

Appendix: Truck Cartel Claim: for information only

Background

The European Commission found that a price-fixing cartel ran from 1997 to 2011 and involved DAF, Daimler (Mercedes Benz), Iveco, MAN, Volvo (Renault) and Scania. The European Commission issued a statement of objections against the truck manufacturers in November 2014. In April 2017 the European Commission published a non-confidential version of the settlement decision in the EU truck cartel case. It found that manufacturers at senior manager level fixed prices, agreed the cost that truck purchasers should be charged for emissions technologies and delayed the introduction of these technologies. The publication of the non-confidential decision had the effect of broadening the scope of the claim to cover all trucks 6 tonnes and over from all manufacturers, whether purchased or leased (new or second hand) between 1997 and the end of 2012 when prices returned to normal competitive levels.

Initial work in SWP finance suggests that there are around £6.7m worth of qualifying purchases in that period (with greater detail on the purchase of 26 DAF trucks in 2011 and 2012 for the sum of £1.795m). We may be able to claim at least 10% of the purchase prices, possibly up to 25%, so this suggests that the value of SWP's claim is between £670k and £1.675m. However, this is based on very preliminary advice as the details of claims, quantum and potential defences are a very specialist job to be carried out by the appointed solicitors. In addition, SWP may be able to claim for the increased cost of outsourced services to other companies, such as Kier, if they have paid excessive prices for trucks used in the delivery of those services to SWP ("the Additional Costs claim"). Any claim would be complex and require specialist solicitors.

On 17 January 2018, Martin Gerrish (former treasurer to SWP) provided advice to the relevant District Council's s151 Officers who provided unanimous instructions that they were content to participate with an LGA scheme. This was preferred to instruct our own solicitors on a fee paying basis as whilst this would recover all our damages plus the majority of costs, we would bear the risk of paying adverse costs if we lose. The intention of SWP, along with other local authorities, has throughout been to minimise risk. Nothing has changed to alter this position. However, a detailed examination of the final documents of the LGA scheme identified a number of areas of concern (outlined below) and SWP asked SCC legal to review other alternatives.

SWP have 6 years from the accrual of the cause of action to bring a claim. The problem is establishing exactly when the cause of action accrued i.e. when you could have reasonably determined that there was a cartel. Given that the European Commission issued a statement of objections against the truck manufacturers in

November 2014, the first arguable deadline for limitation is November 2020. If SWP is going to join a claim, then it needs to issue by November but it will be necessary to make a decision by September.

Options going forward

A review by SCC legal identified and considered three schemes; the LGA scheme, the Edwin Coe scheme and the Road Haulage Association scheme. The scheme documents in relation to each potential option are very complex and it is impossible at this stage to advise about all of the potential pitfalls or problems which could be encountered as claims proceed. All of the potential schemes set out below have an element of risk that adverse costs will be ordered, albeit a very slim risk. To fully eliminate risks would likely require such a high level of insurance to be purchased that claims would probably not be financially viable. SWP will therefore need to allocate appropriate resources to support our claim, which is a risk given the other pressure on our staff time. However, the potential benefits identified mean that doing nothing is not a recommended option.

A summary of the alternative options is as follows, with the conclusions RAG rated according to the extent to which they meet our criteria (do we have sufficient control, does it manage our risk adequately, and is there an adequate likely level of recovery):

	Private funded option	LGA scheme	Edwin Coe Scheme	RHA scheme
Management of Group	Control of individual claim	All in, all out	Control of individual claim	All in, all out
Risk of liability for adverse costs if lose	Yes	Unlikely but possible	Unlikely but possible	Unlikely but possible
Promoted level of recovery after costs deducted	All plus costs after assessment	36 - 61%	75%	91 - 95%
Actual minimum level of	All plus costs after assessment	No guarantee	50%	No guarantee

recovery after costs deducted				
Claim for additional costs	Yes	Yes	Yes	No

Further commentary on key elements of each scheme:

1) LGA Scheme

The scheme involves a conditional fee agreement, litigation management agreement and litigation funding agreement. The documents are very complex. However, in broad terms, all of the participants in the scheme pass control of the claims to a Steering Committee, which is to be appointed from representatives of the member local authorities. LGA say that Claimants have signed up with £100m worth of claims. No individual member can settle their own claim unilaterally without very onerous penalties. Given how complex the arrangements are, it is impossible to predict whether any particular elements of the agreements will prove to be a problem for SWP. The solicitors work on a no-win part fee basis. The part fee is funded by Vannin during the course of the claims. If and when the claims are settled, the solicitors, LGA and Vannin will all take a share of the proceeds for their own fees and reward. Even if the scheme works as it is designed to do, a large part of our recovery will be taken by the various fees and premiums to be charged. When all those sums are paid, then the remainder is distributed to the members of the group, pro rata to the value of that member's claim. There is no guarantee how much of the damages will eventually be paid out to members. There is cover of £10m for adverse costs.

2) Edwin Coe (EC) Scheme

EC are running a current issued claim including £150m worth of purchases and are issuing a second claim, probably in November but it will be important to become involved by September so that the preparatory work for that claim can be done. EC run the claim on the basis of a Damages Based Agreement (DBA) which is like the US model of contingency fee, i.e. that the solicitors and funders are paid a percentage of the recovery. All costs are funded by a litigation funder during the course of the claim. Each member of the group makes their own decisions and can exit the group when they are content with offers made. Whilst EC say that they will never charge more than 25% plus VAT of the recovery, legal review of the agreement shows that under certain circumstances they reserve the right to charge a maximum of 50% including VAT. The VAT implications need further review. We do not yet have clarity on the level of cover for adverse costs but EC have said "There is always a limit to

what the insurer will pay out but we always seek to keep the amount of cover proportionate to the estimated value of the claim/likely recoverable costs".

3) RHA Scheme

This scheme is similar to the LGA scheme, with a litigation management agreement and litigation funding agreement. However, it has a much larger claim value – apparently £1.5bn. It is another "all in all out" scheme and it is based upon a Damages Based Agreement (preferred) rather than a conditional fee agreement. There is no guarantee of the level of recovery. The brochure does say "Based on conservative assumptions in relation to the level of damages per truck and the overall number of trucks that are in the RHA's claim, the level of return to the funder will be at most 9% and may be as low as 5%". If correct this would be a much greater level of recovery than the other 2 schemes. However, the funder could charge up to 30% of the recovery in addition to the solicitor's costs and funding costs, which could in extreme circumstances take up all of the recovery. It is also similar to the LGA scheme in that we cannot make our own decisions about the claims, it is "all in all out", and SWP would not be able to opt out of the group without very severe penalties. Under this scheme we could not pursue the 'additional costs' claim which, given our service were outsourced to Kier, may impact on our return.

Recommended approach

Whilst none of the schemes are perfect and we cannot be certain about the success of our claim and the quantum of it, the potential return is significant enough for SWP to consider that we should pursue this. With the first potential deadline for claims coming up shortly, it is also considered prudent that we make a decision now. Whilst not perfect, the Edwin Coe Scheme most fully aligns with our objectives of minimising risk, maximising return and giving an appropriate level of control:

- SMG and s151 officers have previously rejected a privately funded scheme and nothing has changed to alter that conclusion
- The Edwin Coe scheme offers more control than the other two externally funded schemes, and under the Road Haulage scheme we would be a very small part of their claim
- The level of recovery under the Edwin Coe scheme is anticipated to be higher than the LGA scheme and we have greater comfort in the minimum level of recovery
- Whilst the nominal recovery under the RHA scheme is higher, the level of recovery is not guaranteed and under this scheme we cannot pursue an additional cost claim and we would be a very small part of an overall claim

Should the Edwin Coe scheme not proceed then we will proceed with the Road Haulage scheme.

SMG have reviewed the proposed approach and support the approach proposed. s151 officer support for the recommended course of action is being sought and a verbal update will be provided to the Board. The Board are not being asked to make this decision (to be made under officer delegations) and this paper is provided for information only.