages for infringing conduct that took place in a country when it was not yet part of the EEA can simply be claimed on the basis of the Decision. On this point, the Truck Manufacturers are right. Infringement of Article 101 TFEU cannot apply to a country during the period when it was not yet a member of the EU and not part of the EEA. After all, the Treaty did not

yet apply to that country. Accordingly, this Court does not share the Claimants' view that it is irrelevant where a truck was purchased, as long as the transaction price can be traced back to the list prices about which arrangements were made and information was exchanged. If the claim is based on Article 101 TFEU - and it appears from the Claimants' summonses that all of them are - the place where a truck was purchased is relevant. This can and will be further discussed at a later stage of the proceedings, when the Claimants' claims will be assessed.

Temporal scope

3.31. The Decision establishes that the Infringement started on 17 January 1997 and ended on 18 January 2011 (para. 2). The Truck Manufacturers assert that the Claimants are claiming damages for transactions that took place outside of the Infringement Period and that those claims therefore lack a proper basis. The Claimants acknowledge that some of their claims relate to transactions that took place after the Cartel Period. The Claimants invoke the doctrine of the 'lag effect' of cartels for those transactions.

3.32. It is generally accepted that a cartel can have a lag effect, as the Claimants assert. It is not to be expected that the impact of a cartel ends immediately on the date that the Commission has identified as the end point of the infringement. In this case, the Commission found that the object of the addressees' practices was to restrict competition in the EEA truck market. As the Commission found in para. 82 of the Decision, it was therefore not necessary to examine whether they actually had that effect. The Claimants will therefore have to demonstrate in further detail the extent to which the Infringement resulted in damage. The Truck Manufacturers rightly point out that it cannot yet be established whether there was a lag effect that would entitle the Claimants to damages, simply because it has not yet been established in court that the Infringement actually had an effect. That, too, must be examined in more detail. It follows from the findings below, about the possibility that the Claimants (or the Underlying Parties) suffered damage, that this will be examined once the extent of the damage needs to be determined. For now, it seems that this will be part of possible quantum of damages assessment proceedings.

Is it ruled out that the Claimants suffered damage?

3.33. The Truck Manufacturers raised the defence that it is implausible that the Infringement caused any damage to the Claimants. This Court has decided to address that issue at this stage of the proceedings. After all, if this Court can exclude the possibility at this stage of the proceedings that the Infringement caused damage, the threshold for a referral to quantum of damages assessment proceedings has not been met and there is no need to examine the substance of the matter.

The positions of the parties

<u>The Claimants</u>

3.34. Essentially, the Claimants argue that it is self-evident that they (or at least the Underlying Parties) suffered damage as a result of the Cartel. They substantiate this as follows.

<u>CDC</u>

3.35. In the summons and the motion relating to the duty of assertion (prior to the Duty of Assertion Judgment), CDC argued the following, in summary, with respect to the damage.

3.35.1. It is evident that the Infringement may have caused damage to the parties that had assigned their claims to CDC (the "Assignors"). The Truck Manufacturers committed the Infringement with the

intention to enrich themselves illegally. The price and technological innovation are essential to the Assignors. Moreover, it is a fact of (economic) common knowledge that one effect of cartel arrangements is generally to increase prices. This is confirmed, *inter alia*, by a study by Oxera Consulting from December 2009, `*Quantifying antitrust damages - Towards non-binding guidance for courts, study prepared for the European Commission, Luxembourg, Publications Office of the European Union 2009*' (the "Oxera study 2009"). It is reflected in Article 17(2) of Directive 2014/104/EU (Cartel Damages Directive), which contains the presumption that cartel infringements are deemed to cause damage. This presumption of proof has been implemented in Article 6:1931 DCC. The Assignors' main items of damage are the overcharge paid, umbrella damages, higher costs of leasing, renting or otherwise financing the trucks, higher costs of owning and using trucks, and the higher price of trucks because the costs of introducing the emission standards have been passed on to customers.

3.35.2. In the motion following the Duty of Assertion Judgment, CDC included an economic analysis of how the Infringement resulted in damage. In summary, CDC asserts the following. By increasing the gross list prices in concert, the ultimate end-user prices and thus the lease rates paid by the Assignors for the ownership and use of the trucks increased. The gross list prices are the factory prices set by each Truck Manufacturer. These are the basis for general pricing in the market(s). The gross list prices were the starting point for further price setting at lower levels within the sales chain.

3.35.3. The coordination of the introduction of new model types also had the effect of limiting customers' business choices and increasing the operating costs of their truck fleets. The factory prices set by each truck manufacturer are the basis for the general price formation in the market(s). The higher gross list prices resulted in a higher purchase price for the Assignors when they purchased a truck. In the case of the other forms of contract - hire purchase or financial leasing, operational leasing - the cartel damage follows from the higher financing costs resulting from a higher purchase price for the owner, which the Assignors, as users of the trucks, were charged in turn (in whole or in part). The more expensive the truck is in purchase for the owner, the more expensive it is to have it available and to use it, whether for the owner itself or for another user who pays the owner for it.

3.35.4. In addition, the Assignors also suffered damage by not being able to take advantage of the economic benefits of the most advanced and cost-effective emission technologies before this was allowed by the Cartel. The emission technology installed in a truck affects the operating costs of the truck, for example, because it has an impact on fuel efficiency, the applicable tax rate, insurance costs, higher financing costs, and costs for road charges and tolls. In this regard, CDC refers to the economic analysis of 22 October 2020, '*Harm caused by collusive delay*' (Exhibit CDCR-0052), prepared by CDC Consulting SCRL (and submitted prior to the hearing).

<u>Chapelton</u>

3.36. In the summons and the motion on the duty of assertion (prior to the Duty of Assertion Judgment), Chapelton argued - in summary - that all buyers of new trucks from cartel participants suffered damage. Pursuant to Article 17(2) of the Cartel Damages Directive, an infringement of Article 101 TFEU is presumed to cause harm. The truck customers were harmed by the fact that the prices they paid were too high. They were also harmed by the fact that the cartel participants agreed on the costs and timing of the introduction of new emission technologies. This affected the business operations and costs of truck users.

STCC

3.37. In the summons it issued with regard to the damage, STCC asserted, put briefly, the following.

3.37.1. It is plausible that the parties who assigned their claims to STCC ("Customers") may have suffered damage. As a result of the Cartel activities, an increased or overcharged price was charged for trucks, among other things. Moreover, Article 17(2) of the Cartel Damages Directive provides that cartel infringements are presumed to cause harm. Since Article 6:1931 DCC came into force, a cartel is presumed to cause harm. This means that it must be presumed that the Cartel caused harm, unless the Truck Manufacturers provide evidence to the contrary.

3.37.2. In the motion following the Duty of Assertion Judgment, STCC set out its assertions in more detail. It referred extensively to literature and case law, including the following documents:

- a document from the Organisation for Economic Co-operation and Development (OECD), *'Information exchanges between competitors under competition law DAF/COMP (2010)37* ';
- the Decision;
- the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (2011/C 11/01, hereinafter the "Guidelines");
- the judgment by the Court of First Instance of the European Union of 16 September 2013 in Joined Cases T-379/10 and T-381/10 ECLI:EU:T:2013:457 (Bathroom fittings and fixtures);
- the decision of the English Office of Fair Trade (the OFT) of 27 March 2013 on the distribution of Mercedes trucks in England, decision CA98/04/2013 in case CE/9161-09.

3.37.3. In summary, STCC's elaborated assertions boil down to the following. According to STCC, it is generally accepted in case law and (economic) literature that an information exchange alone can have a (very) negative effect on competition, especially when, through that information exchange, undertakings can learn about the market strategies of their competitors, as was the case with the Truck Manufacturers as a result of the Cartel. Indeed, the exchange of such strategic information reduces strategic uncertainty in the market - which is partly the result of undertakings not having a full overview of the actions of their competitors and of past and present new entrants - reduces the independence of competitors' market behaviour and diminishes their incentives to compete. Price competition on the market is effectively eliminated by the information exchange because there is no real need or incentive to compete on price as a result of the information exchange. The information exchange therefore maintains an (excessively) high general price level, which would not have been possible without the information exchange. The exchange of gross list prices alone can have a concerted effect on the purchase price of a truck. According to STCC, it is also difficult to imagine that the six largest Truck Manufacturers, with a combined market share of 90-100%, apparently felt the need to exchange the most strategic, sensitive and confidential information with what would otherwise have been their direct competitors for no fewer than 14 years - with all the effort, costs and above all risks involved - if this had no effect at all on what, according to the Truck Manufacturers, is at the heart of the truck market, namely the prices to be paid by truck customers. The Commission came to a similar conclusion in the *Thread* case,[6] para. 166: "Moreover, it is difficult

[6] COMP/38337 – *Thread* (C(2005)3452) and C(2005)3765).

to understand why the suppliers would have met on a regular basis to agree on list price increases during at least 11 years if these list price increases had "no effect" at all on the actual prices."

3.37.4. In the Decision, the Commission found that the gross list prices constituted the basis for the calculation of the net prices. A concerted effect on the gross list prices (in the sense of an increase of these prices, as discussed among the Truck Manufacturers) therefore obviously also has a concerted effect on the net prices, especially bearing in mind that the net prices are simply gross list prices minus discounts.

Koning & Drenth

3.38. In the summons and in the motion on the duty of assertion (submitted before the Duty of Assertion Judgment), Koning & Drenth argued, with reference to the *Stichting Economisch Onderzoek* report of July 2017 (the "SEO Report", Exhibit KOND-0002), that it had suffered damage as a result of the Infringement. The SEO Report concludes that there was a cartel mark-up of 15-33% per truck. The Truck Manufacturers unlawfully obtained a higher purchase price for the truck than would have been justified if normal competitive conditions had prevailed and if the Infringement had not taken place. Koning & Drenth therefore paid a higher price for the trucks and thus suffered damage. The exact cartel mark-up can only be determined after further investigation.

STEF, Baltrans, Klacska, Via Location, Cartel des Camions, EB Trans, NLTruckkartel and Carlsberg ("STEF et al.")

3.39. With regard to the damage, STEF et al. argued in the summons that is by now commonly accepted that the presence of a cartel leads to price increases on the market. They refer to the 2009 Oxera study. According to STEF et al., the gross price arrangements led to price increases for the customers. In the motion on the duty of assertion (submitted before the Duty of Assertion Judgment) and in the motion supplementing assertions under Article 22 DCCP (submitted after the Duty of Assertion Judgment), STEF et al. point to the presumption of harm provided by the Cartel Damages Directive and - in so far as Dutch law applies - to its implementation in Article 6:1931 DCC. The price mechanism is the same for all Truck Manufacturers. The starting point is a gross price set by the headquarters. Headquarters then set prices for the various national markets. The national dealers then set the final net price which is charged to the customers. In situations where the Truck Manufacturer sells directly to the end user, the Truck Manufacturer (or the importer related to the Truck Manufacturer) sets the net price. This is always based on the gross prices set by the Truck Manufacturers. This means that, if the starting point in setting the prices is higher because of the Cartel, it also means that the final net price charged to the end customer is higher. This applies both to purchasing and leasing trucks. In addition, damage was also suffered as a result of the delay in the timing of the introduction of emission technologies to meet increasingly stringent European emission standards. This damage includes higher fuel consumption and other operating costs, including tolls, compared to the situation that would have existed if the timing of the introduction of new technologies had not been delayed because of the Cartel.

SAATC

3.40. SAATC argues that the damage suffered by the truck customers as a result of the Infringement includes the less favourable (price) conditions on which they purchased the medium and heavy trucks. SAATC substantiates this with the report by Analysis Group, '*Estimation of the overcharge resulting from the EU Truck Cartel for Stichting Truck Cartel Compensation Claims*' of 5 June 2019 (Exhibit 13 SAATC). That report estimates the overcharge at 8.24-13.73% per truck.

The Truck Manufacturers

As regards the exchange of gross list prices

3.41. According to the Truck Manufacturers, the Claimants have not sufficiently substantiated that the Infringement led to damage in general as a result of an artificially increased price level, let alone have they made it plausible that damage was suffered on an individual level as a result of this artificially increased price level. They substantiate this further as follows.

DAF

3.42. DAF argues in the Statement of Defence that the exchange of list prices did not result in damage.

3.42.1. According to DAF, the information that was exchanged was too general and too fragmented to enable the Parties to effectively align their list price levels. Moreover, if there had been effective coordination, this would not have had any effect on selling prices. List prices are not selling prices. In addition, the technical configuration and price are unique to each truck, which in itself makes collusion on selling prices difficult. The selling price of a truck is negotiated between the Truck Manufacturer and dealer on the one hand and the customer on the other. Nor does the customer's decision to buy a truck depend solely on the selling price. Other factors also play a part, e.g. the trade-in price, repair and maintenance contracts. Nor does DAF use predetermined discounts from list prices to arrive at its selling prices. The selling price is the result of negotiations. The selling price is therefore not set 'top down' but 'bottom up'. Nor was there any systematic translation of increases in list prices into selling prices. According to DAF, the truck market is not transparent for the competition. Manufacturers generally do not know what selling prices the dealers apply, in particular because manufacturers are often unaware of the content of package deals offered by dealers. Information on competitors is even less transparent. If there had been any price coordination, this lack of transparency would have prevented Truck Manufacturers from effectively monitoring whether competitors were actually applying those prices and taking action if they were not.

3.42.2. DAF refers to the Compass Lexecon report of 30 June 2020, '*Economic Analysis of the Potential Effects of the Infringement*' (Exhibit DAFA-001) in support of its view that the information exchange had no actual effect on sales prices. DAF also refers to Oxera Consulting's report of 16 April 2019, `*How to assess the effects of the trucks infringement*' (the "2019 Oxera Report"; Exhibit TRUC-0005), prepared on the instructions of the Truck Manufacturers, which shows that information exchange is not harmful in all circumstances, but only if there is effective coordination of market behaviour. DAF argues that three conditions have to be met for this:

1. the information exchange must enable companies to coordinate towards a common goal, i.e. the focal point condition;

2. the information exchange must enable companies to monitor whether the others are actually complying with the coordinated behaviour, i.e. the monitoring condition; and

3. there must be an effective deterrent and penalty mechanism.

According to DAF, none of these three conditions were met, so there was no effective coordination. This is also evident from the fact that there was fierce competition, with every sales person at DAF having to fight for every deal.

3.42.3. Compass Lexecon empirically examined the effect of the Infringement on the sales prices. It compared prices during and after the Infringement. In short, Compass Lexecon's report concludes that there was a very small price difference between the period of the Infringement and the period after that, which is not explained by the economic model. Compass Lexecon considers it "unlikely that the infringement had any actual effect on transaction prices charged by DAF to its customers."

3.42.4. DAF disputes the accuracy of the SEO Report that was entered into the proceedings by Koning & Drenth (see 3.37). It had this assessed by Compass Lexecon, which issued a report on 30 June 2020, '*Economic Assessment of the SEO Report'* (Exhibit DAFA-002). This concludes that the SEO Report was fundamentally flawed and did not provide any basis for presuming the existence or amount of potential damage as a result of the Infringement.

3.42.5. DAF also disputes the accuracy of the Analysis Group report entered into the proceedings by SAATC (see 3.39). It asked Compass Lexecon to assess this report. Compass Lexecon issued a report on 30 June 2020, i.e. the '*Economic Assessment of the Analysis Group Report*' (Exhibit DAFA-003). Again, the conclusion is that Analysis Group's analysis and estimated overcharge are not reliable.

<u>Daimler</u>

3.43. Daimler argues that, based on the characteristics of its pricing mechanism, it is entirely implausible that the exchange of gross list prices had any effect.

3.43.1. The gross list prices used by Daimler were not used in any particular market. The process between the gross list prices and the final prices charged to customers included several steps of negotiations. The actual transaction price paid by the final customer is the result of individual negotiations between that final customer and the dealer. These negotiations are separate from the negotiations that take place at various other levels in the chain between Daimler and the dealer. Daimler could not foresee what price a final customer would be offered in the dealer's offer or what the final price would be. Nor did Daimler have any insight into the details of the offer or into the price elements or discount mechanisms that a dealer would apply. It is therefore entirely implausible that the Gross List Price Infringement had any effect on the final transaction prices, let alone that there could have been any systematic coordination of those prices.

3.43.2. Daimler disputes the SEO Report submitted by Koning & Drenth (see 3.37). This report is perfunctory and only the first part of a more extensive study. The second part of the study has not (or not yet) been submitted. The SEO Report itself indicates that the indicative 15% cartel surcharge for small transport companies in the Netherlands does not constitute proof that can serve as a basis for the calculation of damages. The SEO Report also completely ignores the nature of the Infringement, which is the exchange of competitively sensitive information rather than a hardcore cartel. The SEO Report does not provide any evidence at all that the Infringement generated anticompetitive effects and caused harm.

3.43.3. Daimler also disputes the Analysis Group report entered into the proceedings by SAATC (see 3.39). It had the report assessed by E.CA Economics. Its findings are set out in the report '*Expert opinion on the report by Analysis Group dated 30 June 2020*' (Exhibit DAIM-0001). According to this report by E.CA Economics, Analysis Group wrongly presumed that the Infringement essentially constituted a price-fixing cartel. Analysis Group's assertion that truck prices increased abnormally at the start of the Infringement Period is based on an incorrect comparison. The regression analysis is likewise fundamentally flawed.

3.43.4. Daimler relies on another report by E.CA Economics, i.e. '*Plausibility of net price increases due to gross price related competition law infringements*' of 24 April 2019 (Exhibit DAIM-0002). The only viable and robust economic theory on the basis of which an information exchange could have a price-increasing effect is the theory of coordinated effects. This is subject to three conditions being met:

(i) the competitors involved must be able to find a common target price(s);

(ii) the competitors concerned must be able to monitor the pricing behaviour of their competitors in order to identify possible variations from the focal point;

(iii) the competitive environment must be such that in case of variations the varying parties can be 'punished' by their competitors, making any variation unprofitable.

Daimler asserts that the first condition is not met, with reference to E.CA Economics.

CNH/Iveco

3.44. CNH/Iveco asserts first and foremost that it made no arrangements with the other Truck Manufacturers about the prices of Iveco trucks.

3.44.1. Secondly, it asserts that the market for medium and heavy trucks and Iveco's pricing were not suitable for the price agreements alleged by the Claimants. For instance, the heterogeneous nature of trucks, customisation for the customer, different types of discounts and the fact that the final sales price was the result of negotiations, meant that the final sales price could not be determined simply by knowing the gross price lists. Nor were the gross price lists generally the starting point for negotiations with customers; there was no systematic relationship between the gross list prices and the price a customer had to pay. And the exchange of gross list prices did not automatically lead to higher prices. There can only be a restrictive effect on competition if a number of conditions are met.

3.44.2. Information exchange can only lead to the possibility of harm if there is effective coordination in an economic sense. Three conditions have to be met for this: there must be a focal point, there must be monitoring of the coordination being implemented (internal stability), and there must be an effective punishment or retaliation mechanism in case of the coordination not being implemented (external stability). In its section of the Truck Manufacturers' Statement of Defence, CNH/Iveco indicates in great detail that none of these conditions were met. CNH/Iveco points out, *inter alia*, that there was intense competition among the Truck Manufacturers during the Infringement Period, which demonstrates that there was no effective coordination. If there had been, competition would have been reduced or even non-existent. Significant market share fluctuations in Spain, France and Germany and the other relevant countries do not correspond to what economists would normally expect in a market with effective price coordination. It is rather a contra-indication. In support of this, CNH/Iveco refers to Compass Lexecon's '*Economic Report'* of 30 June 2020 (Exhibit IVEC-0001), which includes the market share analysis. This Compass Lexecon report also shows that the exchange of information in the 2004-2011 period demonstrably had no effect on gross list prices for Iveco trucks in the other relevant countries.

3.44.3. CNH/Iveco disputes the SEO Report submitted by Koning & Drenth (see 3.37). CNH/Iveco engaged Compass Lexecon to assess the SEO report. Compass Lexecon's report of 30 June 2020, i.e. '*Economic analysis of the expert report authored by SEO Economisch Onderzoek'* (Exhibit IVEC-0002), refutes SEO's assumptions and conclusions, according to CNH/Iveco. The SEO Report does not show any effects of the Infringement. The same goes for the Analysis Group Report, which SAATC entered

into the proceedings (see 3.39). Compass Lexecon also published a report on this, i.e. '*Economic analysis of the expert report authored by Analysis Group*' (Exhibit IVEC-0003). This shows that the Analysis Group Report does not demonstrate that the Infringement had any effect on the sales prices of medium and heavy trucks. The Analysis Group Report does not show that SAATC's Underlying Parties suffered damage as a result of the Infringement.

MAN

3.45. MAN stresses that the pricing of MAN trucks takes place at individual level.

3.45.1. There are no standard prices for certain types of truck because the truck markets are highly heterogeneous (each truck is different according to the requirements of the specific customer) and asymmetric. The existence of asymmetric markets is evidenced by the very different market shares of Truck Manufacturers in each country. Consequently, the degree of competition differs from country to country. The gross list price does not determine the final price, which is established on the basis of individual negotiations with free competition. MAN did not set the leasing and rental prices for the Underlying Parties that leased or rented trucks. MAN is only engaged in the manufacture and sale of trucks. Gross list prices for leasing and renting trucks had no impact on the level of the financial obligations of the lessees and renters.

3.45.2. MAN acknowledges that it cannot be ruled out that information exchanges may have restrictive effects on competition. This may be the case if the information exchange leads to (tacit) coordination of market behaviour. According to MAN, complex markets which are also heterogeneous and asymmetric in nature, such as the truck markets, are not generally suited to tacit coordination. The opaque nature of truck markets makes tacit coordination of market behaviour very unlikely.

3.45.3. MAN also engaged Compass Lexecon and asked it to examine the likelihood that the exchange of gross list prices would have led to higher end prices and thus to damage for trucks' end customers. Compass Lexecon issued a report on 29 June 2020, entitled *'On the Plausibility of Price Effects of the Sanctioned Conduct in the Trucks Case*' (Exhibit MANA-0001). In this report, Compass Lexecon reviewed the conditions for effective coordination as formulated in the judgment of the Court of First Instance of the EU in *Airtours v First Choice*.[7] Compass Lexecon described these conditions as follows in its report: the condition of mutual understanding (by some parties referred to as focal point), the monitoring condition, the deterrence and sanction condition and the foreclosure condition. Compass Lexecon concludes that the condition of mutual understanding is not met. This means that there was no effective coordination and, according to MAN, the exchange of gross list prices therefore had no anti-competitive - and therefore price-increasing - effects. Customers did not pay higher prices for their trucks than they would have without the information exchange. No harm was therefore caused.

3.45.4. MAN also disputes the Analysis Group report entered into the proceedings by SAATC (see 3.39). MAN engaged Compass Lexecon to assess that report. It did so in its report of 29 June 2020 entitled *'Economic analysis of the report by Analysis Group'* (Exhibit MANA-0002). In short, this Compass Lexecon report shows that the regression analysis made by Analysis Group has considerable drawbacks, produced very distorted results and was not suitable for estimating the alleged overcharge. Furthermore, the results of Analysis Group's yardstick analysis could not be used either

[7] Court of First Instance EC 6 June 2002, T-342/99, ECLI:EU:T:2002:146.

because no appropriate markets were used for comparison, there were distortive portfolio effects and the yardstick analysis was based on estimates rather than actual data.

3.45.5. MAN also disputes the SEO Report submitted by Koning & Drenth (see 3.37). Compass Lexecon assessed that report on MAN's instructions. The findings are set out in its report of 29 June 2020 entitled '*Economic Assessment of the Report by SEO Economisch Onderzoek*' (Exhibit MANA-0003). According to MAN, this Compass Lexecon report demonstrates that there are objections to SEO's approach of deriving the indicative cartel mark-up from the meta-studies used by SEO. Moreover, SEO's general assertions that Koning & Drenth could not pass on any alleged mark-up to their own customers based on general economic theory are implausible.

Scania

3.46. Scania also disputes that there is a fixed relationship between the gross list prices and the actual transaction prices paid for the trucks.

3.46.1. Trucks are heterogeneous, customised products with unique prices that vary depending on the country, the dealer, the end customer and the specific configuration of the truck. The final transaction prices are the result of several independent negotiation processes between different parties in the distribution chain. Those parties are fully autonomous in the conduct of price negotiations. As a result, actual transaction prices do not move with gross list prices.

3.46.2. Scania argues that it is generally accepted in economic literature that information exchange can have positive and negative effects on competition. Negative effects can only arise if competitors are able to effectively coordinate their market behaviour due to information exchange. That was not the case here. Scania refers to the *Airtours* criteria (see 3.44.3) and claims that they were not met. In support of its assertion, Scania submitted a report by RBB Economics, '*Assessment of the likelihood of damages caused by the alleged Trucks infringement*' (Exhibit SCAN-0002).

3.46.3. Scania asserts that it can be established from an econometric analysis that the Infringement had no effect on prices for end customers. According to Scania, a regression analysis of prices during and after the Infringement period is the most appropriate way to establish a price surcharge. Scania had a regression analysis carried out by RBB Economics as part of other proceedings in Germany. RBB Economics drew up a report, *'Quantitative assessment of potential damages caused by the alleged trucks cartel*' (Exhibit SCAN-0003), which shows that the application of the multivariate regression analysis on the basis of all transactions between Scania distributors and dealers in the cases examined during and after the alleged Infringement results in a price mark-up of -0.38%. This is statistically negligible and confirms that the Infringement had no effects on prices for Scania trucks in the countries under investigation (Belgium, Germany, France, the Netherlands and Spain).

3.46.4. Scania also disputes the conclusions of the Analysis Group report that SAATC entered into the proceedings (see 3.39). Analysis Group did not take into account that prices fell at the end of the Infringement Period. Furthermore, for the purposes of a comparison with prices in other product and geographic markets, Analysis Group chose markets which are not sufficiently comparable to the relevant market for medium and heavy trucks. Analysis Group's regression analysis was conducted on the basis of an inadequate dataset, compared to the dataset used for the RBB Overcharge report. Nor does the regression analysis take sufficient account of the relevant variables that influence the prices of medium and heavy trucks. The results of the Analysis Group report are therefore unreliable. As regards the SEO report entered into the proceedings by Koning & Drenth (see 3.37), Scania argues that it is flawed because no empirical analysis was made that showed a price mark-up. A mere

analysis based on previous studies and economic theories is insufficient. The existence of a price surcharge was therefore not demonstrated in the SEO report, according to Scania.

Volvo/Renault

3.47. Volvo/Renault also argue that there is no systematic link between the gross list prices exchanged between the Truck Manufacturers and the transaction prices that the end customers ultimately paid. It explains this as follows.

3.47.1. Trucks are highly differentiated and heterogeneous, custom-made products, tailored to the specific wishes and requirements of each individual customer. Many of the trucks are also sold as part of a broader package that includes, in addition to the truck, related products and services such as warranties, maintenance contracts, and superstructures (the superstructure of the truck behind the cab). The final transaction price is arrived at in individual negotiations and interactions at various levels of the distribution chain. This also involves external factors, which may vary from country to country and from customer to customer, such as the balance between supply and demand for trucks in a given market, the end customer's willingness to pay for them, the relative strength of a brand in a given market, the market share of that brand and the cost of delivering trucks, which in some countries could be affected by exchange rate fluctuations.

3.47.2. As regards leased trucks, Volvo/Renault has no influence over the lease terms paid by the end customers. The lease payment amounts depend on several factors and are determined by the leasing companies and finance companies.

3.47.3. Volvo/Renault submits that the information exchange regarding gross list prices had no effect on the transaction prices paid by end customers. It relies on two reports by Frontier Economics Ltd ("Frontier"): one entitled "*Response to SEO Economic Research's Expert Report*", dated 30 June 2020 (Exhibit VCVA-0001) and the other entitled "*Response to Analysis Group Expert Report for SAATC*", also dated 30 June 2020 (Exhibit VCVA-0002).

3.47.4. According to Frontier's reports, the exchange of information can lead to implicit collusion or coordination of market behaviour under special circumstances. Whether that collusion actually took place has to be examined. According to Frontier, two requirements must be met before undertakings can coordinate their market behaviour on a long-term basis:

1. undertakings should be able to reach a common understanding on the terms of the collusion of their market behaviour and, in particular, should also be able to identify when a company deviates from those terms; and

2. undertakings must be able to monitor and enforce compliance by all stakeholders.

Frontier concludes that it is unlikely that these requirements could have been met, given the nature of the information exchange and the characteristics of the truck market. Frontier also concludes that, given the absence of a systematic relationship between gross list prices and transaction prices, it cannot be assumed without empirical evidence from an economic perspective that the Infringement had a negative effect on the transaction prices.

3.47.5. Volvo/Renault argues that CDC is incorrect in referring to the 2009 Oxera study (see 3.34) in support of its claim that the Infringement caused harm. That report deals with investigations of classic, hardcore cartels. It contains no evidence that overcharges were made in this case. Rather, this case is about the information exchange of gross list prices. Further, the 2009 Oxera study says

nothing about the Infringement or about the overcharges resulting from other competition law infringements in the truck industry. The 2009 Oxera study recognises that the question of whether a specific infringement results in an overcharge must be assessed on a case-by-case basis, in accordance with the law that applies to the damages claim. Thus, based on the 2009 Oxera study, it cannot be concluded that there was any effect, let alone an overcharge in this case.

3.47.6. Volvo/Renault also disputes the SEO report that Koning & Drenth entered into the proceedings (see para. 3.37). According to that report, an empirical analysis is needed to produce evidence that can serve as a basis for calculating the damage. The Koning & Drenth report nonetheless states that, based on the results of several meta-studies, it can be argued that the Infringement resulted in an overcharge of 15%-33%. According to Frontier's '*Response to SEO Economic Research's Expert Report*', it is not possible to draw that conclusion based on the sources and methodology used. From an economic perspective, it cannot be assumed that the exchange of information on gross list prices actually resulted in the increased transaction prices . Nor did that happen in this case. Similarly, the proposition that, theoretically, explicit or implicit hardcore cartels always lead to overcharges of more than 0% finds no support in the economics literature, to say nothing of the fact that this was not actually a hardcore cartel anyway.

3.47.7. Referring to Frontier's '*Response to Analysis Group Expert Report for SAATC*' , Volvo/Renault also disputes the Analysis Group report that SAATC entered into the proceedings (see para. 3.39). Analysis Group incorrectly assumes that the Infringement involved an agreement among the Truck Manufacturers to raise transaction prices above those of the competition. However, this does not follow from the Decision. In addition, Analysis Group's report is based on a poor understanding of the truck market. The conclusions drawn in it are unsound and unreliable.

<u>More on the joint position adopted by the Truck Manufacturers</u>

3.48. The Truck Manufacturers also made the following arguments.

3.48.1. Sharing information did not have the effect of increasing prices. However, the Claimants argue that they suffered harm and they rely on the statutory evidentiary presumption provided by Article 17(2) of the Antitrust Damages Directive, implemented in the Netherlands in Article 6:1931 DCC. However, the Infringement took place between 17 January 1997 and 18 January 2011. The Antitrust Damages Directive did not enter into force until 25 December 2014. In the Netherlands, it was not implemented until 10 February 2017. Consequently, neither the Antitrust Damages Directive nor Article 6:1931 DCC applies. Nor do the articles in question have retroactive effect.

3.48.2. The Claimants must assert and prove that they suffered harm. Merely referring to the Decision is not sufficient. Nor does the presumption of harm follow from the Decision. Indeed, the Commission did not establish any harmful effects in the Decision. Given that the Commission found that the practices of the Addressees had the object of restricting competition, it was not necessary to carry out any further investigation into whether the Infringement also caused harm. The object of restricting competition is sufficient to impose a fine.

3.48.3. In their motions of 3 October 2018, CDC, STCC and Chapelton referred to the Rotterdam District Court judgment of 26 September 2018 (*Van Gelder v Shell*)[8] to substantiate the presumption of harm. However, that case cannot be compared with this one. In the *Van Gelder v Shell* case, the Commission found that the infringement had had actual anticompetitive effects. That did not happen

[8] ECLI:NL:RBROT:2018:8001

in this case. Furthermore, *Van Gelder v Shell* involved price-fixing, whereas this case is about information exchange.

3.48.4. To substantiate the presumption that the Infringement caused harm, the Claimants refer to a number of meta-studies, including the 2009 Oxera study and the SEO report (see para. 3.37). The Truck Manufacturers dispute that it is possible to conclude, based on those meta-studies, that the Infringement should be presumed to have caused harm. To buttress that assertion, they refer to the 2019 Oxera Report, prepared by Oxera on behalf of the Truck Manufacturers (Exhibit TRUC-0005), which states that it is not possible to draw general conclusions from the studies cited by Claimants.

The EURO standards

3.48.5. Nor was there any effective coordination as regards the EURO standards-related infringement. Contrary to what the Claimants assert, the Truck Manufacturers did not postpone introducing new, EURO standard-compliant trucks until they were legally required to do so. This is shown by the following table of introduction dates listed for each Truck Manufacturer:

Truck Manufacturer	**EURO III**	**EURO IV**	**EURO V**	**EURO VI**
DAF	Sept. 1999	Oct. 2005	Oct. 2005	Sept. 2012
Daimler	Oct. 1999	Sept. 2004	Sept. 2004	June 2011
Iveco	March 2000	March 2006	Aug. 2005	Nov. 2012
MAN	First quarter 2000	Fourth quarter 2004	Fourth quarter 2006	First quarter 2013
Renault	First quarter 2000	May 2006	March 2009	Sept. 2012
Scania	Nov. 1999	March 2004	Sept. 2005	April 2011
Volvo	April 2000	Sept. 2005	Sept. 2005	July 2012
Legal deadline	**1 Oct. 2001**	**1 Oct. 2006**	**1 Oct. 2009**	**31 Dec. 2013**

3.48.6. Nor, according to the Truck Manufacturers, is it plausible that the timing of the introduction of new emissions technology could have caused harm to the Claimants or the Underlying Parties. New emissions technology does not necessarily lead to lower operational and/or operating costs. The Claimants' assumption that the EURO standards say something about fuel consumption is, as such, unsubstantiated. Any increased fuel economy achieved simultaneously with the amendment to the EURO standards was due to the fact that that amendment resulted in increased production costs. The sales prices rose as a result of that. Other innovations were introduced to make it attractive to purchase a new truck model. Lower fuel consumption was one of these.

3.48.7. The EURO standards-related Infringement did not result in increased toll charges either. The Claimants make this assertion, but they have not substantiated it. At least as far as Germany is concerned, trucks compliant with the new EURO standard had been on the market for quite a considerable period by the time that truck users were first able to benefit from lower toll rates resulting from that new standard.

3.48.8. Nor is there any evidence that the Claimants or the Underlying Parties would as a rule have purchased new trucks with new emissions technology at a faster rate if those trucks had been available any earlier. Nor, as regards the EURO standards, did the Infringement have any effect on any individual Truck Manufacturer's passing on of the costs of emissions technology. Firstly, the costs of new emissions technology would have been passed on even if the Infringement had not occurred. The costs of emissions technology are part of the cost of the truck. It is normal to pass on such costs. Furthermore, incentives in that regard had been provided by various national governments. The fact that the costs resulting from the introduction of new emissions technology were going to be passed on was therefore only to be expected by customers and also unavoidable. The fact that the costs were passed on and transaction prices rose as a result does not mean that the customer suffered any harm as a result. The Truck Manufacturers go on to submit that the Claimants have not provided any substantiation of their assertion that the Truck Manufacturers were able to pass on more emissions technology costs as a result of the Infringement than they would have been able to without it and that this led to higher transaction prices.

This Court's findings

3.49. As stated above, this Court is not going to assess at this point, for each individual Claimant, whether the threshold for referral to the quantum of damages assessment proceedings has been met. The nature of the Truck Manufacturers' defence regarding the damage is much more general and far-reaching. Indeed, they argue that, regardless of whether the individual Claimants have complied with the duty of assertion regarding the likelihood of the possibility of damage, the Infringement did not result in any damage whatsoever. The Truck Manufacturers argued this defence with the view to having the Claimants' claims dismissed for that reason alone.

3.50. With a view to the claimed referral to the quantum of damages assessment proceedings, the Claimants mainly limited themselves to asserting and substantiating, to a greater or lesser extent, the likelihood of the possibility of damage in the documents that were exchanged before the Truck Manufacturers put forward their Defence.

In their Statement of Defence, the Truck Manufacturers then argued that the Infringement had not caused any damage at all. This Court chose to address this defence first, for reasons of procedural economy. The fact is that, if this defence succeeds, the substance of Claimants' claims would need no further consideration. In order for this defence to succeed and thus bring the proceedings to an end at this stage, the Truck Manufacturers will have to show that it is crystal clear that, generally speaking, it is impossible for the Infringement to have caused any damage. Only then can it be assumed at this point that there was no possibility of damage.

3.51. The views of the Truck Manufacturers set out above show that they rely heavily on the argument that the information exchange could not have had a harmful effect because no effective coordination of truck sales prices was possible in the truck market in the EEA. This argument is based on the so-called *Airtours* criteria, the Guidelines and what *inter alia* the 2019 Oxera Report says about them. That report states the following:

(…)

2.7 Information exchange does not inherently have negative effects on competition and consumers. Indeed, some extent of information exchange is a normal feature of many well-functioning markets. Economic theory shows that information exchange by itself does not necessarily result in higher prices and will do so systematically only in the

particular circumstances where it enables firms to collude effectively in circumstances where they otherwise would have been unable to do so, or, through closer monitoring, collude more effectively than would otherwise have been possible. Whether such an effect applies depends on the nature of the information and the market context in which the information is exchanged.

(…)

4.14 In general, from an economics perspective, coordination between firms on price can be successful only when firms reach a clear common understanding on how they are going to conduct themselves in the market and further additional criteria are satisfied. These additional criteria relate to factors that will reduce the likelihood of a tacitly coordinated outcome breaking down.

These criteria have found their way into competition law as the `Airtours' criteria, which are consistent with the conditions for tacit coordination set out in the economics literature, as follows:

- the coordinating firms must be able to monitor to a sufficient degree whether the coordinated behaviour is being adhered to;
- there must be some credible punishment mechanism that can be activated if a firm is found to be deviating from the coordinated behaviour;
- there must also be some feature of the market that prevents the coordinated outcome being disrupted by current or future competitors (for example, barriers to entry in the market).

4.15 In this framework, subject to firms having reached a common understanding with regard to some factor of competition, information exchange about past conduct or current market conditions has the potential to raise prices by allowing a greater degree of monitoring of the conduct (the first criterion) than would otherwise be possible.

4.16 In summary, information exchange can in theory facilitate collusion in two ways:

- by enabling firms to better reach a common understanding with regard to prices. This will usually require information on future pricing intentions, and may be challenging where a market is complex or where demand or supply conditions are unstable;
- by allowing firms to better monitor any deviations from an otherwise established coordinated outcome, and so punish these deviations. This will usually require verifiable, firm-specific information on current, or at least recent, prices.

3.52. In addition to the argument that effective coordination in the truck market was not possible and the Infringement for that reason alone had no (damaging) effect, the Truck Manufacturers point out that there was in fact no overcharge either. According to the Truck Manufacturers, this is demonstrated by the aforementioned reports that they submitted to refute the Claimants' reports, which do conclude that overcharges were imposed.

3.53. Prior to the hearing, CDC submitted an expert opinion by Prof. Joseph E. Harrington Jr. of the Wharton School of the University of Pennsylvania and Prof. Maarten Pieter Schinkel, Professor of Competition Economics and Regulation at the University of Amsterdam (“Harrington & Schinkel”),

entitled '*The Collusion on Gross List Prices by the European Trucks Cartel and its Effect on Net Retail Prices*' (Exhibit CDCR 0051, the "Harrington & Schinkel Report"). Only CDC entered this report into the proceedings, in its own case. At the hearing, all Claimants relied on the Harrington & Schinkel Report. The question is whether this is allowed in procedural terms, given that there are still different sets of proceedings despite the cases being joined. Referring to the (*de Groene Serie Burgerlijke Rechtsvordering ("*Green Series on Civil Procedure'), the Claimants answer this question in the affirmative.

3.54. The Truck Manufacturers oppose allowing Claimants other than CDC to rely on the Harrington & Schinkel Report because the submission of a report is not equivalent to making submissions. The Truck Manufacturers evidently consider this reliance on the Harrington & Schinkel Report as making new submissions. They point out that, according to the Duty of Assertion Judgment, no more new submissions were allowed after September 2019.

3.55. This Court concurs with the Claimants' position. The purpose of a joinder is for one court to hear and decide related actions. Given that the cases being considered involve virtually the same questions of law, there is also an interest in ensuring that the decisions in all cases are as similar as possible. The mere fact that the court must assess each case separately does not mean that parties to proceedings cannot refer to submissions and documents made and filed, respectively, in another case, provided that it is clear to all parties concerned what they deal with and all parties concerned have actual access to them. This does not mean that the relevant documents have to be submitted in each individual case. As long as all the parties concerned have access to them, it is sufficiently guaranteed that the principle of hearing both sides of the argument has been observed. Finally, sufficiently clear reliance has to be placed on submissions, facts, and exhibits from those other case(s) so that it is clear to the opposing party what it needs to defend itself against and it is clear to the court what it has to decide on.[9] Because all the parties have access to the Harrington & Schinkel Report and have been able to express their views on it, the Claimants are able to rely on it in all the cases.

3.56. Moreover, the Claimants rightly point out that the Court has asked them to agree their positions with each other so that submissions can be made on behalf of all of them. At this Court's request, the submissions made in the oral arguments were made on behalf of all the Claimants collectively. The Claimants also collectively rely on the facts and exhibits submitted during the oral arguments. The Claimants also point out that the Harrington & Schinkel Report elaborates on a paper by Harrington entitled '*The Anticompetitiveness of Sharing Prices*', dated 26 March 2020. That paper was submitted by all the Claimants except CDC, Koning & Drenth and SAATC (see for example Exhibit CDCR-0051, STEF-0028). In addition, all the Claimants took cognisance of an executive summary of the Harrington & Schinkel Report. The oral arguments put forward on behalf of the Claimants on 25 November 2020 were a summary of that report.

3.57. This Court finds that to the extent that a new submission was made, as argued by the Truck Manufacturers - the introduction of the theory of harm in the Harrington & Schinkel Report - that submission was made in response to the Truck Manufacturers' defence that the Infringement could not have resulted in harm. The Duty of Assertion Judgment was obviously not intended to prevent the Claimants from having the opportunity to attempt to provide a reasoned rebuttal of that defence. That would be in violation of the fundamental principle of hearing both sides of the argument and would not do justice to the fact that it was precisely because of the Truck

[9] See also Dutch Supreme Court 10 July 2009, ECLI:NL:HR:2009:B14209

Manufacturers' defence on this point that the District Court decided to bring it up and allow the parties to debate it. In addition, the Truck Manufacturers had the opportunity to respond to the Harrington & Schinkel Report and they availed themselves of it. This Court therefore rejects the Truck Manufacturers' defence and allows all Claimants to rely on the Harrington & Schinkel Report.

3.58. The Harrington & Schinkel Report formulates a theory of harm for collusion in determining and for exchanging information on gross list prices. Harrington & Schinkel summarise the pricing mechanism of a Truck Manufacturer as follows (p. 2):

> *The Pricing Process*
>
> The first collection of facts concerns the determination and dissemination of gross list prices in the pricing process. Gross list prices were set by truck manufacturers' senior management at headquarters level and depended (amongst other things) on manufacturing cost. Increases of gross list prices were normally implemented to reflect expected rising costs of input materials. The gross list prices were then communicated as planning premises to the wholesale level, which could be integrated sales divisions or independent sales agents, typically at a national or regional level. The prices paid by the ultimate buyer or user of trucks depended on the truck specifications of their choice, which it would typically express first at the dealership. The end prices were the result of a sequence of pricing decisions made at various intermediary levels, distributors and dealers, in the vertical distribution chain between the manufacturers and the ultimate buyer. In this price formation process, the gross list prices were the starting point in the determination of the end prices for trucks paid by the customer. A series of rebates and discounts off of the initial gross list prices were typically determined in negotiations between the manufacturer's headquarters and its direct intermediary (sales division and/or agents), between consecutive intermediaries (dealers), and between the ultimate seller and the truck buyer. The end prices effectively paid at the local level by a truck buyer essentially equalled the gross list prices minus the net total of these discounts.
>
> In sum, the pricing process awaiting each truck customer starts from manufacturing cost which entered through the gross list prices, which subsequently entered the negotiations that comprise the price formation along the vertical distribution chain which ultimately determines end prices that the customers paid."

Harrington & Schinkel based this on what the Decision says about the role that gross list prices play in the Truck Manufacturers' pricing mechanism (p. 15):

> (...)
>
> The price-setting processes in a vertical distribution chain for such products can be complex, both internally within the original manufacturer and between the various intermediary layers. The sequence of steps in the determination of truck prices during the European Trucks Carte] is described in several public sources. In its settlement decision of 19 July 2016 against all truck manufacturers except Scania, the Commission offers the following succinct description of the role of gross price lists in the price setting mechanism for truck manufacturers:
>
> "[P]ricing starts generally from an initial gross [price list with harmonized gross] list price [across the EEA] set by the Headquarters. Then transfer prices are set for the import of trucks into different markets via wholly owned or independent distributor companies. Furthermore there are prices to be paid by dealers operating in national markets and the final net customer

prices. These final net customer prices are negotiated by the dealers or by the manufacturers where they sell directly to dealers or to fleet customers. The final net customer prices will reflect substantial rebates on the initial gross list price. Not all steps are always followed, as manufacturers also sell directly to dealers or to fleet customers.

3.59. Harrington & Schinkel's theory of harm is summarised in the Executive Summary of the Harrington & Schinkel report and it reads as follows (pp. 6-9):

Cartel Effects from Gross List Price Information Exchange

We now turn to the theory of harm for the case of an information exchange by the truck manufacturers, in which prior to the meetings of the truck manufacturers' managers, gross list prices had been independently set at each manufacturer's headquarters. At those meetings, the colluding managers would only have shared those previously-determined increases in each of their gross list prices, without using that information to revise (independently or collusively) their gross list prices during (or after) the meeting. We explain that this communication practice can still have raised final end prices in the truck markets and thereby harmed truck purchasers.

It may not be immediately obvious how the act of sharing previously-determined and independently-set gross list prices can nevertheless affect final prices. It may be argued that if gross list prices cannot be changed after sharing them, this information exchange cannot affect gross list prices and, consequently, end prices. There is a crucial presumption in that argument, however, which is that truck manufacturers would have independently set the same gross list prices whether they would or would not have been planning to share them. Anticipating that it will share gross list prices with its rival truck manufacturers, we explain that each truck manufacturer's headquarters will independently choose higher gross list prices. Once having established that an information exchange results in higher gross list prices then, by the reasoning earlier, those higher gross list prices will affect all subsequent prices in the vertical distribution chain and, consequently, raise the final prices paid by truck purchasers.

In order to understand the mechanism by which an agreement to share pre-determined gross list prices results in truck manufacturers independently, choosing higher gross list prices, consider the following simple example. Under competition (and in the absence of sharing gross list prices), suppose that the managers of the truck manufacturers expect gross list prices to rise by, say, 5%. They also recognize that higher profits would be earned if they were all to raise gross list prices by, say, 10% - which would raise subsequent prices in the vertical chain of production and pricing by the mechanism set out earlier. Of course, in competition, no individual truck manufacturer has an incentive to do so on its own. The reason is that raising its gross list prices by 10%, when rival truck manufacturers' gross list prices are only increased by 5%, would result in that truck manufacturer's end prices in the market being too high relative to the competition, because its higher gross list prices would be passed through to yield higher end prices. Thus, a competing truck manufacturer does not raise its gross list prices by 10% because it is concerned that it will be left at a competitive disadvantage in the expectation that rival truck manufacturers would only raise their gross list prices by 5%.

A headquarters' decision-making changes fundamentally, however, when the truck manufacturers' headquarters have an information exchange agreement, so they anticipate sharing their gross list prices after setting them. Each headquarters could now raise its gross

list prices by 10% on the expectation that other truck manufacturers would do likewise. If, upon sharing their gross list prices, it learns that rival truck manufacturers also raised theirs by 10%, that will be according to expectation and all will earn higher profits by the subsequent raising of prices in the price formation along the vertical distribution chain. But suppose a headquarters instead would learn that other truck manufacturers' headquarters only raised their gross list prices by 5%. The truck manufacturer is locked into its 10% gross list prices increase which, as a result of the information exchange, it now knows puts it at a competitive disadvantage. But, having been informed that its gross list prices are higher than those of other truck manufacturers, this truck manufacturer's headquarters can, at least partly, respond with allowing larger discounts at the wholesale level. Though headquarters does not fully control the level of those discounts that will effectively be given, for they are negotiated with the wholesale level as set out earlier, the headquarters still can influence them so as to reduce how much more its dealers' net prices are compared to those of other truck manufacturers.

Sharing gross list prices informs a truck manufacturer when its gross list prices are not competitive, which gives it the opportunity to intervene in the subsequent internal pricing process and thereby reduce that competitive disadvantage. This makes the pricing process used in the European trucks market particularly suitable to collude and raise already committed gross list prices by information exchange alone. Because the knowledge of there being an information exchange of gross list prices reduces the risk to a truck manufacturer from participating in a common increase in gross list prices, it is then more inclined to enact that common increase. Since this is true for all truck manufacturers, they are all more inclined to choose and commit to higher gross list prices when they anticipate sharing them. An information exchange of gross list prices this way results in higher gross list prices.

To be clear, it is not the act of sharing gross list prices that raises gross list prices - for those gross list prices are presumed to be fixed and, thus cannot be changed upon learning other truck manufacturers' gross list prices - it is the anticipation of sharing gross list prices that causes all headquarters involved in the collusive information exchange to each set higher gross list prices independently. An understanding among truck manufacturers' headquarters to share gross list prices results in each headquarters being more secure in setting higher gross list prices because it knows it will have the opportunity to partly respond with higher discounts should other truck manufacturers' gross list prices prove to be lower. A common understanding as to an information exchange agreement would be the natural implication of the truck manufacturers' headquarters having met and shared prices on a regular basis over an extended period of time. We conclude that the extensive information exchange of gross list prices at the senior management level is expected to cause truck manufacturers to set higher gross list prices, which will consequently result in higher end prices for truck purchasers.

(…)

Conclusion

In this report we explain that the causal effect of gross list prices (raised in collusion) on (higher) end prices follows from established economic principles and established facts of the trucks market. In essence, the colluding headquarters caused their intermediaries to believe that manufacturing costs for trucks were higher than they actually were. Each manufacturer's sales division (or independent sales agent), unaware of the existence of the headquarters'

cartel, (incorrectly) deduced from the (collusively inflated) higher gross list prices that manufacturing costs had increased - which would have been correct if their headquarters had been in competition, as the sales divisions believed they were - and thereby negotiated discounts as usual and thus would not have offset the raised gross list prices.

In the subsequent normal pricing processes for trucks in the vertical distribution chain, the gross list price overcharges that all manufactures collusively implemented at the start were passed through into higher end prices: higher gross list prices minus similar discounts as in competition resulted in higher net prices. That way, the cartel margin in the gross list prices got passed on, at least in part, into higher net purchasing prices for truck buyers. There is no need for the European Trucks Cartel to have colluded on discounts or net prices, as the defendants have asserted. There is also no reason to expect that the gross list prices increases were fully mitigated in the series of discounts and price negotiations between gross list prices and net purchasing prices, so that end prices would not have been affected materially, as defendants have argued.

What we show is the sense in which the European Trucks Cartels aim of "the distortion of independent price setting and the normal movement of prices for trucks in the EEA", as established by the European Commission, would have been effective in causing harm. To be clear, the cartel's aim need not be to coordinate on end prices but only to affect end prices. The cartel’s practices were intended to increase truck manufacturers' gross list prices by either agreeing to gross list prices or sharing their gross list prices - or any combination of these two types of collusion. Those higher gross list prices caused wholesale, dealer, and end prices to be higher through the processes common to the European trucks market by which wholesale, dealer, and end prices are determined. Artificially higher gross list prices would, like an actual increase in the manufacturing cost, permeate prices at all levels including higher end prices paid by purchasers of trucks, regardless of those trucks' configurations or the countries in which they were sold.

Our findings include that, even if the infringement established by the Commission were a mere information exchange about (increases in) gross list prices, the expected effect would be that net prices for trucks were above competitive levels. Coordination on (increases in) gross list prices further supports such higher prices. We also note that any (occasional) discussion of net (dealer or end) prices is not inconsistent with the cartel mechanisms that we lay out, as those mechanisms only do not require collusion on discounts (i.e. wholesale) or net prices. In addition we note that to the extent that the European Trucks Cartel did involve the manufacturers directly communicating about and coordinating on the end prices they charged to buyers, standard cartel theory applies and the price effects and harm are immediate.

We conclude that final truck purchasers were very likely harmed by the truck manufacturers' cartel because their practices should be expected to have raised the prices those truck purchasers paid. These end price rises are also the source of cartel benefits to the participating truck manufacturers, and therefore the ultimate aim of the collusion. The precise extent of the increases in end prices as a result of the collusively overstated gross list prices for any particular truck transaction or group(s) of transactions is to be determined by empirical study.

3.60. The Truck Manufacturers dispute the accuracy of the Harrington & Schinkel Report.

3.60.1. They point out that Harrington & Schinkel recognise that the prevailing theory of effective coordination does not work in the context of trucking markets. However, the Harrington & Schinkel Report comes up with a new theory which has no basis in existing economic literature and has not been published in a scholarly economic journal. Moreover, it was developed for the specific purpose of supporting the Claimants' claims. Nor has the theory been validated by any empirical evidence that companies actually act as the theory describes and assumes.

3.60.2. As regards the theory itself, it comprises two distinct steps. The first step deals with the question of how the Infringement could have resulted in higher gross list prices at the headquarters level. The second step deals with the question of whether the effect of those higher gross list prices was to increase transaction prices and, if so, how. The first step assumes two scenarios that could lead to higher gross list prices. The first scenario assumes that gross list prices were expressly coordinated. However, according to the Truck Manufacturers, there were no specific, systematic arrangements on pricing. The second scenario assumes an agreement to exchange gross list price information. And that is where Harrington & Schinkel come up with a new theory. Merely agreeing to exchange list prices would result in headquarters individually setting higher list prices. This theory has not been accepted in the context of competition law. Moreover, it does not hold up, given the pricing in the truck markets. A gross list price does not have a clear and unambiguous function in the chain, which is the same for all Truck Manufacturers. In addition, at some Truck Manufacturers gross list prices were set by the headquarters and, at others, they were set by national marketing entities. Also, the purchase prices that the headquarters charged to the first customer do not correspond to the gross list prices or were not even based on them. Therefore, the ‘anticipation theory' does not hold up for two reasons. How does a Truck Manufacturer know - without being aware of the discounts (or purchase prices) of its competitors - how much discount to give in order to ultimately achieve the same price increase and ensure that it is no longer pricing itself out of the market based on the purchase price it imposes on the distributor or dealer, for example? Another important assumption made by the ‘anticipation theory' is that the headquarters only has a limited influence over discounts, so that to some extent the headquarters itself is bound by the gross list prices it disseminates and is thus kept from indulging in ‘cheap talk'. Indeed, if it is too easy to adjust the exchanged prices afterwards, these exchanged prices become meaningless. Indeed, any price increase is then just as easily relinquished afterwards, according to Harrington & Schinkel. But this is precisely what is now possible at the headquarters level: relinquishing possible list price increases for the distributor, for example, in purchase price negotiations. The distributor would welcome lower purchase prices. That means ‘cheap talk’ all round in the exchange of gross list price information. Incidentally, this points up an obvious inherent contradiction in Harrington & Schinkel's theory. On the one hand, headquarters would be able to ‘repair' its own excessive list price increases easily enough by applying discounts afterwards, but, on the other hand, that would not be so easy because that would make the list prices meaningless. As the Truck Manufacturers put it, ‘You can't have your cake and eat it.'

3.60.3. The second step in Harrington & Schinkel's theory is also flawed, according to the Truck Manufacturers. There is no empirical support for the assumption that a headquarters’ gross list price increase that is unrelated to a cost price increase will still pass through the chain as a cost price increase as long as the customer believes it is a cost price increase, nor does this reflect the way negotiations are conducted in the industry. Nor is it true that the key function of gross list prices is to signal cost increases. A list price increase need not reflect a cost increase. Moreover, it is not true that a distributor has no idea how cost prices develop and would therefore simply perceive and

accept any increase in list prices as a cost price increase. This does not accord with what actually happens in with practice, nor is there any empirical evidence to back that up.

3.69.4. At the hearing, Dr Niels of Oxera also responded to the Harrington & Schinkel Report on behalf of the Truck Manufacturers. He stated the following, among other things:

> 'In an exchange of information, it cannot simply be assumed *a priori* that the practices led to an overcharge: the facts have to be examined. Economists agree on this as well. In the Trucks case, one specific factor is that the information exchange involved gross list prices and it is generally accepted - also by the Commission - that there is not always a direct or mechanistic link between gross price lists and final transaction prices. Nor can this be inferred from the content of the Commission's Decision and other documentation regarding the practices. Facts are facts and economic experts do not determine them.
>
> Harrington & Schinkel come up with another theory of harm, which deals with fake cost increases to artificially increase gross list prices. In short, this theory of harm is scientifically interesting and novel, but it has not been empirically tested. Oxera's view is that this theory cannot be used to draw conclusions about the likelihood of an overcharge, because the model's assumptions and mechanisms are too unrealistic for that in the trucking market context. Ultimately, then, Oxera's conclusion from an economic perspective is that to demonstrate an overcharge, two things are needed: 1) a "plausible theory of harm, i.e., how the practices referred to in the Decisions, which involve an exchange of information on gross price lists, can lead to overcharges on transaction prices, and 2) an empirical analysis of possible overcharges on transaction prices based on specific facts and data."'

3.61. At the hearing, Prof. Schinkel responded to the Truck Manufacturers' criticism of the Harrington & Schinkel Report.

3.61.1. According to him, that criticism makes little sense. According to Prof. Schinkel, the Truck Manufacturers still assume, wrongly, "the *ideé fixe*" of the net final price as regards the alleged effectiveness of a Cartel. Prof. Schinkel acknowledges that there is no focal point, that the transaction prices and market shares fluctuate, that there was variation in prices, and that there was competition among dealers. But the point is that there did not have to be a net price cartel for the cartel mechanism to work anyway. The effects identified above correspond exactly to the theory of harm, according to which information is exchanged at headquarters level. The theory fits with the facts. Prof. Schinkel points out that the theory contains elements that are generally accepted and constitute standard economic theory. The Harrington & Schinkel Report clearly refers to the prevailing economic literature. Prof Schinkel also stated the following:

> 'Mr. Schillemans then considers that the part of the theory of harm that deals exclusively with information exchange contains an inconsistency, an inherent contradiction, which is demonstrated by para. 2.13(ii) of his written arguments. But there is none at all. It does not involve having your cake and eating it. Mr. Schillemans' observation is based on a misunderstanding of the theory, despite the Truck Manufacturers and their economists having been able to study the entire Harrington/Schinkel Report.
>
> Both the coordination and the information exchange theory, and hence any combination of them, are based on less than complete control over the discounts and hence net prices lower down the column, by the headquarters. Therefore, the theory is not based on no control at all,

nor is it based on complete control. The theory is based on an intermediate form, that is, not on one of those two extremes.

This limited influence over those discounts fits very well with the role of senior management as described by the Truck Manufacturers themselves in their reports and as identified by the Commission. The headquarters and sales divisions negotiated within each organisation a maximum and an average discount that could be included by the sales divisions in negotiations further downstream with the dealers. This was typical and it happened regularly, for example on an annual basis. The sales divisions together with the dealers, individually or on the basis of numbers of trucks per customer, determined the final individual net prices and thus the individual discounts that were given. Headquarters was only involved at the first stage, i.e. the negotiations between the headquarters and the sales divisions, regarding the maximum or the average discount.

However, the inconsistency alleged by Mr. Schillemans is between these two extreme assumptions: either complete control - and in that case, there could be a risk of defection - or, at the other extreme, of no control at all - and in that case, the anticipation theory would not hold. But both of these extremes are unrealistic, and our report is in fact based on the reality that lay between those extremes. The Truck Manufacturers themselves have also documented that reality at length in this case. It should be noted that Mr. Schillemans' attempt at criticism relates solely to the anticipation theory, because if agreements were simply made about gross list prices, then the point is also proven. And that would also apply if that only happened to a limited extent, i.e. occasionally or in combination with an information exchange. But the bottom line is: those extremes are unrealistic and the Harrington/Schinkel Report was based on reality, which was somewhere in between the two extremes. That reality has also been extensively documented in this case.

The point is that, with that imperfect control, the headquarters did not deviate if the gross list prices were all high, so there was no defection. But possibly, if the anticipation effect inadvertently failed anyway, it could be tempered somewhat by allowing higher discounts. So it worked as a kind of a handbrake. A handbrake that, of course, the Truck Manufacturers did not use when they were in balance.

That handbrake was not that discounts were adjusted throughout the chain, as the Truck Manufacturers suggest. The handbrake was that, in that extreme case, the sales divisions were allowed to give a higher maximum discount. Obviously, the sales divisions always tried to push for a higher discount, because they were unaware that there was a cartel. The sales divisions entered into negotiations with the headquarters with the intention of negotiating higher discounts in order to increase sales. The headquarters gave them those discounts in the normal way, but on the basis of an across-the-board gross list price increase. That is what follows from the theory. This is very clearly explained on page 103 of Appendix 3 to the Harrington/Schinkel Report. That appendix was also posted as a paper on the SSRN website, as a contribution to the economics literature.

Thus, the cake analogy does not hold: there is no inconsistency.’

3.61.2. The following responses made by Prof. Schinkel to questions posed by this Court at the hearing are also relevant:

‘2.4.3. **Question from this Court, judge Dudok van Heel**:

Is it true, simplistically stated, that you are saying that the fact that gross list prices were agreed, matched or shared had the effect of systematically pegging gross list prices at a higher level than they would have been in a free market, so that if you look at all the graphs (of the Truck Manufacturers) there is nothing wrong with them, but that all those graphs are probably one or two centimetres higher than they would have been if no one (i.e. none of the Truck Manufacturers) had known each other's gross list prices?

2.4.4. **Prof. Schinkel’s reply**:

Yes, exactly.

Because the sales divisions all negotiated as normal with everyone - after all, they were not involved in the cartel - they still all gave discounts as always, but discounts on a price level that itself was higher across the board. It is still remarkable how much analysis is needed to really get to the bottom of this, to get it to really tally, because it has to be the case that the sales divisions really did believe that the costs were higher if they were presented with a higher gross price. And we show that is indeed what happened. The fact is that the same would have applied in the competition between the headquarters.’

(…)

2.4.5. **Question from this Court, judge Vaessen**:

Does the theory mean that, given that all the Truck Manufacturers were doing this at the senior management level, it therefore appeared that the gross prices were actually increasing when in reality that was bogus and those costs increases were not genuinely necessary but they did seem to be to the outside world, including lower management levels?

2.4.6. **Prof. Schinkel’s reply**:

Yes, exactly.

An important point is also, and this has been extensively documented, that senior management was involved in the cartel. The mechanism also worked at a slightly lower management level, but at least it did in fact operate at high levels of management. Lower levels of management were not involved in the cartel. That is the bottom line.

The interesting thing is that, today once again, the Truck Manufacturers are giving extensive examples of competition for market shares etc at those lower levels. That may well have been the case, because all the cartels had to do was agree on gross prices, after which everything agreed at a higher level then developed downstream, because they knew that all the Truck Manufacturers were working on a margin.

It was like the tide lifting all the boats. The little boats kept bobbing up and down on the waves, but even the very lowest boat was still at a higher level, which was the higher prices that were being paid by truck buyers.’

3.62. This Court finds as follows: the Harrington & Schinkel Report and Prof. Schinkel's explanation of the theory of harm at the hearing show that, according to Harrington & Schinkel, there is a new type of cartel. Because high-level consultations dealing solely with the gross price lists took place in

the Truck Manufacturers' organisations, it was possible for the Truck Manufacturers to maintain the perception of full competition, both within and outside their own companies. This is illustrated by the emails filed by DAF (Exhibit DAFA-0008). This also allowed the perception to continue that the price of a truck was negotiable bottom up. Meanwhile, however, gross prices were increased from above due to the consultations at issue. Given that this happened across virtually the entire industry, it appeared to the outside world that the price levels had risen. This theory of harm illustrates that the artificial gross list price increases, based on the appearance of cost increases resulting from the usual negotiation process on discounts, led to an across-the-board net cartel mark-up on the net final prices paid by customers. Accordingly, the Truck Manufacturers' defence that effective coordination was not possible because the *Airtours* criteria were not met due to the many variables at play in the truck market, is refuted by Harrington & Schinkel. All the variables were taken into consideration, precisely because of the agreements made on list prices at the grassroots level. The artificial price increases, or, in Prof. Schinkel's words, the artificially created tide that lifted all the boats, benefited all the Truck Manufacturers. It follows from the Harrington & Schinkel Report that this also applied to the instances in which concrete arrangements were made about increases in gross list prices. Although the Truck Manufacturers dispute that that occurred, the Commission has established in so many words that it did, in para. 51 of the Decision.

3.63. This Court finds that the Harrington & Schinkel Report is conclusive and convincing. It was prepared by individuals who may be regarded as experts in the field and it shows in an understandable way not only what effect the information exchanged between the manufacturers had on the market, but also that the impression of a fully competitive market was maintained by concealing the agreements made both inside and outside the company. This is underpinned by the widely accepted economic theory that prices rise when costs increase. According to this Court, the theory expounded by Harrington & Schinkel that the lower links in the distribution chain, who knew nothing about the agreements on gross list prices and the information exchange regarding gross list prices, saw the gross list prices as cost prices, is convincing. This Court does not share the Truck Manufacturers' criticism of that report. This Court finds that Prof. Schinkel adequately rebutted that criticism during the hearing; see the passages from the official record cited above. In addition, this Court finds as follows.

3.64. According to Dr Niels of Oxera, there is not always a direct or mechanistic link between gross price lists and final transaction prices. That leads this Court to infer that, according to Oxera, the possibility of such a link having existed cannot not be ruled out. Dr Niels also stated that the facts have to be examined. And that is what Harrington & Schinkel did: they proceeded from the content of the Decision and the content of the Truck Manufacturers' reports regarding the way in which prices were set. Based on that, they explain how the information exchange could have led to higher prices. Although the Decision provides no information on how the lower links in the distribution chain interpreted the (higher) gross list prices i.e. whether they unquestioningly assumed that they were cost increases, that does not diminish the plausibility of the theory expounded in the Harrington & Schinkel Report.

3.65. The Truck Manufacturers submitted documents arguing that the gross list prices were not a factor of the pricing. However, that defence is inconsistent with the Commission's findings in the Decision, which, as stated above, this Court is obliged to adhere to.

The Commission established a link between the gross list prices and the prices paid by customers. Furthermore, the Truck Manufacturers did not convincingly explain what purpose was served by

exchanging the gross list prices. All the Truck Manufacturers submit that there was no link between the gross list prices and the final prices that consumers paid for trucks. According to DAF, gross list prices serve primarily as a mechanism for ranking the various chassis configurations and options in a logical order of technical complexity and/or added value for the customer. At Daimler, gross list prices serve as an internal pricing structure to identify the relationship between the pricing of different components of a truck, thus enabling a comparison to be made between different trucks. At CNH/Iveco, gross price lists were mainly used internally as part of the decision-making process in relation to meeting annual targets/financial goals/budgets. Volvo/Renault states that the gross list prices are "paper" prices used to create logical pricing structures for the thousands of truck configuration options available and to ensure consistent differentiation of the prices of the products offered. None of these statements, for which no further factual substantiation was provided, rule out the possibility that the consultations at issue regarding the gross list prices played a role in the pricing mechanism. Furthermore, at least according to the E.CA Economics report entitled *'Plausibility of net price increases due to gross price related competition law infringements'* of 24 April 2019 (Exhibit DAIM-0002, see 2.42.4), the gross list price that Daimler used did in fact play a role in setting the prices. The fact is that it states:

> 4.6. Price setting process
>
> (...)
>
> Specifically, Daimler's price-setting process consisted of the following four stages:
>
> 1. **Central decision on gross list prices by Daimler's headquarters**. The Steering Committee Pricing ("SCP") decided on inflation adjustments and price re-positioning (both changes to gross prices). Major decisions needed to be approved by the truck division's management board. This process usually took place in April and May of the year prior to the year to which the price adjustments should apply. The final decisions on gross prices for each component as of January the next year were taken at the end of May. The new gross list prices were then communicated to the sales division through printed manuals or, later, through electronic truck configurators. [emphasis added by this Court]
>
> 2. Wholesale level: negotiations between headquarters and the MPC/GD. This consists of four consecutive steps between May and September.
>
> a. The headquarters' decisions are passed on as "planning premises" to the wholesale level at the end of May.
>
> b. The headquarters and the MPC or GD hold planning discussions between June and September based on the planning premises and overall economic, market, sales and revenue situations, resulting in market-specific price adjustments. These may be different from the headquarters' planning premises; any differences are reflected in adjusted discounts since, from 2006 onwards, gross prices are not market-specific anymore. All discounts agreed on in this process refer to average discounts granted by the MPC to dealers, usually defined as a percentage of the gross price. Dealers, including Daimler-owned ones, are free to decide on the final net price offered to customers." [emphasis added by this Court]

3.66. The Truck Manufacturers also submit that the reports submitted by DAF, Daimler and Scania show that the Infringement did not result in overcharges. However, those reports were produced on

the basis of internal data from the Truck Manufacturers which they did not share with the Claimants. Accordingly, the results presented by the Truck Manufacturers are not verifiable, meaning that those reports should be ignored at this stage.

3.67. At the hearing, the Truck Manufacturers were also unable to provide a convincing answer to the question about the purpose of the information exchange on gross list prices. The Truck Manufacturers claim they were merely interested in everything that was going on in the market and saw little or nothing harmful in that exchange. That is quite different from what the Commission found in the Decision regarding the purpose of the collusion, which was to disrupt independent pricing and normal price movements for trucks in the EEA (para. 71). The Decision shows that there was already considerable transparency in the truck market (para. 29). The Truck Manufacturers' future market behaviour and their plans regarding changes in gross prices and gross list prices were among the remaining uncertainties. Once again, this Court points out that, with the exception of Scania, the Truck Manufacturers have acknowledged the Commission's findings. It is impossible to see why a Truck Manufacturer would, out of pure interest, provide its competitors with information about its future market behaviour if it did not receive something in return that would (or could) be to its benefit. In this case that would be information about the future market behaviour of their competitors, the intention being to coordinate their market behaviour, as the Commission also found. The Commission also found that the Addressees committed the Infringement intentionally (para. 104). The information exchange obviously benefited the Truck Manufacturers. The Cartel functioned for many years and not one member withdrew from it early. This is another argument against the claim that the Infringement had no effect and could not have caused harm. Here this Court refers to para. 81 of the Decision, where the Commission finds that, given the market share and sales of the Addressees in the EEA, it may be assumed that the effects on commerce were appreciable.

3.68. It follows from the foregoing that the Truck Manufacturers' defence that no damage was or could have been sustained by any customer, meaning that all the claims should be dismissed at this stage of the proceedings, does not hold up. Accordingly, the parties' submissions about the possibility (and impossibility) of damage due to the Infringement as regards collusion in timing and passing on costs for introducing new emission technologies as required by the EURO 3 to 6 standards, requires no further discussion at this point.

Conclusion

3.69. It is not an established fact that it can be ruled out that the Infringement resulted in harm to the Claimants. This does not alter the fact that it will now have to be assessed, for each Claimant, whether the threshold for referral to quantum of damages assessment proceedings has been met. In this regard it has to be plausible that a Claimant, or at least the Underlying Party, could possibly have suffered damage as a result of the Truck Manufacturers' unlawful acts. This Court has not yet ruled on that. This means that these proceedings will be continued and that the merits of the Claimants' claims will be further assessed in light of the other arguments made by the Truck Manufacturers in their statements of defence.

3.70. As announced during the hearing, a case management conference will be held to discuss the further course of the proceedings. That case management conference will be held on 27 May 2021 and presided over by a single judge, judge R.A. Dudok van Heel, acting as the supervisory judge (*rechter-commissaris*).

4. The Decision

This Court

4.1. refers the cases to the case management conference to be held on 27 May 2021,

4.2. stays any further decision.

This judgment was issued by R.A. Dudok van Heel, M.A.M. Vaessen and K.A. Maarschalkerweerd, judges, assisted by J.P.W. Manders, Registrar, and pronounced at an open hearing on 12 May 2021.

[duly signed and stamped]