Case No. : 1284/5/7/18 (T) ; 1290/5/7/18 (T) ; 1291/5/7/18 (T) ; 1292/5/7/18 (T) ; 1293/5/7/18 (T) ; 1294/5/7/18 (T) ; 1295/5/7/18 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Rolls Building,
7 Rolls Buildings,
Fetter Lane
Holborn
London EC4Y 1NL

3 December 2019

Before:

The Honourable Mr Justice Roth, The Honourable Mr Justice Fancourt, Hodge Malek QC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Trucks Proceedings (Preliminary Issue Hearing – December 2019)

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PIH – Day 1

Tuesday, 3 December 2019

(10.30 am)

(Proceedings delayed)

(10.55 am)

Housekeeping

THE PRESIDENT: We are aware of the technical problem with the transcription and we will consider in a moment what we should do about that as we don't want to lose much more time. There is a bit of flexibility but it has limits.

We did think it is worth coming in in any event because there are a couple of matters we wanted to mention at the outset.

First of all the matter of Suez and the pleadings in Suez. Ms Demetriou, as we understand it from a letter we have received from your solicitors, your application to amend the claim form, particulars of claim, is now agreed; is that right?

MS DEMETRIOU: That is right.

THE PRESIDENT: That has been ironed out. So in the light of that we give permission to make those amendments. I think the version in the bundle is without those amendments, I believe.

MS DEMETRIOU: That's correct.

THE PRESIDENT: So perhaps tomorrow when we are not sitting

there could be substituted the version which can be served also later today or tomorrow.

MS DEMETRIOU: We will do that.

THE PRESIDENT: And I think the defence in the Suez case is a draft defence anticipating as it were those amendments and if a defence -- I don't know if it needs separate service. The defence will be in the form of a draft, I think. But if a formalised defence could also please be substituted tomorrow by the defendants in the Suez case and we hope as tomorrow is a non-sitting day it shouldn't present a problem.

The next matter is the timetable for this hearing. Thank you all for your skeleton arguments which we have read and appreciate. We note how the defendants have, as it were, divided out the recitals for comment between them to avoid overlap. There is, of course, overlap perhaps inevitably on other matters that we have to deal with. That is to say on the case on the binding nature of recitals and abuse of process. But we hope and trust that when it comes to oral submissions you have agreed who will make the submissions on each side on those matters so that, for example, on the binding nature of recitals there will be one counsel speaking for the defendants plus DAF separately because DAF takes a slightly different position, and when it comes to

abuse of process again there will be one counsel speaking on abuse of process and that we don't need to hear from more.

There has been some correspondence about the order for this hearing. The members of the Tribunal have had some further discussions about that this morning and we think on reflection that we would like to revise the order that was previously suggested to have the claimants' submissions on general principles and abuse of process first and not specific recitals, so the general principles under both heads and then the defendants' submissions under both heads and then replies which we think can be accommodated in Days 1 and 2, and to leave Day 3 to go through the individual recitals which we think once the general principles have been fully explored should be for the most part a reasonably rapid exercise because the observations made on the recitals very much reflect what is being said about general principles.

In following that approach it would mean that today we will hear the claimants' submissions as general principles on the binding nature of recitals first, we would not then go into the detailed recitals but go on to the claimants' submissions on abuse of process and to conclude that by 3.30, and then have 45 minutes for the

defendants' submissions on general principles on the binding nature of recitals starting today, continuing tomorrow morning, then the defendants' submissions on abuse of process -- not tomorrow, sorry, Wednesday -- Thursday. Day after tomorrow. Thursday.

And to conclude by 3 o'clock on Thursday, leaving 45 minutes for replies, 3 o'clock -- sorry, leaving one hour and a quarter for replies on Thursday, and then Friday for going through the recitals. We hope that doesn't cause any inconvenience in particular to counsel who is going to start on the general principles of the binding nature of recitals later this afternoon. I don't know if that is Ms Bacon or Mr Beard, I don't know which of you is going to go first.

MR BEARD: The intention is I will focus on case law and obviously DAF's position in relation to it and then Ms Bacon is going to pick up on the issues to do with that case law and the essential basis material.

THE PRESIDENT: I am sure you will be quite capable of addressing us for 45 minutes this afternoon.

So that is the course we would like to follow. Now we would at that point wish to begin. Where are we on the Opus position? It is now working? Yes, it is coming up here, in which case we can start.

Mr Brealey.

Submissions by MR BREALEY

MR BREALEY: As you are aware, I appear for Ryder and Hill Hire with Mr Spitz. Can I dispense with the cast. I think you have got it there.

THE PRESIDENT: Yes, we have a cast list.

MR BREALEY: You will note that Mr Beard QC has replaced Mr Pickford, Ms Ford QC has replaced Mr Hoskins, otherwise everyone is the same.

On the claimants' side there is a division of labour. I shall open the case and deal with the law on the binding nature of the recitals. Ms Demetriou will deal with the law and abuse of process. She will have to follow me today. Mr Ward will tackle the individual recitals. So I'm binding nature of recitals, Ms Demetriou is abuse, Mr Ward will tackle the individual recitals.

Before we get to the law, can we put the preliminary issue into context. I think we can't do it in a vacuum. And to do that could I go to our skeleton argument. That is at bundle E, tab 2. Bundle E, tab 2. Our skeleton. Just to put this in context and then we will go to the decision as well. Tab 2 and paragraph 2 sets out the preliminary issue. The actual order is at bundle C, tab 48, but for convenience paragraph 2, page 3 sets out the preliminary issue and just to note

in passing we are concerned with sections 3, 4 and 7. That is the first line. We are concerned with sections 3, 4 and 7 of the decision. That is the preliminary issue.

Can I then go to paragraph 10 of the skeleton. That sets out article 1, all the defendants accept that article 1 is binding. That is not much of a concession because obviously they are bound by article 288 of the treaty. But if we go over the page --

THE PRESIDENT: Sorry to interrupt you. When you say article 1 alone, I thought it was accepted that all the operative part is binding?

MR BREALEY: I think they do but for the purpose of liability they are concerned with article 1 here. I will let the defendants speak for themselves. But certainly article 1 they accept is binding.

Over the page, now we are coming to the crux of the preliminary issue. This paragraph sets out what the defendants accept is binding as regards the recitals. So you will see there are only seven recitals they accept are binding and that only in part. So it is an extremely narrow approach to what is binding in this decision and before we get to the law I would just like to put this in context.

We see at paragraph 12 the skeleton may accept in

part recital 68, 69, 71, 78, 81, 85 and 88. To put it in context, could I note recital 81. Recital 81, if we go to common bundle F with the decision, that is the outer ring of authorities, recital 81 is at page 18 of the decision.

So recital 81 we see is in section 4, the legal assessment. So legal assessment and then in the third section "Restriction of competition", recital 81 on page 18.

They accept the first sentence is binding:

"The anti-competitive behaviour described in paragraphs 49 to 60 above has the object of restricting competition in the EEA-wide market."

The rest of the recital is not accepted as binding, so that recital, the conduct is characterised by the coordination between addressees which were competitors, gross prices, directly and through the exchange of planned gross price increases, limitation and timing of the introduction of technology, complying with new emission standards, and sharing other commercially sensitive information such as order intake and delivery times, price being one of the main instruments of competition, the various arrangements and mechanisms adopted, but the addressees were all ultimately aimed at restricting price competition within article 101 of the

treaty.

So we see that only the first sentence is binding, so they could in principle deny that they were competitors, they could in principle deny that they exchanged future gross price increases, they could in principle deny a factual finding relevant to object infringement; that is behaviour that was aimed at restricting price competition.

But the narrowness goes much further than that because they accept that the first sentence is binding, save recitals 49 to 60.

So we get to the rather Kafkaesque situation, the defendants accept that behaviour is binding, but not what the behaviour actually was.

We see this because recitals 49 to 60, if one goes back, is essentially at section 3, page 11, the description of the conduct. So none of this is regarded as binding by the addressees.

THE PRESIDENT: Well, a little bit. I thought, I know you show it, or maybe it is -- I thought that, although it is not in your list in paragraph 12, I thought that certain aspects of recitals 49 and 50 are accepted.

MR BREALEY: They are admitted but not regarded as binding.

THE PRESIDENT: I see.

MR BREALEY: So if we can just tease that question out

a little bit more, let's see what the defendants' approach means in principle and then what in practice. If one goes, for example, to recital 52 on page 12, I will just read 52:

"The following examples of meeting ..."

THE PRESIDENT: I don't think you need read out. We have all read the decision carefully. If you direct us to the recital, if you want us to re-read it quickly to ourselves, we can do that. It is probably quicker, isn't it?

MR BREALEY: 10 seconds.

THE PRESIDENT: Yes. (Pause).

MR BREALEY: So what it means in principle, it means in principle they can deny a meeting took place on 17 January 1997. It means they can deny that future price lists were discussed, as found by the Commission. It means they can deny that a meeting took place on 6 April. It means that they can deny that they discussed additional charges for euro 3. All that is up for grabs, in principle, in domestic litigation.

To tease this out a little bit more, what this means in practice -- because the preliminary issue seeks to ascertain also what recitals are admitted, could we go to the composite schedule. This is in various places, but it is in tab 9 of the skeleton bundle. I don't know

if you ...

THE PRESIDENT: Yes.

MR BREALEY: So keeping on paragraph recital 52, if one goes to page 8, for the purpose of this litigation let's see what is being said.

THE PRESIDENT: This is about recital 52?

MR BREALEY: Recital 52 on page 8 of the composite schedule. This is tab 9 of the skeleton bundle.

THE PRESIDENT: Page 7 on the one -- do you mean at tab 9 or do you mean the one that I think is attached to your skeleton?

HODGE MALEK: There is a big one.

MR BREALEY: There is quite a few.

THE PRESIDENT: Just to clear it up, we have at tab 9, which may be too far away for you to see it, "Extracted submissions on individual recitals ...". That is our tab 9. We also have at the end of your skeleton --

MR BREALEY: So that is in my tab 10. Have you got the colour one? Whichever -- it could be attached to the --

THE PRESIDENT: As long as -- I just want to make sure we have -- we are on the same page. And then we have a one that is in landscape format.

MR BREALEY: Yes.

THE PRESIDENT: With blue colouring at the top.

MR BREALEY: Yes.

THE PRESIDENT: Is that the one you mean?

MR BREALEY: Yes, the one that was attached to the skeleton was at the bundle page 38. That was updated and inserted at the end of the skeleton bundle.

HODGE MALEK: I have one headed "Composite schedule ..." updated 29 November. That is what I am working from.

MR BREALEY: Okay. And that is in my bundle, tab 9 of the skeleton. It is the same document but it has been updated.

THE PRESIDENT: We have got it now.

MR BREALEY: Really we just go to recital 52 and we can note recital 52.

THE PRESIDENT: Just a moment. 52, yes.

MR BREALEY: So it is the recital is set out and one sees actually there are -- it is set out in six paragraphs. It is split up into the sentences.

THE PRESIDENT: Yes.

MR BREALEY: So we see there that actually they all admit that the meetings took place. Daimler admits the recital, although we know it says it is not binding. But if we look at the fourth paragraph, for example:

"The evidence demonstrates that future gross list price changes were discussed."

That is on the left-hand side. You can put numbers 1-6 down.

THE PRESIDENT: Yes.

MR BREALEY: And Mr Ward is going to deal with this, but I'm just putting this in context. The fourth paragraph:

"The evidence demonstrates that future gross list price changes were discussed."

Daimler admits that. But if you look, for example, at DAF, DAF the fourth sentence is not admitted, so they are putting the claimants to proof. We can discuss at another time actually whether they can just not admit it, but they are at the moment not admitting it. Iveco the same, they admit the meetings took place but they are not admitting essentially what the discussions were about.

Volvo don't admit it either, and you see MAN two thirds of the way down, the fourth sentence is not admitted, third and fourth sentence is not admitted. So that is the position for the domestic litigation.

Recital 52 is not regarded as binding and for the most part what was found by the Commission to have been discussed is also not admitted.

One sees in the response on binding, that is the fourth column, not a central basis, and the defendants refer to paragraph 4 of the preamble to 5 February and actually this is a neat summary of the defendants' case. We see it in the skeleton. I will articulate it later

on. But it is actually quite a neat summary of the defendants' case as to why these recitals are not binding and for me if one is looking at this composite schedule, it is attached to this composite schedule and is at page 30 of tab 9, bundle E. It is headed:

"Annex 1. The preamble to 5 February ..."

So this is a document that they refer to in the schedule as to why it is not binding. And just to flag, given the time I will not read it, I mean, it may be the Tribunal can just skim paragraphs 3, 4 and 5 in order just to emphasise the implications of it.

So paragraph 3 of this document is essentially floating DAF's very extreme submission that no recitals are binding. Paragraph 4 reflects the defendants' only marginally less extreme submission that those recitals in 4(a) are binding, and we see in 4(b) the defendants stating that no part of section 3, that is the behaviour, is binding, and for completeness I refer the Tribunal to paragraph 5:

"Any acceptance by the Addressee Defendants in the table below that a recital constitutes part of the essential basis is to be read subject to the following ..."

And if one looks at (e):

"Where a recital which cross-refers to other

recitals is accepted as comprising part of the essential basis, the cross-referenced recitals are not thereby accepted as ... essential ..."

And that is where you see the recital 81. So that is how they get to recital 81. They say the first sentence is binding but not the paragraphs which actually particularise the behaviour.

So that is the battleground between the parties. We submit that the defendants' statement does not represent the law and that is what I'm going to try and do in probably now an hour and I will set out the relevant legal principles relating to the binding nature of recitals and I will do this by reference to going to certain cases.

The first case I would like to go to, please, is the Enron Coal case. That is the Court of Appeal judgment, and that is authority bundle 2, tab 27. I know many of these cases will be familiar to the Tribunal. Given the time I'm not going to go through the facts in any detail. I want to tease out the various propositions I get from the cases. It is authority bundle 2, tab 27.

Essentially paragraphs 1 to 3 set out what the case was about, paragraphs 1 to 3, what was a follow-on action for damages following on from the Rail Regulator's decision, its dominant position. The

claimants failed because they failed to prove causation.

But I want to emphasise certain paragraphs and, as I say, tease out propositions I get from the judgment.

The next paragraph to go to is paragraphs 33 and 34, page 8. To remind ourselves, this was the old section 47A. It has now been replaced. 47A(9) has been replaced:

"In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed."

In that case it was the Rail Regulator, but (6) does refer to Commission decisions.

If one then goes to paragraph 39, just to note because the defendants make something of this, the case also concerns section 58, where the findings of fact by the UK authorities are binding. That is not relevant in this litigation, but what is relevant is paragraph 50 and 53, and these are the key paragraphs we rely on as authority for the binding nature of recitals. This is the Court of Appeal setting out what it regards as the reason why certain recitals are binding.

Could I ask the Tribunal to read carefully paragraph 50 and 53 and then I will emphasise certain propositions that I get from paragraph 50 and 53.

THE PRESIDENT: Yes. (Pause).

MR BREALEY: So could I emphasise four aspects that I draw from these two paragraphs, relevant to what the defendants say. First, the court was concerned with claims for damages under section 47A(9), like the present 58A. It was concerned with claims for damages under section 47A(9). And this provision makes no distinction between the authors of any infringement decision. The CMA or Commission.

The second proposition is that the court recognised at paragraph 53 that there must be a basic set of facts that underpin the infringement. That is the third sentence of paragraph 53:

"That must carry with it a certain basic set of findings of fact, without which the decision could not have been made."

That is the second proposition.

The third proposition is a binding set of facts are those that are, I quote, "directly relevant" to the finding of infringement. The words "directly relevant to a decision as to infringement" is halfway down paragraph 50. So a binding set of facts are those that are directly relevant to the finding of infringement.

In other words, these are the key facts and are distinguished from, I quote "peripheral or incidental

facts", the phrase Lord Justice Lloyd uses, "peripheral or incidental facts".

The fourth proposition is the purpose of the binding nature of a recital is the same regardless of the author of the decision, the purpose of the binding nature. That is to say, challenging these facts, these key facts would be tantamount to challenging the finding of infringement. It would, as Lord Justice Lloyd said, subvert the infringement finding. He uses the word "subvert". To challenge them would be tantamount to challenging the finding in question.

MR JUSTICE FANCOURT: Them in the plural, you say you should look at facts of this character collectively, rather than individually one by one.

MR BREALEY: Well, both, individually and collectively. And I will come on to that, that certainly if you are looking at section 3 of the settlement decision, you would look at the individual facts but you would look at them collectively because they form the essential part of the finding of infringement.

To answer the point, the recitals may refer, for example, to 10 meetings at which the cartelists agreed to fix prices. Now, the 10 meetings could form part of the essential basis for infringement individually and collectively. But if you challenge one meeting

successfully it doesn't mean to say the other nine are peripheral or incidental. You may have 10 meetings, they may collectively form the essential basis. But simply because you knock out one and the decision is not annulled doesn't mean the other nine are somehow peripheral. So that is the defendants' case, as we will see.

So that is the Enron judgment. It is Court of Appeal. It dealt specifically with the binding nature of recitals.

THE PRESIDENT: And you say that although this is of course -- no, you say they don't discuss article 16 here, do they, in this decision, because it is an ORR decision.

MR BREALEY: Yes. Section 47A, so going back to paragraph 50, in the old days before the change, before the Consumer Rights Act 2015, 47A(9) concerned OFT decisions and Commission decisions. Section 58A only dealt with claims in the court and OFT decisions, and that is why Lord Justice Lloyd at paragraph 49 says it seems a bit odd that no reference is made in section 58A to a decision of the European Commission.

And all this was changed when we had the new section 58A. 58A now refers to infringement decisions of the CMA and the Commission and before the Tribunal

and before the court.

THE PRESIDENT: Yes. So he says at 49 that that might perhaps, because it was left to be governed by Iberian.

MR BREALEY: And Ms Demetriou obviously will deal with the Iberian because it concerns abuse.

THE PRESIDENT: Yes.

MR BREALEY: But my first proposal is the Court of Appeal was concerned with a domestic claim for damages under section 47A(9), you can now read that as section 58A, and that makes no distinction between the author of the decisions. It sets it out, but it is not making a distinction.

So that is the Court of Appeal authority.

THE PRESIDENT: Yes.

MR BREALEY: Can I -- the next authority is BritNed and that is authority bundle 3, tab 47. It is a long judgment. We are only going to a small section of it. Just on page 9 of the judgment, paragraph 1. We can see paragraph 1, it was a follow-on action. It was following on a decision of the European Commission in Power Cables.

THE PRESIDENT: So just like this case.

MR BREALEY: Just like this case. So the defendants say Enron, it was all concerned with the Rail Regulator, it has nothing to do with this case; this actually is

a Commission decision.

THE PRESIDENT: Yes.

MR BREALEY: And the relevant section is on page 26. So these are paragraphs 67 and 68. They are the relevant paragraphs on the binding nature of recitals. Paragraph 67 and 68. And again is it best, sir, if I ask the court to just read those paragraphs and then I can -- because we are short of time, I will then inform the court what our essential propositions are.

THE PRESIDENT: Yes, okay. Can you just remind me, was this a settlement decision or a decision --

MR BREALEY: No, this was a --

THE PRESIDENT: -- after a disputed period?

MR BREALEY: In actual fact ABB has recently, I think Mr Ward is going to refer to this, challenged a certain aspect of the decision. But this was a full-blown decision.

THE PRESIDENT: Yes, thank you.

MR BREALEY: I can't remember if there were any leniency applicants, but it was not a settlement decision.

THE PRESIDENT: That is all I wanted to know.

MR BREALEY: I am told ABB ...

So these are the critical paragraphs.

THE PRESIDENT: Yes.

MR BREALEY: I would like to draw the Tribunal's attention

to three aspects about this judgment which are relevant to this case. First, the court had regard to EU law to decide what the binding nature of the decision was for the purpose of the damages claim. So the court had regard to European law to decide what actually the decision was. So Commission decision defined by EU law. It seems an obvious proposition, but it wasn't so obvious to the appeal decision in Deutsche Bahn. We will come onto that in a moment.

So that is the first point, the court had regard to EU law to decide what the binding nature of an EU decision was for the purpose of damages and we see that from proposition 6 at page 28 at the bottom. A decision is an instrument, and over the page. So Mr Justice Marcus Smith is looking at EU cases --

THE PRESIDENT: Yes, we have seen that, yes.

MR BREALEY: The second point I want to note is applying EU law, and this is (b), this is (b) on page 28, applying EU law, a recital is binding in a damages action if it constitutes -- and this is important, and I emphasise the word "part", "part of the essential basis" for an infringement decision. Hence my 10 meetings point.

The reason I emphasise "part" is because the defendants, as we see, and we will see, emphasise it has to be the essential, whereas we say you have to look at

it more on a holistic basis; is that recital a part of the essential basis and that is what Mr Justice Marcus Smith was deciding, which is pretty obvious, we would say.

So that is the second -- "part of the essential basis" for the infringement decision.

THE PRESIDENT: Yes.

MR BREALEY: The third point I want to note, and this is essentially paragraph 68, the findings of fact in the recitals as to the behaviour of the cartelists were regarded as part of the essential basis.

THE PRESIDENT: Well, it wasn't challenged.

MR BREALEY: Well, it wasn't challenged. But the judge accepted it. But I agree. It wasn't challenged by -- I appreciate it is different clients, but it wasn't challenged by Mr Hoskins or Freshfields.

THE PRESIDENT: Yes, but I think here it is.

MR BREALEY: Here it is. But nevertheless it was -- seemed to be common ground, and normally when it is common ground it seems to be pretty obvious, if it is common ground, that the behaviour, a general description of the cartel, constituted part of the essential basis for a decision.

So that is the second domestic authority I want to --

THE PRESIDENT: Before you leave that, is there anywhere in this judgment, did the judge have to consider any dispute as to -- about any particular recital as to whether it was an essential basis or not?

MR BREALEY: We have trawled through this and I do not believe there is.

THE PRESIDENT: And the second question is, as you know this judgment went to the Court of Appeal.

MR BREALEY: We trawled through that as well and it does not really touch on it.

THE PRESIDENT: But do they comment at all on the judge's comments in paragraph 6?

MR BREALEY: I have double-checked, and as far as I can recall it doesn't. I will double-check. So that is the second domestic judgment, emphasise part of the essential basis.

The second part is the authority in Deutsche Bahn and that is in volume 4, tab 66. Volume 4, tab 66. Again, just to set the scene, paragraphs 1 to 4 show this was another follow-on action for damages based on the carbon and graphite Commission decision, and the issue was the nature of the infringement decision which would bind for the purpose of the follow-on claim and then determine whether the claim is time-barred. So there is a time-bar issue, but really it centred on the

definition of "decision".

So again, just to note in passing some paragraphs, and then I will draw some propositions. Paragraph 6 on page 4, again we get the same section 47A(9) but equally applies to section 58A now. This was a Commission decision and therefore paragraph 10 is important:

"Section 47A(9) ... reflects a general principle of European law, that domestic courts cannot take decisions running counter to a Commission decision ..."

And that is relevant to the next paragraph, paragraph 16, because the Court of Appeal said that the decision should be defined by reference to domestic law, not European law and the Supreme Court said that was an error. We see that in the last three lines of paragraph 16.

So we are looking at European law to decide what is meant by "decision", and we get the same approach at paragraph 22, page 11. It is the bit in the middle which is actually quite important for the present case in paragraph 22. In a nutshell, you cannot have a different Commission decision for damages actions to that on judicial review in the community courts. A decision must be the same. So that is where you get the, halfway down:

"[That] ... would mean that there existed at one and

the same time an unmodified decision for European purpose and a modified decision for domestic law purposes."

So the Supreme Court is saying there the decision must be the same and we will obviously say that is the decision with the operative part and binding nature of recitals, if that is what European law says.

I would ask the Tribunal to also note paragraphs 24 and 25, then I will draw the Tribunal's attention to three aspects of this judgment. So paragraphs 24 and 25.

So could I, having drawn attention to these paragraphs, draw attention to three aspects of the judgment that I want to emphasise. The first, I have already alluded to this, the first is that -- and this is what Mr Justice Marcus Smith stated in BritNed -- the first is that the decision that is binding for the purposes of the damages claim is the same binding decision that applies in the case of judicial review in the community context. It is the same decision. And in my submission that includes binding recitals if those recitals are binding for the purposes of judicial review in the community context.

That is the first proposition.

The second proposition is that the Supreme Court

considered that all issues regarding the scope of the cartel, and I emphasise the word "scope" of the cartel, would be decided in the decision. We get that from paragraph 24. So it is proceeding on the basis that the scope of the cartel is decided in the decision and that in my submission" scope" includes the behaviour of the cartelists. That is paragraph 24. We see halfway in that paragraph "scope of the cartel".

THE PRESIDENT: So you say it is more that -- I think it is Lord Mance, isn't it?

MR BREALEY: Yes.

THE PRESIDENT: When he refers to scope, he spells out at paragraph 25 in the second sentence --

MR BREALEY: Yes, the decision referred to is there "cannot be a decision in the air".

THE PRESIDENT: But he then says it must be a decision between specified parties, specified periods. On one view, that is the scope.

MR BREALEY: Well --

THE PRESIDENT: But you say that -- and that is how he explains the assumption, which is the sentence you have drawn attention to in paragraph 24. But you say it goes beyond that.

MR BREALEY: Yes. As you know, sir, this concerned basically the interpretation of the article itself,

whether the article had a bundle of individual decisions or whether it was a collective decision.

THE PRESIDENT: Mm-hm.

MR BREALEY: But the third proposition that I -- so when Lord Mance is referring to scope of the cartel, that in my view -- when it says will have decided all issues regarding the scope of the cartel -- just to pick up -- go back to authority bundle 3, BritNed, before I go on to the third proposition. So it is authority bundle 3, tab 47, page 26. And let's have a look at what that article said in Power Cables. This is at the bottom of page 26:

"Article 1. The follow undertakings infringed Article 101 ... by participating, in a single and continuous infringement, in the (extra) high voltage underground and/or submarine power cables sector."

Now, that is the infringement described in less than three lines and then when Lord Mance at paragraph 24 is saying in follow-on action "the Commission Decision will have decided all issues regarding the scope of the cartel", you wouldn't know what the scope of the cartel was unless you looked at the recitals, and indeed if you do Google the decision and you pick it up, you will see that the recitals particularise that it was a "cartel". You wouldn't get that from article 1.

THE PRESIDENT: Nor does it look like you would get from article 1, if that is the full article 1, the period, would you, in that case?

MR BREALEY: No, no.

HODGE MALEK: So where do I find article 1 in the Deutsche Bahn case? It is the decision -- I would just like to see what that says, really.

MR BREALEY: I would have to -- it may be it is in the Court of Appeal judgment. I will find it.

So there are three propositions I wanted to get from the judgment. I will just repeat the first two. The first is that it is the same decision. The second is that Lord Mance is referring to the scope of the cartel.

THE PRESIDENT: Yes, we have got that, got that.

MR BREALEY: And the third one, I don't think it is without relevance, is that Lord Mance -- this is paragraph 25 -- Lord Mance considered that Lord Justice Lloyd in Enron was referring generally to infringement decisions, irrespective of the author. This is because Lord Mance refers expressly to those paragraphs 50 and 53 I mentioned earlier.

So paragraph 50 and 53 is getting at least some endorsement by the Supreme Court, but importantly it is getting endorsement for the purposes of a Commission decision. And why is that relevant? It is relevant so

1 when Mr Beard gets up and says well, you can dismiss
2 Enron because it is all concerned with the Rail
3 Regulator, my third proposition is well, actually that
4 is a bit simplistic because both the Court of Appeal and
5 the Supreme Court is looking at section 47A(9) in a more
6 holistic way.
7 I will get article 1 for you, but Mr Spitz reminds
8 me at paragraph 12 of the judgment it seems that they --
9 THE PRESIDENT: They do set out the period. They do set out
10 the period.
11 MR BREALEY: Well, this is in the carbon graphite decision.
12 I don't know about the Power Cables decision.
13 THE PRESIDENT: But that is -- is that not article 1 to
14 which Lord Mance referred in paragraph 25? Is that not
15 the one in paragraph 12?
16 MR BREALEY: Yes, and I can read -- someone has just handed
17 me -- so article 1 of this decision in Deutsche Bahn is:
18 "The following undertakings have infringed article 1
19 from 1 January 1994 by participating for the periods
20 indicated [and this is the important bit] in a complex
21 of agreements and concerted practices in the sector of
22 electrical and mechanical carbon and graphite products."
23 That is all it says. And then it is ABB addressed
24 to the various individual companies. So what is stated
25 at paragraph 12 is essentially what is in article 1.

THE PRESIDENT: Yes.

MR BREALEY: All that you get is that the parties participated in a complex of agreements and concerted practices in the sector of electrical and mechanical carbon and graphite products.

So the last proposition, paragraphs 50 and 53 are getting some degree of endorsement from the Supreme Court.

Can I go to two last cases. At the moment I have referred to domestic authority. Two last cases --

THE PRESIDENT: Just before you do that ... I'm told that the transcribers would like a break; would that be a sensible moment for five minutes?

(12.00 pm)

(A short break)

(12.05 pm)

THE PRESIDENT: Yes, Mr Brealey.

MR BREALEY: Two cases to go through and then I will finish and I will hand over.

The next case is Dutch Banks, and that is authority bundle 1 at tab 6. Authority bundle 1 at tab 6. It is only a small part of the judgment we need to really deal with.

This concerned an agreement between banks to charge a commission, and the European Commission found that the

agreement distorted competition in The Netherlands, but did not crucially affect trade on the facts of the case. Accordingly the Commission granted a negative clearance. The banks sought the annulment of the finding that it distorted competition and the court ruled it admissible because it did not adversely affect the bank's interest. So it was essentially a case about locus standi.

But if we go to paragraph 31 we see the assessment by the court, it is on page 10 of the bundle. Paragraph 30 and 31 are the relevant paragraphs. Paragraph 30 and 31 sets out what all the students of European law know, that you have to have an act adversely affecting your interests if you are going to be able to appeal it to the European Court.

But it is the passage in paragraph 31 halfway down, so after 31, after reference to the IBM case, which is the classic locus standi test. You get to a line which begins "annulment" and I ask the Tribunal to emphasise the words:

"Their legality might be open to review by the Community judicature only to the extent to which, as grounds of an act adversely affecting a person's interests, they constituted the necessary support for its operative part. The Court of First Instance notes in this case not only does the act not adversely affect

the applicants' interests but also that the contested recital does not constitute the necessary support for the operative part of the act."

The reason I refer to this, and we will see this in the Dutch Ports case in a moment, just a different terminology: "necessary support". That is not irrelevant to the present case because the defendants in this case seem to be really focusing on the essential part, so they refer to "the essential", whereas in this we get "necessary support".

The next case is the Dutch Ports case. This is tab 21 of the same bundle. This is really concerned with locus standi, this is tab 21. We know the facts. The Netherlands notify aid to the Commission. It was for port dredging. The court considered the aid was state aid, exempted it, and the action for annulment was inadmissible because the annulment did not adversely affect the government's interest.

We refer to this case. It is relevant because it is the decision referred to by Mr Justice Marcus Smith in BritNed and there are a couple of passages I want to emphasise. Paragraphs 12 to 14, this is the arguments of the parties. This is a summary of what the Commission is submitting. So paragraph 12:

"The Commission submits that the action is

inadmissible."

Why? Paragraph 13, only an act which is binding and capable of affecting his interests. The measure has no binding legal effect such as to affect its interest, does not bring about any change in its legal position. That is standard stuff.

And then paragraph 14 I ask the Tribunal to note:

"Whatever the grounds on which an act is based, only its operative part is capable of producing legal effects unless the grounds, as grounds of an act adversely affecting a person's interests, constitute the necessary support for the operative part thereof ..."

See Dutch Banks. So that is what the Commission is submitting.

The court puts it in a slightly different way. So the findings of the court is at 1821. It is paragraph 21 which is relevant for our purposes. That is the paragraph that is cited by Mr Justice Marcus Smith in BritNed, where he says:

"The relevant act is a decision and to the extent that ...(Reading to the words)... constitutes part of the essential basis ... so too does a recital."

And he refers to paragraph 21 of this case and you get that from the last sentence of paragraph 21. And at paragraph 24 again it is important just to note:

"... the disputed part of the statement of reasons for the contested decision has no binding legal effect such as to affect the interests of the Kingdom of The Netherlands."

In other words, if the operative part did adversely affect the government's legal interests, then the statement of reasons which would necessarily support it would have binding legal effect.

So where does that all take us? In our submission the relevant principle is as follows. It is as set out in Enron, BritNed, Deutsche Bahn and the Dutch Ports case. What is the principle? We say the principle is this. Where the Commission adopts an infringement decision, a recital which constitutes a part of the essential basis for that finding of infringement is also binding. So where the Commission adopts an infringement decision, a recital which constitutes a part of the essential basis for that finding of infringement is also binding.

And just to clarify that basic proposition, we submit that the essential basis concerns any factual finding or assessment that is directly related to the finding of infringement or constitutes the necessary support for that finding of infringement. We say there is no material difference between an "essential part",

"directly related" or "necessary support".

I won't, given the time, deal with the defendants' arguments. I will deal with those in reply, see how they make them out given the time. I'm told, sir, that we would go on to the law and abuse, but because we are slightly out of step Mr Ward may want to draw attention to some other authorities on binding nature of the recitals because he was going to go through it recital by recital.

THE PRESIDENT: No, that is fine.

MR BREALEY: I think Mr Ward may just take a few minutes and then we will pass to Ms Demetriou.

THE PRESIDENT: Thank you, Mr Brealey.

Submissions by MR. WARD

MR WARD: Sir, I am in your hands of course as to how we would proceed. I do have some slightly more granular submissions to make on the law by reference to what really is in dispute in the recitals. So you will have seen from the defendants' various defences there are certain themes which recur. What I have in mind by way of my submissions is to deal with those themes at a reasonably high level of generality and then when in due course one looks at the individual recitals one can relatively quickly go through them by reverting back to those arguments. I can do that now or that can be done

1 when we deal with the detail.
2 THE PRESIDENT: Just a moment.
3 No, we think you should do it now and that is very
4 very helpful and that is why we rather envisaged that
5 following this way of proceeding, when we then come on
6 Friday to look at individual recitals they will, as it
7 were, slot into argument that we have already heard.
8 MR WARD: That is very much my expectation, sir.
9 So what I will do is deal with some of my high level
10 points now and at most illustrate by recital but refrain
11 from detail.
12 THE PRESIDENT: Yes, I think illustration is helpful.
13 MR WARD: Good, thank you sir.
14 THE PRESIDENT: Let me just put away ...
15 MR WARD: I wanted to start by making some general
16 submissions by reference to section 3 of the decision,
17 and section 3 is the part which deals with the facts.
18 Mr Brealey already took you through the structure of the
19 decision, but just perhaps -- it is helpful to very
20 quickly put it into context.
21 THE PRESIDENT: Yes.
22 MR WARD: I'm dealing -- I'm afraid I don't know what bundle
23 it is but I hope by now you have it loose.
24 THE PRESIDENT: We have all got it.
25 MR WARD: Thank you sir. So the description of the conduct

starts on page 12, section 3, and you will see there, we have already seen, about four pages of high level description of the facts that form the cartel and starting on page 16 is section 4 which is headed "Legal assessment" and it says:

"Having regard to the ... evidence, the facts as described in section 4 ..."

THE PRESIDENT: Yes.

MR WARD: We think that is clearly a typo. It means section 3.

THE PRESIDENT: We have that typo repeatedly.

MR WARD: We do, unfortunately, but it is evident it is a typo.

THE PRESIDENT: It is page 15 in our copy.

MR WARD: I'm so sorry, sir.

THE PRESIDENT: Page 15, I think, isn't it? You said 16.

MR WARD: Well, I was looking at recital 64, so it sounds like the numbering might be different to mine.

THE PRESIDENT: Yes, I assume we have the same version.

MR WARD: I'm going to avoid page numbers as I have managed to have a different version to you. In any event it is recital 64 that heads the legal assessment section and as Mr Brealey explained, there are some concessions by the defendants that at least parts of section 4 are binding, but there is still quite a bit of dispute about

that, and there are a number of references back to the factual section 3 in the legal assessment section, having regard to the body of evidence and facts described in, I will say, section 3; and then again in recital 68, the conduct described in section 3, it should be, can be described as a complex infringement, et cetera.

And then we see it again at 71, under "Single and continuous infringement". In the present case the conduct described in section 3 constitutes a single and continuous infringement. And then turning on a couple of pages to recital 81, Mr Brealey showed you this already, under the heading of "Restriction on competition", the anti-competitive behaviour described in paragraphs 49 to 60 has the object of restricting competition, and the defendants' rather nuanced case is that although 49 to 60 are not binding somehow recital 81 is.

But what is striking -- and you will have seen from the schedules that they take very nuanced positions on what they are prepared to admit in section 3, 49 to 60. There is not much that they all admit and each of them has slightly different positions on the individual sentences of those recitals. There is virtually no positive case, it is just bare non-admission. But the

effect of what they say is to essentially require the claimants to reprove most of these facts before the Tribunal and in our respectful submission that is simply the wrong approach, that the entirety of the factual section is binding as being the essential basis for the decision.

Now I just make a few high level legal submissions in relation to that. The first is that although there are eight lever-arch files of authorities I'm not aware of any in which someone has been appealing the substance of a decision and yet told that particular parts of the factual assessment are not binding.

What we do see are cases like Dutch Banks where there is a recital that may be undesirable in the course of a decision which is ultimately favourable. So there is a state aid clearance but on the way there is a finding, for example, that the parties were undertaking, and I will leave that to my learned friends to develop the submissions on that.

But the case law they primarily rely upon is of that kind. We haven't seen any which are of the kind that is contemplated here where a cheese paring approach is taken to the recitals that support the adverse finding under challenge.

Now their case has one immediate and very stark

consequence, which is that if they are right, nothing at all in section 3 would have been appealable. So if they had decided to go to the court rather than accept the settlement, then according to them none of that at all would have been available for review.

That is just plainly wrong and to see why simply by way of example, the case of Servier shows an instance in which the General Court got quite stuck into review of questions of fact and if I might ask you to turn up authorities bundle 3, under tab 54 we have the Court of Appeal's judgment on a preliminary issue in Servier, which sets out -- I know, of course, my Lord Justice Roth will be well aware of this.

It is under tab 54 in volume 3. And the issue in that appeal is not the same as the one that is before this court, but it is very helpful in explaining what went on in the European proceedings in Servier. The question was -- it was a case of abuse of dominant position on the basis of what is sometimes called pay for delay and there was a big issue in the proceedings about what the correct product market was and we can see that at the bottom of paragraph 3 on page 3:

"An important issue in the Commission investigation into the Article 102 infringement was the definition of the relevant market in which Coversyl competed [the drug

in question]; was the relevant market limited to perindopril or did it include other ACE-inhibitors or a wider range of products?"

Thankfully we will not need to understand this detail for today's purpose.

You will see over the page:

"The Commission defined the relevant market ... as comprising only perindopril and rejected Servier's ..." submission that it was a wider market.

At paragraph 7 it says that they challenged the decision in the court and at the bottom of that paragraph it notes they made three complaints in relation to the definition of "relevant product market" and then the Court of Appeal quotes three paragraphs of the General Court's judgment which explains the scope of its review on questions of fact. I would just draw attention to the bottom half of 1375, which explains that:

"Those Courts [by which it means the European courts] must establish, among other things, not only whether the evidence relied on is factually accurate, reliable and consistent but also whether the evidence contains all the information that must be taken into account to assess a complex situation ..."

So it is trite that in Luxembourg you can bring

a challenge on findings of fact albeit that it is not like a full trial like parties would enjoy in the Competition Appeal Tribunal.

And then if one simply skims paragraphs 8 through to 13 or 14, you can see very readily the Commission, the General Court engaged in a detailed examination of the evidence to see whether the Commission's finding of relevant market was justified and indeed it concluded it was not, and in paragraph 9 it makes clear it was focusing on the question of substitutability of these products. Then at paragraph 10 the General Court examined all the material on which the Commission relied in some depth. It concluded:

"In the light of all the documents ... there is no significant difference between ..." the different types of drugs, et cetera.

I will not take up time reading more of it. It is, in my respectful submission, an unambiguously correct proposition of EU law that there can be factual challenges.

Yet according to these defendants it simply wasn't open to them to do so.

Now, I would like to show the court another authority which demonstrates a challenge to factual matters, because it is also important for a further

point that I'm going to come on to. This is the Power Cables judgment which came out only last week and as a result of that it is in the last bundle of authorities, F8. I want to take a little time on this because it serves a number of purposes in our argument.

You will find in volume F8 I hope, recently inserted, a tab 108. And tab 108 should be a very slim extract from a very long decision which is the Power Cables decision.

THE PRESIDENT: Yes.

MR WARD: If I could ask you to turn the page, you will see this is just the operative part of the decision and you saw this quoted in fact, partially quoted in the Britned claim, because the BritNed claim follows on from this. But as Mr Brealey points out, article 1, the operative part is in very, very non-specific terms. It just talks about an infringement "for the periods indicated, in a single and continuous infringement in the (extra) high voltage underground and/or submarine power cables sector" and then in fact it does give the dates for each individual undertaking. Mr Justice Roth asked that question.

So that is the decision and it is extremely high level.

If we turn the page to 109 we will find the appeal

that was brought by ABB. This is in the General Court at First Instance. And ABB, as this explains, paragraph 3, was actually the immunity applicant. It had full immunity. But it nevertheless objected to one aspect of the Commission's decision and we can see the infringement is described from paragraph 11 and following and over the page we can see at 22 what it was that ABB objected to. Essentially it objected to the types of power cable that were within that rather generalised formulation.

So if we look at paragraph 22:

"The applicants claim that the court should:

"Annul in part Article 1 of the contested decision in so far as it finds that the applicants had participated in a single and continuous infringement in the (extra) high voltage underground and/or submarine power cable sector in so far as that finding extends to all projects involving underground power cables with voltages of 110 kV and above (and not only projects involving underground power cables with voltages of 220 kV and above"."

And then the second bullet point is exactly the same thing but in relation to what are called accessories and you can see the word "accessories" in the third line two thirds of the way along.

So you can see already and immediately that the locus of their appeal was not concerned with anything that is explicitly there on the face of the finding of infringement, but they ask the court to annul that infringement finding insofar as it covers these lower voltage cables.

The judgment deals with the fact -- I'm so sorry, before I move on to that. If you see at paragraph 25, what is alleged is a manifest error of assessment on the facts, that on the facts the cartel did not extend to 110 kV cables.

And then turning the page to 28 to 30 --

THE PRESIDENT: Just pausing there a moment.

MR WARD: Sorry, sir.

THE PRESIDENT: We haven't got, of course, the long decision which I'm sure is extremely long.

MR WARD: It is very long.

THE PRESIDENT: Is the phrase "extra high voltage underground and/or submarine power cables" as it were defined in an early recital?

MR WARD: I don't know, although it seems likely it would be. We will check that over lunch, sir, if I may.

THE PRESIDENT: Yes.

MR WARD: I was going to take you forwards to 28 to 30 which explains why even a leniency applicant was able to bring

this claim. You will see it says:

"... it should be noted that the applicants do not dispute the existence of an infringement, or the calculation of the fine, or call into question information and materials which they submitted to the Commission in the course of the administrative procedure in the context of their application for immunity. However, they do submit that the contested decision contains certain errors which extend the scope of the Commission's finding in relation to the infringement ...

"At the hearing, the applicants essentially observed that a lack of precision in the determination of the products or the duration of participation could have significant consequences in the context of actions for damages before the national courts, which they claim are connected to the Commission's decision."

And the court recalls the significance of such consequences is acknowledged.

So what this means is that the court was willing to entertain a challenge essentially to the detail of the factual findings and the recitals notwithstanding that the operative part was in very general terms.

Just to move on, in the first Court of First Instance the challenge failed in its entirety, but in last week's judgment of the Court of Justice ABB was

partly successful. We find the Court of Justice judgment under the next tab and we can I think take this now very quickly. We will see from paragraph 37 that the Court of Justice considers precisely the argument that we have been addressing, namely whether -- I'm so sorry.

At 36 they reject the first ground of appeal which was to do with cables generally from 110 to 220 kV.

But at 37 they address the second limb of the claimant's argument, which was about power cable accessories within that band. To cut a long story short, they upheld that finding and we can see why, very, very quickly, at 44 and 45. They say at 44 in the last three lines:

"The General Court effectively relied on an unsubstantiated presumption. In those circumstances it must be held the General Court failed to have regard to evidential requirements in finding that the collective refusal to supply the power cable accessories in 643F of the decision covered accessories for cables between 110 to 220 kilovolts."

So they actually upheld that small part of challenge and, very importantly, having rejected the rest of the challenge, if we could turn right towards the end of the judgment, paragraph 101, grants the relief that ABB were

actually asking for:

"It follows that the decision at issue must be annulled insofar as it finds ABB liable for an infringement in respect of a collective refusal to supply accessories for underground power cables with voltages from 110 to 220."

Now, that did not mean that the entire operative part would be annulled or even that there were any words that could be blue pencilled from the operative part. So if one looks at the dispositif at paragraph 3 on the very last page, the order is made to annul the decision insofar as it finds ABB liable and so forth.

Now why do we say that matters. It matters for two reasons. Firstly, it is another good example of factual challenge, but secondly it goes to a very substantial stand in the defendants' case that Mr Brealey has already alluded to, which is they argue that large numbers of recitals are not essential basis, because if they were knocked out on their own the operative part of the decision would not be annulled. And they say essentially that -- they atomise the decision. They say that each of these individually would not be enough on its own and therefore none of them can be essential basis.

Mr Brealey has already given a short answer to this,

which is that each is part of the essential basis and this is a peculiar means by which they seek to take advantage from just how long-standing, widespread and all-pervading this cartel really was.

One can have an infringement decision based on a single action, a single information exchange, for example, and we had that recently in a case called Balmoral where it was just one anti-competitive action and in that case of course if you successfully quash that one incident, the decision falls over.

What we have here is much more like a centipede. It has a very large number of legs and each of those legs is, in our submission, individually part of the essential basis. It is true if they wanted to annul the decision altogether then they would have to attack a great many of those legs, but that doesn't mean that each individual leg is not part of the essential basis.

Power Cables is an excellent example of that because only one small element of the decision was successfully attacked and what the court did was to contemplate a qualification of the operative part as a result.

There are other cases in the authorities bundle which demonstrate the same point and perhaps I will just show the court one useful dictum on this which we cited in our skeleton argument which is in the first

authorities bundle under tab 17. This is a case called Lagardère, or at least that is how I am going to pronounce it. There is a rather tortured procedural history in this case, but I am going to go quite rapidly to the important dicta. Essentially, two important concentrations were notified to the Commission and the Commission decided not to oppose them. We can see that recital 6. But the Commission issued its decision twice, and the second occasion substantially corrected it in a way which was more adverse to the parties.

We can see that at paragraph 11, because essentially it identified a larger number of restrictions which were not to be regarded as ancillary to the concentrations and therefore essentially didn't get the benefits of the clearance. The issue was whether this was something that the parties were entitled to challenge. The court said no in the end, but the useful part for present purposes is at page 22 of the bundle numbering, paragraphs 67 and 68. At 67 the court talks about the role of recitals and says:

"... the courts have consistently held that only the operative part of an act is capable of producing binding legal effects and, thereby, of having adverse effects, nevertheless the statement of the reasons for an act is indispensable for determining the exact meaning of what

is stated ..."

Of course that is precisely why it is binding, so that the exact meaning is understood and is treated as binding. And then at 68:

"It follows that the decision of 10 July 2000 can be the subject of an action for annulment only if, even without altering the operative terms of the decision ... the amendment of some of the grounds of the latter changed the substance of what was decided in the operative part, thus affecting the applicants' interests ..."

That is precisely what happened in last week's judgment in the court in regard to the Power Cables case.

There are other examples, but I go no further with this point given the time, unless and until it proves necessary having heard my friends' arguments.

I think that is all I wanted to say on the law in my opening remarks before picking up more detail when we go through the individual recitals. Unless I can assist further at this stage.

THE PRESIDENT: Your case is that section 3 comes within that principle?

MR WARD: Yes, yes. So section 3 is of course -- as this is a settlement decision it is in summary terms. This is

the factual foundation of section 4, which is the legal analysis applied to the facts which gives rise to the infringement in the operative part. But it is to the recitals we have to look to understand what is meant by the very general wording in the operative part of the decision. And just as in Power Cables it is very imprecise, as I'm sure everyone is well aware, article 1 just talks about colluding on pricing and gross price increases in the EEA, and one of the contested matters in this case is what that actually means.

HODGE MALEK: Do you need to look at all the recitals to learn what the operative part means?

MR WARD: My submission is all these recitals in section 3 have a bearing on what is the nature of the infringement that has been found because in various ways they describe and explain the nature of the collusion on pricing and gross price increases which is the foundation of the decision.

We see that repeated reference back in the legal assessment part to the whole of section 3. So this is the conduct which is the cartel. So if this was a single information exchange case it would just describe -- I am reading again from Mr Brealey's example -- a 17 January 1997 headquarters meeting in Brussels; that is recital 52. But this cartel was so

much bigger and more complicated than that. In fact there are a myriad of anti-competitive acts that make up the cartel. Moreover if we look at recital 71 it even says that any -- just to turn that up now -- in the fourth line of recital 71 it says:

"Any one of the aspects of the conduct has as its object the restriction of competition and therefore constitutes an infringement of article 101 in its own right."

So the Commission is saying all of this conduct is infringing conduct. Add all that conduct together and you get a single and continuous infringement and that is the single and continuous infringement which is described at high level at article 1 of the operative part.

On Friday I will go through this in more detail and make it good and we can examine the parts that are objected to on various grounds. In fact that sentence I have just read out is the subject of objection, but in our respectful submission this is just the factual foundation of the decision. All of it is essential and all of it goes to explain what the decision really means.

MR JUSTICE FANCOURT: Do you say that the reference to, for example, the conduct described in section 3 or behaviour

described in paragraphs 49 to 60 above of itself incorporates by reference and therefore becomes part of the essential basis, or do you just say that illustrates the point you have just explained to us, that it is necessary to go to that material?

MR WARD: I am going to have that both ways. I am going to say the reference back makes it clear without doubt, but even without the reference back I would be able to make the same submission because the structure is very clear: here are the facts, here is the law, here is how we apply the law to those facts and the conclusion of that exercise is the infringement finding.

Can I be of further assistance at this point?

THE PRESIDENT: Thank you very much.

MR WARD: Thank you.

Submissions by MS DEMETRIOU

THE PRESIDENT: Who goes next? Ms Demetriou, thank you.

MS DEMETRIOU: May it please the Tribunal. I'm going to address the Tribunal on abuse of process and it is the claimants' contention that it is an abuse of process for the defendants to seek now to contest the facts contained in the decision. In a nutshell what we say is that it is abusive for the defendants to have admitted the conduct in the recitals to the decision, to have admitted that conduct to the Commission in order to

obtain a substantial reduction to their fines, and then to seek in effect to withdraw those admissions in these subsequent proceedings. They seek to do that not because they are saying that the recitals are wrong and wish to advance an alternative positive case, but simply in order to enter a series of non-admissions which would have the effect of making the claimants have to prove all over again the facts that they have already admitted.

I propose to develop my submissions in the following order. I'm going to first of all take the Tribunal to some of the relevant authorities on abuse of process. I anticipate I can do that quite quickly because the Tribunal will have seen from the skeleton arguments that there is a good measure of common ground in terms of the applicable underlying principles.

Secondly, I'm going to take the Tribunal to the key legislative provisions and also some recitals in the decision that deal with the settlement procedure and how that operates and how it operated in this case.

Thirdly, I'm going to elaborate on the headline points that I have just summarised and explain why it would be an abuse of process within the meaning of the test laid down in the cases for the defendants to resile from their admissions in the circumstances of this case.

Finally, I propose to address the key arguments made by the defendants in response to our contention. I'm not going to deal with their arguments in a lot of detail because I will see how they develop them and can turn to them in reply, but I do want to say what our broad answers are to the various key points that they make.

HODGE MALEK: One point before you do. Obviously I haven't seen the settlement; sometimes when you settle with a prosecutor or regulator the settlement will have a provision that you are not allowed to make a statement which contradicts what is set out in the statement of facts in the decision; how does that work in this context? Is there any provision that says that the cartelists are not allowed to publicly deny the various things set out in the decision?

MS DEMETRIOU: We, of course, can't see the settlement submissions so we don't know if there is anything in the settlement submissions in which the defendants agreed anything along those lines. I will take you in due course to the settlement procedure and to the legislation which sets out how this was meant to operate in general.

HODGE MALEK: That would be very helpful.

THE PRESIDENT: Just to be quite clear, I think it is pretty

clear, but just to make sure there is no misunderstanding, the entire submission on abuse which you are going to develop is based on the fact that there is a settlement, is it?

MS DEMETRIOU: It is based on the fact that this is a settlement decision, that's correct. It doesn't follow from that that every settlement decision that resiles from facts submitted in any settlement would necessarily be an abuse, because we recognise that it is a fact-specific analysis and so there may be circumstances in which it would not be abusive to seek to resile from settlement decisions. So I'm not seeking to persuade the Tribunal to lay down any general guidance, but for the purposes of our argument, then it is critical that this is a settlement decision, yes.

THE PRESIDENT: Yes, thank you.

MR JUSTICE FANCOURT: And you are approaching it on the assumption, contrary to your clients' cases, that the relevant findings in question are not part of the essential basis of the decision.

MS DEMETRIOU: That is correct, because if we are right on the primary argument then the Tribunal would not need to determine this.

But, my Lord, the position that we are in, just stepping back, is that we have a decision which is

a much more streamlined decision than one would get in a contested procedure and the facts that are set out are much less full, much less detailed than one would get if it were not a settlement decision.

As I will come on to explain, the facts set out in the decision reflect the admissions made by the defendants in their settlement submissions and we are now faced with a contention that almost none -- in fact DAF says none -- of the findings of fact are binding, and in addition they are free as a matter of English procedural law simply to resile from them in these proceedings. It is that point that I'm dealing with.

MR JUSTICE FANCOURT: Also to what extent are we dealing with them as non-admissions? You have to prove it, or are they saying, "There are certain facts simply not correct and we dispute those facts".

MS DEMETRIOU: So the vast majority of what are said are simply non-admissions --

MR JUSTICE FANCOURT: There will be examples where they say, "This fact here is simply not correct".

MS DEMETRIOU: There are almost no examples of that. They will deal with that, but as far as we can see there are almost no examples of that. In the main there is a series of non-admissions and coming back to the overriding point about this being a fact-sensitive

analysis, one can see if there were some information that came to light after the event which threw into doubt an admission, then it may not be abusive in those circumstances to put forward an alternative case. But that is not what is going on here, and what is very clear from the skeleton arguments of the defendants is that although they resist our arguments, nowhere in their skeleton arguments do they seek in substance to say that these recitals are wrong and that there is in fact an alternative story to tell. So that is a key feature of our argument under this head.

THE PRESIDENT: There is one recital where I think everyone agrees that there is an error with regard to the exception made for DAF in recital 48, as I understand it, although DAF says it is not binding. But I think as I understood it, it is accepted that the reference in the fifth line, with the exception of DAF, is not correct.

MS DEMETRIOU: My Lord, I think that is right. Can I come back -- can we deal at the end with individual recitals --

THE PRESIDENT: I believe that is right, Mr Beard, is it not?

MR BEARD: I believe so.

MS DEMETRIOU: I think that is correct.

My Lord, I see the time; would you like me to get started on the authorities or would you like --

THE PRESIDENT: We started a bit late so why don't you go until about 1.05.

MS DEMETRIOU: So the applicable test, as I said, is largely common ground and we can see, just to save time, if we pick up MAN's skeleton argument, which I have in bundle E at tab 4, behind tab 4, and turn to paragraphs 14 and 15, we accept that the essential test is the test laid down in paragraphs 14 and 15. So if the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings, it will only be an abuse of process for the court to challenge the factual findings and conclusion of the judge or jury in the earlier action if:

"(1) it would be manifestly adverse to a party to the later proceedings that the same issue should be relitigated, or;

"(2) to permit such re-litigation would bring the administration of justice into disrepute."

Then at 15, in determining those points essentially it is a focus on the facts that the court must carry out and so we accept the propositions in those paragraphs. So the test is largely common ground and the aspect of abuse on which we rely in these proceedings derives from

the Hunter case. If we could start by picking that up, please, in the first authorities bundle behind tab 3.

The Tribunal will know that although this is an authority which dates back to 1981, it is an authority which has been applied on many occasions and is still very often cited, and what the authority demonstrates is that it may be an abuse of process to attack collaterally a finding made by another court and in subsequent authorities it has been made clear that the first proceedings don't necessarily have to be court proceedings but can extend to decisions by regulators. We see that both in Iberian and also, for example, in the Barings case.

But sticking with Hunter for the moment, the Tribunal will know that the case concerned the Birmingham 6 and the defendants argued during the course of the criminal proceedings that their confessions had been procured by force. This was determined against them at trial, so there was a voir dire that was carried out by the judge and subsequently they were convicted and following conviction they brought proceedings against two Chief Constables and the Home Office for damages in respect of the force which they say was used to procure their confessions. It was held by the House of Lords that the subsequent proceedings were

a collateral attack on the decision of the criminal court and therefore an abuse of process.

We can see the reasoning. So starting at page 536 at the beginning of Lord Diplock's speech between paragraphs C to D. So he says there that:

"... this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

So again you see there an iteration of the test which is common ground:

"The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House would use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutory power."

And then moving on to page 540 at the very bottom of

the page at letter H, so there it is said that:

"... it is my own view, which I understand is shared by all your Lordships, that it would be best, in order to avoid confusion, if the use of the description 'issue estoppel' in English law, at any rate ... were restricted to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies, of which the characteristics are stated in a judgment of my own in Mills v Cooper ...

"The abuse of process which the instant case exemplifies is the initiation of proceedings in a Court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

And then over the page at 542B to C you have some extracts there from Reichel v Magrath and the speeches in that case which are repeated, which again go to explain the basis and the rationale for this, for the operation of this rule.

Now, one of the points to make about Hunter, and it emerges from the last extract that I showed the

Tribunal, is that it is a case in which the two sets of proceedings did not, of course, involve the same parties. So clearly the defendants to the criminal proceedings were plaintiffs in the civil proceedings, but in the civil proceedings they sued the police and the Home Office, who were not, of course, parties to the criminal prosecution. So that is a point to bear in mind when considering the submissions made by the defendants to the effect that it would be a rare case where the litigation of an issue which has not previously been decided between the same parties and their privies would amount to an adducement.

Essentially what we see from the cases -- so there is no discussion of that particular feature in Hunter, so plainly both parties weren't the same in Hunter, but there is no discussion of that. The proper analysis of this, in our submission, is that generally in abuse of process cases it will be the case by definition that the parties are not the same, because if they were the same, then you would be in the realms of cause of action estoppel or issue estoppel.

So it may be that abuse of process cases are really relatively rare. That may be the case. But it is not the case that within the category of abuse of process there is some additional hurdle that has to be satisfied

if the parties are not both the same in both sets of proceedings.

We see this in fact from the Virgin Atlantic Airways case which is in the second authorities bundle. I can take this very quickly. It is behind tab 38. The first paragraph it is helpful to look at is paragraph 17 which is on page 10 of the printed bundle pages. That is tab 38, page 10. And this is a paragraph in the speech of Lord Sumption where he sets out the categories which fall under what he calls the portmanteau term of res judicata. He separates out the different related forms of this. So you have the first principle, which is cause of action estoppel. Further down the page the fourth principle is the principle that where the cause of action is not the same as it was in the earlier one, there is an issue that is binding on the parties. So that is issue estoppel.

Then finally, and this is the aspect that concerns us, finally there is the more general procedural rule against abusive proceedings which may be regarded as the policy underlying all principles with the possible exception of the doctrine of merger.

Then we see at paragraph 25, going on to page 16, a discussion of Johnson v Gore-Wood and the principle in Henderson v Henderson and so the principle in Henderson

v Henderson is not relied on in the context of this case. But what is interesting is Lord Sumption there saying:

"The focus in Johnson v Gore-Wood was inevitably on abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run ..."

Then we see that:

"Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation."

So what we see there is a recognition that precisely where one doesn't have the same parties in two sets of proceedings, that is when abuse of process is likely to be relevant, because in cases where you do have the same parties or their privies then one is much more likely to be arguing the case on the basis of cause of action estoppel or issue estoppel.

My Lord, might that be a convenient moment?

THE PRESIDENT: Yes, thank you very much. We will say 2.10.

(1.10 pm)

(The short adjournment)

(2.10 pm)

THE CHAIRMAN: I don't know if it is possible to prop open the back door to get some draught. It does get quite hot in here, I think everyone is conscious of that. If that can be done, I don't think we have a noise problem, that might help.

Yes, Ms Demetriou.

MS DEMETRIOU: Sir, I had just taken the Tribunal to Virgin Atlantic Airways. Can we go back briefly to MAN's skeleton argument, which is in bundle E behind tab 4.

THE CHAIRMAN: Yes.

MS DEMETRIOU: Because I want to finish up on the degree to which this is common ground, the underlying principles. So it is behind tab 4 and on page 6. I have said that we accept that paragraphs 14 and 15 accurately reflect the test that is applicable in this case.

THE CHAIRMAN: Yes.

MS DEMETRIOU: I have dealt with paragraph 16. That is the point on Virgin. And a further point is in paragraph 17 by reference to Bragg v Oceanus Mutual and what is said there is that it is an exceptional course. So there is a citation from Sir David Cairns' judgment in that case and it is said:

"'It would in my judgment be a most exceptional

course to strike out the whole or part of a defence in a commercial action' simply because the issues raised by way of defence had been addressed in prior proceedings between different parties."

If we could briefly turn up that judgment. So that is in authorities 1 behind tab 4 and if you could turn to page 138 which is page 7 in bundle pagination.

So this section is from the judgment of Lord Justice Kerr and he then makes a similar point. This is on page 138, halfway down the first column. So he says there that:

"... defendants who wish to relitigate a particular line of defence in a subsequent action, albeit that they were unsuccessful in this respect in a previous action, are clearly in an a fortiori position from that of the plaintiff in that case."

Then he gives an illustration and the illustration concerns two private -- two sets of private proceedings, so you have a situation he says where:

"... a client instructs accountants to investigate and report on some company which the client is thinking of buying. The accountants then produce a report and sue the client for their fees. The client's defence is that the investigation was negligent and that the report is worthless, and this ... succeeds."

Then:

"Suppose that a third party, to whom the report has been passed and who has bought the company in reliance on it, then sues the accountants in negligence." And it is said, "Could it possibly be said that the accountants are precluded from denying negligence on the ground that this issue had already been fully investigated and decided against them in the action against their client? In my view, the answer would clearly be no."

So we don't either dissent from that proposition. But what we say about that is that that is not this case, because one can quite see that in a situation where you have two sets of proceedings between private parties -- I mean, to give another example, you may have a road traffic accident and there is proceedings between two of the participants in the road traffic accident and then a third party comes along later and may have new evidence which throws a completely different light on the way the accident happened and they shouldn't be precluded from running that point, even though it relates to the same accident and one of the parties is the same.

But what we say about that is this case is quite different because the defendants have not -- this is not a case in which the defendants have -- the first

proceedings relate to private litigation, but the first proceedings were public enforcement proceedings and in those proceedings, in those proceedings brought by the public authority, the European Commission, which has primary responsibility or important responsibility for enforcing the competition rules, in those proceedings these defendants deliberately chose to admit facts to the public authority in return for receiving a significant benefit. Moreover, in circumstances where they were fully aware that the Commission decision was likely to be used as the basis for damages claims brought by victims of the cartel and then in those circumstances, which are very different, they are withdrawing their admissions and forcing the claimants to prove the same facts.

So we don't dissent from the proposition so far as it goes but we just say it is not an analogous case.

A much more closely analogous case to the present is Iberian which is the final authority I'm going to take the Tribunal to and that is in the same bundle behind tab 7, and to take the Tribunal to the key paragraphs we see on page 5 at paragraphs 7 to 8, the background to all of this. So what was denied following a decision -- so it was admitted, we see at 7(2):

"It is admitted that the European Commission has

issued a Decision ..."

And that decision found that the defendants had abused their dominant position, but denied that the alleged findings of the Commission are admissible in evidence or that the plaintiff is entitled to rely upon them. So that is what is said in the defence.

And then at 8, the further and better particulars given by the defendants stated:

"(i) the plaintiff contends that the conclusions drawn in the Decision by the Commission are conclusive as to whether the defendants have committed abuses of their dominant position whether raised in the decision or in the present proceedings.

"(ii) the plaintiff contends that the findings of fact set out in the Decision of the Commission are conclusive evidence of those facts whether raised in the Decision or in the present proceedings and that the plaintiff is entitled to rely on those findings of fact as such."

And so you see an immediate analogy with this case. And then moving on to paragraph 17, that says:

"This really highlights the battleground between the parties. The plaintiff wants to be able to rely upon conclusions of fact reached by the Commission (in so far as not overturned on appeal) ... It wants to be able to

proceed with its claim without having to prove from scratch that the defendants have abused their dominant position in the United Kingdom market. On the other hand the defendants argue that this court should neither be assisted by or pay attention to any conclusions of fact on these important issues arrived at elsewhere."

You see at 18 that:

"The plaintiff's arguments are founded primarily on principles of res judicata ..."

And then:

"Alternatively the plaintiff says that it would be an abuse of process for the defendants to deny the correctness and applicability of the findings in those European proceedings."

And then moving on, first of all the court deals with the issue, the first way in which the argument was put, and we see on page 8 the heading:

"Are proceedings before the Commission ... of such a nature as to fit within the Mills v Cooper criteria so as to give rise to issue estoppel?"

And the conclusion on that issue, which is not directly on point in this case, is at paragraphs 36 to 39 and essentially the issue estoppel argument was rejected on the basis that the claimant and defendant were not parties to civil proceedings before the

Commission or the European courts and we see that explained at 36, and we see in the middle of that paragraph:

"... since competition proceedings before the Commission cannot be described in English terminology as civil proceedings between the parties, it is not possible to say that the issue estoppel arises in this case."

So that is the first argument failed. We see the conclusion on paragraph 39.

Then we have a section headed "A broader approach" and what one sees when one looks through this broader approach, so it is seen perhaps most clearly from paragraph 52 on page 14 and paragraph 55 on page 15, is an analysis of cases like Delimitis and Banks v British Coal which were the basis on which article 16 of regulation 1 of 2003 was enacted.

So article 16 of regulation 1 reflected case law, pre-existing case law, and that case law included the Delimitis judgment and that is all about the duty of sincere cooperation precluding or seeking to avoid divergent decisions and so that is the basis on which this part of the judgment is analysed.

And then we see the section on abuse of process which is the final way in which the point is put and

that starts on page 20, under the heading "The defendants are bound" just above paragraph 75, and you see that paragraph:

"This brings me to the final way in which the plaintiff puts its case. Even if principles of res judicata do not apply ... it says that the defendants are bound by the European decisions ... It is not open to them to assert that those decisions are wrong in any national court. This argument is not dependent on the status of the plaintiff."

And that is an important point, because one of the points made by the defendants in attempting to distinguish Iberian is to say well, Iberian is a case where the judge made findings of the very close involvement of the claimant in the proceedings. But what the court is saying here is that that particular point was not a necessary point for the abuse of process argument to run. So this argument is not dependent on the status of the plaintiff.

"It would apply in the present proceedings even if the plaintiff had made no complaint to the Commission and had played no part in the European proceedings. To use English legal terminology, for the defendants to deny the correctness of the plaintiff's allegations of abuse of a dominant position amounts to an abuse of

process since it would involve a collateral attack on binding decisions of the Commission, CFI and ECJ."

And then you see that at 78 the courts say that the argument --

"... all the arguments of public policy which have led me to conclude that neither the plaintiff nor the defendants can challenge the European decisions in this case on the basis of res judicata apply with particular force to the defendants. Whatever the position of the plaintiff, the defendants were directly and fully involved in the European proceedings. They were the addressees of the ... decisions. The public policy considerations therefore have particular force where the defendants are concerned."

And then moving on, on to page 22, the numbering goes a bit wrong but at the top of the page you have -- the paragraph numbering goes wrong, you have paragraph 86, where the judge, Mr Justice Laddie, refers directly to the Hunter case and he says -- he says there that -- he explains what the basis for the Hunter decision was and then further down the page at paragraph 83, but I think it must be 89, I think there is a misprint:

"The Hunter case was concerned with whether a litigant could relitigate an issue determined in

previous proceedings before a competent court to which he was a party. In this case it can be said that the decision of the Commission was not a decision of a competent court, although that argument would not apply to the decisions of the CFI and ECJ. However, in view of the special position held by the Commission in relation to competition issues and the public policy considerations set out earlier in this judgment, I think that the underlying rationale in Hunter applies here as well. To adopt the sentiments of Jeremy Bentham [and those sentiments are expressed in the paragraph just above], to allow the defendants to argue afresh here all those points that they argued and lost in the course of eight or nine years of detailed proceedings before the competition authorities in Europe would be absurd. I can see no compelling reason why they should be allowed a second bite at the cherry for the purpose of persuading the English courts to come to a conclusion inconsistent with that already arrived at in Europe. It follows that in my view it would be abuse of process to allow the defendants to mount a collateral attack on the Commission decision in the proceedings against any party before any national court. On this basis as well, preliminary issues (b) and (d) are answered in the affirmative."

And then in the next paragraph:

"In coming to these conclusions, I have applied what I believe are concepts of English law."

And he has said what those are, it is the principle emanating from Hunter.

So this is in some ways a different case to the present case. We say that the present case is a fortiori this one because in the present case the decision reflects admissions made, admissions made for gain by the defendants. But the critical point that we derive from this case is that the Hunter principle applies to decisions of the -- can apply in principle to decisions of the European Commission.

So --

THE CHAIRMAN: Preliminary issues (b) and (d) are on page 6, paragraph 14.

MS DEMETRIOU: Yes, that is right, so the preliminary issues are paragraph 14(b) and (d). And so you see the decisions are conclusive as to the facts in the present proceedings, that is (b), and then (d) concerns the conclusions as to the interpretation and/or applicability of article 86 which of course is now article 102.

So that is all I wanted to say in opening about the law and the applicable principles.

I'm going to move now to take the Tribunal to the relevant legislation concerning the settlement process, the procedure, and before I take the Tribunal to the documents, can I say in advance what the key propositions are that I'm seeking to derive from the relevant legislation.

The first is that the settlement procedure provides for significant rewards for parties who cooperate.

The second is that the premise of the settlement procedure is that the decision adopted by the Commission at the end of it will reflect the parties' settlement submissions, in other words their admissions.

The third point is that arriving at that decision the parties' full rights of defence are guaranteed and the fourth point is that if the settlement decision does not accurately reflect the settlement submissions made by the parties, there is then a procedural duty on the Commission to put the new points or the different points back to the parties for comment and ultimately the settlement submissions are deemed, if the decision adopted at the end of the process is different, are deemed to have been withdrawn and cannot be relied on by the Commission.

I would like to start with the relevant regulation and for the Tribunal's note, the relevant regulation in

consolidated form is at authorities bundle 1, tab 22. But I'm not going to take you to the consolidated version because I think it is helpful to look at the recitals of the amending regulation and so the regulation which amends the main procedural regulation is at F8 -- sorry, authorities bundle 8.

THE CHAIRMAN: We have been slightly bewildered at the way these bundles have been put together. Why on earth the legislation is not all together in one bundle and scattered about so you have to hop around and we have to hop around defies any logical basis we can see.

MS DEMETRIOU: Sir, I'm not sure why they ended up in that way.

THE CHAIRMAN: It is really very unhelpful.

MS DEMETRIOU: So behind tab 104 we have the main procedural regulation, 773 of 2004. But the one we want to look at is the amending regulation in the previous tab, behind tab 103, and it is these amendments which relate to the settlement procedure which then -- which are then made to the regulation behind tab 104 and which then result in the consolidated version which we have in the first volume.

But it is helpful to look at the recitals to the original regulation 622 of 2008, first of all we see at recital 3 -- so before going any further, if I could

just highlight one point in case the Tribunal hasn't appreciated this up until now, but the general, and we will see this from the decision, but the general way in which settlement procedures are intended to operate is that the settlement procedure starts before the statement of objections stage and what then happens is that the parties make their settlement submissions and those are then reflected by the Commission in the statement of objections.

Now, what happened in the present case was a bit different because the parties asked for the settlement procedure to be used at quite a late stage of the proceedings, a relatively late stage, and this is an additional fact which we rely on which makes it particularly abusive in this case for the defendants to seek to resile from their admissions because in this case what happened was that the Commission was conducting a contested investigation and had issued a full statement of objections and when the parties decided to invoke the settlement procedure and when they made their settlement submissions, crucially, they had access to the full statement of objections and also to the entire file of Commission evidence and so this was a case in which the defendants made their admissions, their settlement submissions, in the knowledge of all

the evidence, the totality of the evidence that the Commission had on file in relation to the defendants, so that is a factual point. We will see that in the decision itself.

THE CHAIRMAN: This is true of all of them, including the immunity applicant.

MS DEMETRIOU: Yes. So when you see recital 3, that says:

"When the Commission reflects the parties' settlement submissions in the statement of objections and the parties' replies confirm that the statement of objections corresponds to the contents of their settlement submissions, the Commission should be able to proceed to the adoption of a decision."

So it didn't quite happen in that order in this case, but what one sees from that recital is the idea that the Commission case, so at this stage set out in the statement of objections, and we will see later set out finally in the decision, should be a case which corresponds to the content of the admissions, of the settlement submissions.

And then we see that reflected in recital 4, because we see in the middle of that this recital 4 concerns the Commission's discretion to determine which cases might be suitable for settlement and in this regard, and we see this in the middle of the recital, account may be

taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable time frame.

So this is all about reaching a common position.

Then over the page ...

THE CHAIRMAN: It refers to, just continuing that sentence:

"... in view of factors such as [the] ... extent of contestation of the facts."

MS DEMETRIOU: Yes, so if the parties are vigorously contesting the facts then the Commission is liable to take the view that this is not a suitable case for settlement because it may be hard to reach a common position as to what went on.

Then you see at (5):

Complainants will be closely associated with settlement proceedings and be duly informed of the nature and subject matter of the procedure ..."

And then over the page we have the substantive amendments and the key amendment is at article 1.4:

"The following article 10a is inserted."

And that sets out the key substantive provision and so we see there that at 10a(1):

"After the initiation of proceedings [of the investigation] the Commission may set a time limit

within which the parties may indicate ... that they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions."

And then at 10a(2) this is important because it sets out the information that the Commission must provide to parties that are interested in settling or are taking part in settlement discussions:

"Parties taking part in settlement discussions may be informed by the Commission of:

"(a) the objections it envisages to raise against them"; so essentially the case.

"(b) the evidence used to determine the envisaged objections;

"(c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and

"(d) the range of potential fines."

And then:

"Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the

results of the settlement discussions and acknowledging that their participation in an infringement of Article 81 ... as well as their liability."

And then:

"Before the Commission sets [that] time limit ... the parties ... shall be entitled to have the information specified in article 10a(2), first subparagraph disclosed to them, upon request, in a timely manner."

And what we know in this case, as I have said, is that the particular defendants in this case got more than the minimum that is suggested by subparagraph (2) because they had access to the entire file and the full statement of objections setting out the Commission's entire case in detail.

And then at (3):

"When the statement of objections notified to the parties reflects the contents of their settlement submissions, the written reply to the statement of objections by the parties concerned shall, within a time limit set by the Commission, confirm that the statement of objections addressed to them reflects the contents of their settlement submissions. The [parties] may then proceed to ..." a decision.

THE CHAIRMAN: The Commission.

MS DEMETRIOU: Sorry, the Commission, of course.

So what we have here is again a reflection of the premise, the underlying premise of this procedure, which is following settlement discussions, having seen the evidence against them or much of the evidence against them, in this case all of the evidence against them, the parties then make their admissions to the Commission and the idea is that the Commission's statement of objections will reflect those admissions, those submissions.

And then we see at article 12 that:

"The Commission shall give the parties to whom it addresses a statement of objections the opportunity to develop their arguments at an oral hearing if they [request that]."

And then at (2):

"... when introducing their settlement submissions the parties shall confirm to the Commission that they would only require having the opportunity to develop their arguments in oral hearing, if the statement of objections does not reflect the content of their settlement submissions."

So that's the regulation and I'm going to turn now to the Commission notice on the settlement procedure which is at authorities bundle 2 behind tab 26.

It is important, in my submission, to go through this in some degree of detail because it fleshes out the process that is followed. Of course we assume it was followed in this case subject to the point that I have mentioned about the extra benefit accorded to the defendants in this case, in the circumstances of this case.

So paragraph 1 explains that:

"This Notice sets out the framework for rewarding cooperation in the conduct of proceedings ... [and] the cooperation covered by this Notice is different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is covered by ... the Leniency Notice."

And then at the end:

"Provided that the cooperation offered by an undertaking qualifies under both ... Notices, it can be cumulatively rewarded accordingly."

And then at paragraph 2 the premise is that parties are prepared to acknowledge, to admit their participation in a cartel violating article 101 of the treaty and their liability, and then you see that in return for that, at the end of that paragraph, the Commission can reward that cooperation.

And then at (4) this is the point about full respect

of the parties' rights of defence. So in this procedure too there is full respect given to the parties' rights of defence and we see what that means. It says:

"It follows that the rules established to conduct the Commission proceedings to enforce article [101] should ensure that the undertakings concerned are afforded the opportunity effectively to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission throughout the administrative procedure."

So that applies here in relation to settlement. And it is important to bear that in mind when considering some of the assertions made in very general terms by the defendants in this case, which is that the settlement procedure didn't allow them properly to contest the facts. That is not what is provided for here. And of course if they had an actual gripe about that, they could have brought an appeal on procedural grounds to the courts, because there are very real procedural rights that are accorded to settling parties.

Then moving on, we have the same point that we have already seen in the recitals to the regulation, that when deciding whether or not to explore settlement, account may be taken of the probability of reaching a common understanding. So again that demonstrates that

that is the purpose of all of this. Not imposing the Commission's understanding on the parties, but reaching a common understanding of what happened.

And then we have section 2.2 on page 3, which is headed "Commencing the settlement procedure: settlement discussions."

And so the first stage of this is that discussions take place between parties, the settling parties and the Commission, and as we will see in due course, in this case the discussions took place over a very protracted period of time. And then at 15, at the end of 15 we see that:

"Information will be disclosed in a timely manner as settlement discussions progress."

And that includes the evidence in the Commission's file used to establish the objections and the potential fine.

And then at 16:

"Such an early disclosure in the context of settlement discussions ... will allow the parties to be informed of the essential elements taken into account so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, the estimation of likely fines, as well as the evidence used to establish

the potential objections. This will enable the parties effectively to assert their views on the potential objections against them and will allow them to make an informed decision on whether or not to settle. Upon request ... the Commission services will ... grant it access to non-confidential versions of any specified accessible document listed in the case file ..."

And then at 17:

"When the progress made during the settlement discussions leads to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed by the Commission and the Commission takes the preliminary view that procedural efficiencies are likely to be achieved in view of the progress made overall, the Commission may grant a final time limit of at least 15 days of an undertaking to introduce a final settlement submission."

And then we have section 2.3 headed -- sorry, 19 I should draw your attention to as well. So if the parties choose not to make a settlement submission then of course everything reverts back to the normal contested procedure.

And then we have section 2.3, which is headed "Settlement submissions". And paragraph 20 is important because it specifies the content of the settlement

submission and it says what it must contain and it must contain at (a):

"An acknowledgement in clear and unequivocal terms of the parties' liability for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions."

And then (b) relates to the maximum fine that they would accept and (c) is a confirmation that they have been sufficiently informed of the objections that the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission.

So just pausing there and focusing on what we have got so far before we turn the page, this all follows, the making of the settlement submissions follows a period of discussion between the Commission and the settling parties on a bilateral basis in which they have seen the relevant documents. In this case, they have seen all the documents. And at which the purpose of those discussions themselves is to reach a common understanding of the facts, of the main facts of the

cartel.

And it is on that basis that the settlement submissions are made according to that common understanding and that is why at the end of the process, as we will come to see, there can be a high degree of confidence that the ultimate decision will reflect those settlement submissions, the admissions made by the parties.

So turning the page, we have at (d):

"The parties' confirmation that, in view of the above, they do not envisage requesting access to the file ..."

That doesn't apply in this case because they have already had it. And then (e) concerns the language. And then 21:

"The acknowledgements and confirmations provided by the parties in view of settlement constitute the expression of their commitment to cooperate in the expeditious handling of the case following the settlement procedure. However, those acknowledgements and confirmations are conditional upon the Commission meeting their settlement request including the anticipated maximum amount of the fine."

And then we have at 22 a protection, so:

"Settlement requests cannot be revoked unilaterally

by the parties which have provided them unless the Commission does not meet the settlement request by reflecting the settlement submissions first in a statement of objections and ultimately, in a final decision (see in this regard points 27 and 29) [which I'm going to come to]. The statement of objections would be deemed to have endorsed the settlement submissions if it reflects their contents on the issues mentioned in point 20(a). Additionally, for a final decision to be deemed to have reflected the settlement submissions, it should also impose a fine which does not exceed the maximum amount indicated therein."

And so turning that around, so making the negative into a positive, settlement requests can be revoked unilaterally if the Commission doesn't meet its side of the bargain and its side of the bargain means reflecting the settlement submissions in the decision and not doing anything different.

MR JUSTICE FANCOURT: Does that mean reflecting them totally or substantially? What does it mean?

MS DEMETRIOU: My Lord makes a fair point. It is not made clear. We would say what is made clear is that they have to be reflected -- the contents on the issues mentioned in point 20(a) have to be reflected and when one goes back to 20(a) one sees there that one is

looking at the main facts, their legal qualification including the parties' role and the duration of their participation.

So we would say that the main facts which are then relied upon as the basis for the infringement, and which are admitted, have to be reflected accurately in the settlement decision, and we will come on to see that if they are not then there is an important procedural right which is afforded to the parties because anything additional, anything different has to be put back to them for comment and we see that in paragraph 29.

Before that we see there is the heading "Statement of objections and reply" and we see there that at 27, as regards the statement of objections:

"The Commission retains the right to adopt a statement of objections which does not reflect the parties' settlement submission. If so, the general provisions in Article 10(2), 12(1) and 15. (1) of Regulation ... 773 will apply."

So in effect you go back to the procedural rights that are then afforded under the main regulation.

"The acknowledgements provided by the parties would be deemed to be withdrawn and could not be used in evidence against any of the parties in the proceedings, hence the parties concerned would no longer be bound by

their settlement submissions and would be granted a time-limit allowing them, upon request, to present their defence anew, including the possibility to access the file and to request an oral hearing."

So that is at the statement of objection stage and then we see something very similar at paragraph 29 at the final decision stage and this is a very key paragraph, a very key right that is afforded to the parties because what this says is if the Commission adopts a final decision which departs from the parties' settlement submissions, so we see that, departs from its statement of objections which in turn have endorsed the parties' settlements submissions, what happens is the Commission, if it follows that course, has to inform the parties and notify to them a new statement of objections in order to allow for the exercise of their rights of defence in accordance with the applicable general rules of procedure.

And so in answer to my Lord's point, if there is some material fact which affects, which is such as to call for -- gives rise to a right of the parties to make representations because it is a material fact which is a fact detrimental to their position which they haven't agreed to, then it needs to be put back to them in a new statement of objections and then we see that the parties

would then be entitled to have access to the file to request an oral hearing and to reply to the statement of objections.

The acknowledgements provided by the parties in the settlement submissions would be deemed to have been withdrawn and could not be used in evidence against any of the parties to the proceedings.

So what we know about the present case is that in the present case the Commission did not issue another statement of objections and so we can take it from that in our submission that the decision did indeed accurately reflect the parties' settlement submissions.

So had the decision, the settlement decision that the Commission finally adopted, had that decision not reflected the settlement submissions, had it departed from them in some way, or had it contained additional material which is inculpatory material which had not been the subject of the submissions, then that would have had to have been put back to the parties in the form of another SO. And had the Commission failed to comply with that requirement, then we say, as with any other procedural breach, the parties could have appealed against that on procedural grounds.

Let's take an example where -- let's say the decision had gone beyond the admissions of the parties

and had included, for example, additional meetings which the parties had not acknowledged in their settlement decisions. Then we say the Commission would have had to put those to parties in the additional statement of objections, and had it failed to have done that they could appeal to the General Court on the basis that the settlement decision did not accurately reflect their settlement submissions and these consequences were not applied and those consequences included the deemed withdrawal of the settlement decision and the inability of the Commission thereafter to rely -- to be able to rely on any of the settlement submissions in the case.

MR JUSTICE FANCOURT: We know that none of that happened in this case.

MS DEMETRIOU: None of that happened.

MR JUSTICE FANCOURT: So we don't get to the first stage of that being engaged.

MS DEMETRIOU: Exactly, none of that happened, my Lord. So when one is looking at the mealy-mouthed comments, with respect, in the defendants' skeleton arguments where they say well, we didn't have an independent arbiter, DAF says, determining whether or not these points were right, it is a point which just does not arise because these are admissions they made. You don't need an independent arbiter. Then if the Commission fails to

reflect those admissions, then there is a remedy, a procedural remedy. So it is a nonsense to say we can't be bound by these admissions because there was no independent arbiter. So that is really the point.

Now moving on, paragraph 32 we see the rewards:

"Should the Commission decide to reward a party for settlement in the framework of this Notice, it will reduce by 10% the amount of the fine to be imposed after the 10% cap has been applied having regard to the [fining guidelines]."

So that is very significant when one is aware of the scale of possible fines in these cases, a very significant reward which the parties obtain through this cooperation which is laid down in this notice.

And then at paragraph -- I think that is probably all we need to look at in this. Those are the most relevant parts of this settlement notice.

So that is the notice. I now take you to the decision itself. Does the Tribunal have it? I have it in the confidential authorities. Does the Tribunal have it separately?

THE CHAIRMAN: I have got it.

MS DEMETRIOU: You have got it.

So the first recital that -- well, we see, first of all, in the preamble having given the undertakings

concerned the opportunity to make known their views on the objection, so confirmation there that fair process has been followed. And then we have recital 3:

"The facts as outlined in this Decision have been accepted by MAN, Daimler, Iveco, Volvo and DAF, the addressees in the settlement procedure."

There is no qualification there. These are the facts set out in this decision, in these recitals, and they have been accepted and that is because of the whole settlement procedure which I have just taken you through, which follows the period of bilateral discussions and access to the file and the settlement submissions which are then faithfully reflected in this document. That is why the Commission is able to say with confidence these facts have been accepted.

Now moving on, we see at paragraph 31 -- I just ask you to note this so I don't come back to it. It is a point relevant to a submission that MAN makes. You see that at the end of paragraph 31 the Commission granted conditional immunity from fines to MAN and just to make the point, so one of MAN's less convincing submissions in this case is it did not reap any reward from the settlement process because it reaped its reward through the leniency mechanism.

But the problem with that argument and the reason

why it is unconvincing is that MAN received 100 per cent, not 10%. 100 per cent reduction of their fine. No fine at all. And the reason that of course they had to cooperate with the settlement procedure once it had commenced was that the immunity, so the 100 per cent reduction, the annihilation of their fine, was conditional on their cooperation, so they had a huge reward.

Then we see at 32 that there were dawn raids carried out. So there are inspections carried out at the premises of the addressees, so this is how the investigation proceeded after the immunity notice.

And then you had other defendants coming forward seeking immunity or leniency. At paragraph 36 the Commission made various requests for information under its powers and then at 37, and this is the point I was alluding to earlier, the Commission initiated -- adopted a statement of objections which it notified to the defendants and so at this stage, unlike many cases and unlike the paradigm case that we have seen in the settlement notice, the settlement procedure hadn't been invoked at this stage so it was conducted as a full investigation, there was a full statement of objections and that was notified.

Then you will see at 39 that the addressees had

access to the complete file of the Commission and then at 40 subsequently, so that was on 20 November 2014, so having digested all of that for several months -- I think some of these dates are actually confidential so I'm going to be careful about the dates, I'm just going to point to them, but the Tribunal has the dates in the version you have -- so you see then several months later the addressees approach the Commission and ask to continue the case under the settlement procedure.

Then at 41 you see that settlement meetings between each addressee and the Commission took place between those dates. And you can see it is a considerable period of time. And during those meetings each addressee expressed its views on the objections raised by the Commission against them and of course they knew exactly what those were because they were set out in the full SO.

The addressees' comments were carefully considered by the Commission and where appropriate taken into account, so there was a period of trying to reach agreement. The Commission also provided the addressees with an estimation of the range of fines likely to be imposed by the Commission and informed them that no additional statement of objections would be adopted.

Then at the end of the settlement discussions the

addressees considered that there was a sufficient common understanding as regards the potential objections and the estimation of the range of likely fines to continue the settlement process.

Then we have the submission of the formal request, the settlement submissions are then described in paragraph 43. Then at 44:

"Each of the addressees made the above-mentioned submission conditional upon the imposition of a fine by the Commission which will not exceed the amount as specified in its settlement submission."

And then just to complete the picture and moving well on into the decision at 134 to 135 on page 28 and 29 of the bundle, you have confirmation of the application of the reward for settlement, which is the reduction in fines.

And of course this decision is much briefer, much more streamlined than it would have been had the settlement procedure not been adopted and we see that by directly comparing the Scania decision, which I know the Tribunal has seen, and which Scania of course did not settle and there was a much lengthier and fuller decision in relation to Scania which did not -- which is much more detailed than this one.

THE CHAIRMAN: Do you say that is also a benefit to the

addressees?

MS DEMETRIOU: It is a benefit -- the fact that it is a streamlined process, yes --

THE CHAIRMAN: Well, a streamlined process -- but I'm talking about the decision, that it is a shorter --

MS DEMETRIOU: Yes, it is a benefit to the addressees and a disbenefit to us and the short point is that the addressees for their part avoid detailed scrutiny of the cartel and avoid all of the detailed findings that the Commission would otherwise have made about the operation of the cartel and what that translates to is a very real disadvantage to the claimants because the claimants, unlike a non-settlement decision, do not have the Commission's view following a full investigation of the way in which the cartel operated.

So what we have instead are a much briefer summary, a much, much briefer summary of the operation of the cartel and moreover -- so what one has in a decision that is not a settlement decision is first of all an extremely detailed exposition of how the cartel operated and then a -- all of that is backed up by reference to the evidence on the Commission file. And so typically you will see findings made by the Commission, very detailed findings going through all the relevant meetings and what was discussed and what the impact of

that was, and then footnoted to those findings will be the evidence on the file.

So if you are a claimant in a case like that, then once the file is disclosed to the claimants in a damages claim and once the decision is disclosed, then one is able to piece together the Commission's findings as to the operation of the cartel and relate that to all the evidence on the Commission file.

Of course the Commission investigations in these cases can often last, as the Tribunal will know, several years. They are very detailed investigations which benefit from compulsory powers of information-gathering et cetera, and including dawn raids and questions being put to the parties and requests for further information. And so the claimants in that kind of case have a very full picture of how the cartel operated backed up by direct reference to the evidence which of course is critically important in then establishing what the claimants then need to establish in the national court which is relating the operation of the cartel by its detail to demonstrate how that resulted in loss being caused to the claimants.

Now what one has here is something very, very different. A much, much briefer decision with very little detail about the operation of the cartel. Such

detail as there is does not reference the evidence on the case file because the basis for these findings are the settlement submissions themselves, which the defendants have not voluntarily disclosed to us and which they are at pains to say in all of their skeleton arguments can't be ordered to be disclosed by the court.

And so in a sense there is a big void underlying the findings in the decision and what we have had to do, and the Tribunal has seen this, is try to piece together for ourselves, and that is why it has led to this very lengthy repleading exercise, tried to piece together from the primary evidence on the Commission file how this cartel operated so it leads, firstly, to substantial benefits in terms of not as much scrutiny for the defendants, and those translate to substantial disbenefits for the claimants.

Those points are of course very, very important in -- very important, very relevant when considering whether it would be abusive for them to turn round and say even those curtailed factual findings we are allowed to resile from having made -- having admitted them. That is really the point.

So I think having answered my Lord's question reasonably fully I can make my submissions now quite efficiently.

We say that in all of these circumstances, if the objective bystander were asked the question: would it bring the administration of justice into disrepute and/or result in manifest unfairness to the claimants if the defendants were permitted to resile from the recitals to the decision, the answer is plainly yes. We say that for the following reasons.

First of all, as I have said, the recitals to the decision represent the defendants' admissions. They are not contested findings. And had the defendants wished that particular matters should not be included within the decision, then they should not have made the admissions they did. It was their choice. There is no suggestion in this case that there is any inconsistency between the admissions they made in their settlement submissions and the ultimate decision and had there been, they would have been able to do something about it, as we have seen.

So in the present case, as I have said, the defendants had the benefit of the Commission's statement of objections, detailed statement of objections, and full access to the file before making their settlement submissions so they therefore had full knowledge of the evidence before the Commission in advance of making their admissions so they could make their admissions on

the basis of a very full state of knowledge.

Second, the defendants of course made these admissions in order to obtain a substantial benefit, namely a 10% reduction to their fine. And it is clear to settling parties and would of course have been clear to these defendants that a settlement decision is liable to be used in civil proceedings as the basis for damages claims brought by victims of their infringement. We say it would indeed bring the administration of justice into disrepute if the defendants could admit facts to the regulator in order to obtain a lower fine but then simply resile from them in subsequent litigation.

We know that there is a strong public interest in holding parties to settlement decisions that they freely entered into and I will just take the Tribunal to one more authority, which is the OFT v Somerfield case in authorities bundle 2, behind tab 36.

This of course is one of the cases that arose from the tobacco litigation and essentially the Tribunal will know that what happened was that some parties successfully appealed against the OFT decision but others had settled before the appeal and the question was then whether the settling parties could appeal out of time against the decision despite having settled.

The Tribunal did grant them permission to appeal out

of time but that was then overturned by the Court of Appeal and the reasoning is instructive by way of analogy here and we see -- so if we can turn first to paragraph 41, which starts on page 9 but it is the second part of the paragraph on page 10 that I wish to take you to. So what is said there, this is the judgment of Lord Justice Vos, is:

"What seems to me to be most important here is that the Respondents had the fullest opportunity to consider the SO/Early Resolution Agreement [that is the OFT settlement process] theory advanced by the OFT at the stage that they signed up to the [settlement], and the same opportunity to consider the paragraph 40 theory advanced in the Decision, before deciding whether to appeal. They could have appealed the Decision notwithstanding they had signed up to the ERAs. Indeed Asda did so. Of course, there would have been adverse financial consequences ... had they done that, but they assumed those obligations voluntarily. It is true that they had agreed not to seek further documentation from the OFT and so to limit their rights of defence, but they did that voluntarily as well. They knew in advance the limitations they would face in reaching a decision as to whether to appeal the Decision that was ultimately made. And, moreover, they were never promised that the

OFT would be able to establish the ... theory or the theory of harm that would later appear in the Decision. They chose not to appeal with their eyes open."

And then at 45:

"... these answers do not address the real point. It is true that the OFT has the role of a prosecutor and has wide powers to impose penalties, and that those powers must be exercised on a proper basis, but that does not stop commercial parties from taking a commercial view as to whether or not to sign up to an [agreement, a settlement] after a long investigatory process and the publication of a lengthy Statement of Objections. The addressee knows precisely the terms that are being offered. It knows what it has done in relation to the alleged infringements, and what it is being asked to admit, and the terms requiring its cooperation and the fetters on its right to defence on which it is being asked to agree. It can take it or leave it."

So there we have a very strong endorsement of the public interest in holding parties to settlement decisions that they freely entered into.

Of course in this case there is nothing in this case akin to what happened in the tobacco case because here none of the defendants are saying there is anything

wrong with this decision and that takes me to my next point, which is that the abusive nature of the defendants' position is underlined by the fact that they are not seeking to deny the recitals and advance an alternative case, so this was a point touched on a little earlier. Instead, they have entered a series of non-admissions, so their position is not then that the recitals are wrong, but that despite having admitted the fact in the recitals to the Commission, the claimant should now have to prove them afresh before the Tribunal. We say that this is not a good reason for seeking to resile from the admissions and quite aside from the expense and delay that it would cause and the disadvantages it would cause to the claimants, it would place an unjustified burden on the Tribunal's resources, requiring it to hear evidence and make findings on facts that the defendants have already admitted and which they don't suggest are wrong.

I just want to take a couple of examples from the recitals and if we take this from bundle B which contains the parties' submissions and if we turn first to B, tab 38, which is the composite schedule of recitals and look at recital 52 on page 9 --

THE CHAIRMAN: Just one moment.

MS DEMETRIOU: Of course.

THE CHAIRMAN: We have had sort of various composite schedules.

MS DEMETRIOU: Would you prefer to take it from the other one that you were looking at?

THE CHAIRMAN: I think it would be easier if so far as possible we could stick to one of them.

MS DEMETRIOU: Yes, I am very happy --

THE CHAIRMAN: If that doesn't take you out of your course.

MS DEMETRIOU: I am very happy to do that. I think it may be on page 8 of the version you were looking at, so recital 52.

THE CHAIRMAN: Yes.

MS DEMETRIOU: So what we see in recital 52 are two --

THE CHAIRMAN: Just one minute. Yes.

MS DEMETRIOU: So the Tribunal will see in recital 52 two specific examples of meetings at which collusion took place. So there is a meeting on 17 January organised in Brussels. It says it was attended by representatives of the headquarters of all of the addressees. The evidence demonstrates that future gross price list changes were discussed. That is the first meeting.

And another meeting on 6 April 1998 in the context of an Industry Association meeting again attended by representatives of the headquarters of all the addressees. The participants coordinated on the

introduction of Euro 3 standard compliant trucks, they agreed not to offer Euro 3 standard compliant trucks before it was compulsory to do so, and agreed on a range for the price additional charge for Euro 3 standard compliant trucks. So that is what is said.

And then what we see is looking across at the defendants' responses, Daimler admits this recital in its entirety. So far so good. But the other defendants do not. And I just want to take you to two of them, so Volvo.

Let's turn up -- if the Tribunal wouldn't mind going back now to bundle B and tab 37 where we see Volvo's amended list of admitted recitals and if we turn to page 7, we can see what Volvo says. It says first of all it says it is not the essential basis, okay. But does it admit it? No, not admitted, save it is admitted that meetings took place on those dates.

So it doesn't admit that any of its employees attended the meeting and it doesn't admit that collusion took place at that meeting and we see similarly Iveco, so that is in the same bundle behind tab 31 on page 6.

And so Iveco says the same. It says it has admitted that the specific meetings took place on those dates, but otherwise no admissions are made.

To take the basic point of whether a representative

of Volvo and a representative of Iveco attended these two meetings, this fact is obviously a fact within the knowledge of those defendants, and recital 52, which says that they did -- representatives did attend those meetings, we say must reflect admissions which they have made, and so we say it is abusive for them now to contend that the claimants have to prove that fact.

Now, it may be different if they were saying -- if they were advancing a positive case. So if they were saying, well recital 52 says that someone from our headquarters attended, but we are going to advance a positive case that they did not. This is an error and we are going to adduce evidence before the Tribunal to show the Tribunal that they didn't attend. That may be different. So it may not be abusive in those circumstances for them to try and contend otherwise.

But this here, they are not doing anything of the sort. They are simply entering a blank, bare non-admission which doesn't advance any positive case and simply puts us to proof and we say that is an abuse.

THE CHAIRMAN: It is particularly odd in the case of Volvo, isn't it, because of what is said at recital 119, because they got immunity for that period because of these submissions, didn't they?

MS DEMETRIOU: My Lord, I think that is correct. I will

double-check. But yes, we say even leaving aside that, in circumstances -- and this is most of the -- most of what the defendants are doing in this case is entering bare non-admissions. I will show you in a minute the exceptions to that.

THE CHAIRMAN: Yes.

MS DEMETRIOU: They are very, very minor. But just to give you another example, so you see the kind of thing, going back to the updated schedule, let's look at paragraph -- at recital 58. So this is referring to certain information exchanges and that says the exchanges at least put the addressees in a position to take account of the information exchanged for their internal planning process and the planning of future gross price increases for the coming calendar year. Furthermore, the information may have influenced the price positioning of some of the addressees' new products.

So that is the effect of the information exchanges that have been discussed.

Then we see looking across at the responses that the MAN defendants essentially -- so let's stick with the first sentence for the time being.

The MAN defendants essentially admit that first sentence, save that they say they make a qualification saying that any gross price increases were made on an

intra year basis. But they essentially admit the first sentence.

And then Daimler for its part admits it insofar as it applies to Daimler, so again so far so good.

But the other defendants enter bare non-admissions and again let's look at Volvo. So they are back to bundle B, behind tab 37 and this time it is page 10. What we just see are the words "not admitted". That is it. "Not admitted". No alternative case, no well no, the information exchange didn't allow us to do that because it was X type of information; a bare non-admission.

Now, the only recitals that I have been able to find, and no doubt the defendants will say otherwise in their submissions if I am wrong, in which there is any type of qualification -- I don't go so far as to say positive case -- but any type of qualification, real qualification that is made are recital 48, which is the point that the President picked up this morning and that is a concession, that is essentially, going back to it, that is a concession by Daimler -- by DAF, I'm so sorry, exactly, by DAF, so there is a concession by DAF that although DAF was excepted in this recital, DAF says that it -- it makes the concession that it did have access to the configurator.

And then moving on, we have recital 60 which is on page 14 of this document and that is addressed at MAN's skeleton argument at paragraph 59. Perhaps we can pick it up from that. So that is bundle E, tab 4, paragraph 59.

Again, so what we have there is it is essentially an admission, but they make two points of clarifications and the clarifications they say are apparent from the face of the underlying documents and so again this is not -- this is not, we say -- it is not a denial with a positive case being put, it is a question of an interpretation being placed on the recital and of course we are pragmatic about these things and so if at the hearing MAN want to say, well, truth is we can't resile from this recital but it needs to be read in a particular way, then they can make that submission. So we are not saying they are precluded from making that submission and the Tribunal can decide what to do about it.

Then going back to the schedule, there is recital 62 and this recital contains an error which the defendants point out. It shouldn't say "addressees":

"As set out in section 4.2, all of the addressees started their participation in the infringement on 17 January 1997."

If it said "undertakings", it would be correct. They have used the wrong word. So it is not correct if the word "addressees" is used but it is true that all of the undertakings of which they formed a group, of which they formed part, started their infringement on that date --

THE CHAIRMAN: It's because of the German subsidiaries.

MS DEMETRIOU: Yes. So again of course we don't say that the abuse of process rule precludes them from saying there is a mistake here, it should say undertakings. Of course that is not our submission.

And then at paragraph 116, so recital 116, we see I think this is the only denial, it is a denial by Iveco of the market share which is in the recital and so this -- first of all this is a recital which BCLP do not contend is a binding recital and although we have -- up until now we are content to not rely on this recital as a binding recital because it is not really in the key parts of the decision, it is in the part of the decision relating to fines so we are not going to push this.

But again in relation to this, if Iveco --

THE CHAIRMAN: Sorry to interrupt you or stop you. Little bit confused. We are not dealing with binding recitals.

MS DEMETRIOU: No, we are not.

THE CHAIRMAN: We are dealing with abuse.

MS DEMETRIOU: We are dealing with abuse of process, yes.
THE CHAIRMAN: So are you not suggesting that this, to deny the market share which is redacted, so we have to be careful, to deny the figure is an abuse or -- I'm not clear what you are saying.
MS DEMETRIOU: So my Lord, in relation to that, you are quite right that I'm merging the two points and they are separate so I accept the point that my Lord is putting to me. In relation to abuse of process no, again, we are pragmatic about this. So if there is a positive case that Iveco are going to put forward to say that the market share is different, we don't say they should be precluded from doing that so our point really is that with that exception none of the other qualifications to the recitals are denials plus positive cases --
THE CHAIRMAN: Can we just look, then, at the recital 46.
MS DEMETRIOU: Yes.
THE CHAIRMAN: All of the addressees exchanged gross price lists and information on gross prices. That is I think admitted. And most of them engaged in exchanging computer-based truck configurators. All of these elements constituted commercially sensitive information, and that ties in with what is said in recital 47, second sentence.
I think DAF at least is saying no, it is not

commercially sensitive information.

MS DEMETRIOU: Well, it is not --

THE CHAIRMAN: Which is, you may say, not a positive case; it is certainly more than non-admission and it is effectively a positive case. I think that is right and I think that is reflected on the schedule.

Mr Beard, have I misstated that?

MR BEARD: No, you have accurately stated the position. I should emphasise that "commercially sensitive" is specifically defined in our pleadings as well. It is capitalised.

THE CHAIRMAN: Well, I don't know if -- I was a bit puzzled by that, actually what it is you are saying. "Commercially sensitive" has a general meaning and I'm not clear whether DAF is actually saying well, it was not commercially sensitive, which is what the Commission is saying, or not commercially sensitive in the sense that it doesn't enable them better to calculate their competitors' prices.

But in either event it is close to a positive case, I think.

MS DEMETRIOU: Sir, I must say I had read that as a non-admission because it says the second sentence is not admitted.

THE CHAIRMAN: Yes, it goes on to say the information

exchanged was not commercially sensitive.

MS DEMETRIOU: There is at the very least an ambiguity because the second sentence is --

THE CHAIRMAN: It may be ambiguous. Let's suppose they are saying no, this is not commercially sensitive, or at least it doesn't -- can look at what they say about recital 47. I just want to use this to understand where you draw the line.

MS DEMETRIOU: Yes.

THE CHAIRMAN: Without sort of spending too much time on this recital.

MS DEMETRIOU: Well --

THE CHAIRMAN: And they say -- and they explain I think in paragraph -- in their comment of 47 -- I mean, suppose DAF or indeed any defendant was saying no, this wasn't commercially sensitive in the sense that it doesn't help the recipients of the information to calculate our prices, our net prices. Would that be a positive case and would there be -- would you say it is not an abuse if they want to run that argument?

MS DEMETRIOU: So, my Lord, we don't say -- so it is not our position that in respect of every type of denial they are automatically permitted to argue about it because we say that the starting point is that the finding that this is commercially confidential information reflects

their submissions, their settlement submissions, their admissions. And so there needs to be a very good reason why they should be able to resile from it later.

Now we are not saying that that reason could never arise, but we make the point that where -- so I know that the Tribunal has this point -- that where no positive case is advanced at all, then that is a clear-cut position, in our submission, because we say there is simply no good reason, even on the face of things, why they should be able to resile from the finding.

THE CHAIRMAN: Yes, I get that point.

MS DEMETRIOU: But we say if a positive case is put forward then one is in the sphere of fact-sensitive analysis that the court has to conduct as to whether or not they should be entitled to resile from it and we say -- we don't -- our submission is they shouldn't be permitted to resile from this finding because it is a clear finding in the decision which is an important finding which reflects, no doubt, the admissions made.

Now if there were circumstances where there was an error or there was evidence which they could point to which -- that the Commission didn't have and which they didn't have when making their admissions then I think we would be in a different territory. But I'm unable to

answer my Lord's question in a black and white way because it is a fact-sensitive analysis. But our submission is absent any particularly good reason, then they should not be permitted to resile from this recital.

MR JUSTICE FANCOURT: Everything you have submitted to us, except the last part of your submissions which focused on the non-admissions, would support the argument that it makes no difference that a positive case is put forward, because the gravamen of your argument is that these are recitals that were based on admissions, they were part of a procedure where there was a full opportunity to engage, to challenge, to reject and so on. There is a substantial benefit obtained in return and there is strong public interest in upholding a consensual resolution of that. So what you are really saying is the non-admissions are an additional point on top as to why it is particularly abusive in this case, I think.

MS DEMETRIOU: My Lord, that is exactly right. That is exactly the way we put it. I am very grateful.

But what we say is we don't exclude that there might be a settlement case in which there is some particularly grave fact or serious fact which causes the -- ultimately it is a fact-sensitive analysis which causes

the court to say well, all of those are very powerful points but in the circumstances of this particular case we think the defendant should be able to re-argue this point again because there may be some court decision which throws an entirely different light on the legal characterisation of facts that have been accepted, something of that nature. But our primary position is that all of these are extremely powerful factors which mean that they shouldn't be allowed to resile from any of these admissions that they have made and as my Lord says, the fact that they have simply entered a series of non-admissions in very large part simply goes to underline the abusive nature of what they are saying. It simply goes to underline the fact that we are not in a situation where they are able to point to any unfairness to them in the application of the abuse of process rule in the manner that we contend for.

The fourth and final submission I have made already and it relates to the unfairness to the claimants. I don't need to elaborate the point because I made the submission in response to a question put to me by Mr Justice Roth and this is the point about the nature, the streamlined nature of the settlement decision and the disadvantage that that puts the claimants to and so we say allowing the defendants to resile from their

admissions --

THE CHAIRMAN: Yes, you have made that point.

MS DEMETRIOU: I have made that point.

Now I am very conscious, I was going to go on and deal in headline fashion with the main points made against me so that the Tribunal has our headline points. I think I still have a few minutes because I think you said 3.45.

THE CHAIRMAN: I said 3.30 but we started at 2.10 so you have a few minutes. We will give you to 3.45.

MS DEMETRIOU: I am very grateful. Can I do that quite quickly, then. I will just deal with the main points and really this is just out of fairness to the defendants so I can say what our response is, having seen their skeleton arguments, so that they have a chance to deal with the main submissions.

Really the primary argument made by MAN, who takes the lead in their skeleton in dealing with abuse of process, is that the claimant's abuse of process argument is inconsistent with the statutory scheme. So they say it is inconsistent both with article 16 and with section 58A and section 58 because they say that that statutory scheme tells us which recitals are binding, so the application of the abuse of process rule shouldn't be allowed to cut across that.

Essentially we say that that submission is wrong because these are different types of rule. So article 16 is a substantive rule of EU law that derives from the duty of sincere cooperation, and the abuse of process rule is a rule of English procedural law, and as with all national procedural rules they can apply -- in applying EU substantive rules they can apply so long as they don't offend the principles of non-discrimination and effectiveness and there is no suggestion of that here.

So we are not saying that the application of abuse of process rule would result in all recitals being binding in every Commission decision. Of course we are not saying that. We are concerned here with the particular aspects of settlement decisions and in particular this settlement decision and what has gone on in this case. And on that point we say that Hunter assists us and could we briefly go back to Hunter.

THE CHAIRMAN: Why don't you just give us the reference. We will look at that and deal with the other main points because you will run out of time otherwise.

MS DEMETRIOU: My Lord, can I tell you the point without turning it up.

THE CHAIRMAN: Yes, tell us the point.

MS DEMETRIOU: One of the points made in Hunter, and it

takes some parsing of the judgment to get here but it is there, is that an argument was made, and one needs to go to the argument, to see that an argument was made against the abuse of process rule applying based on section 11 and section 13 of the Civil Evidence Act.

Essentially section 11 of the Civil Evidence Act 1968 that was applicable then provided that criminal convictions shall be admissible as evidence in civil proceedings for the purpose of proving that a person committed an offence. But section 13 by contrast said that criminal convictions shall for the purposes of defamation actions be conclusive.

And so the argument was made well, we are cutting across that statutory scheme if in this non-defamation case we are effectively making the criminal conviction conclusive and that was rejected by the House of Lords. So that is really the point.

THE CHAIRMAN: Do you want to give us the reference?

MS DEMETRIOU: Yes, the reference is -- you can see the plaintiff's argument at page 534H to 535A and the argument was rejected at 544D.

The other point made by MAN is one relating to undermining the EU settlement regime and their key argument is that they say it would discourage defendants from settling if it were an abuse of process to later

resile from their admissions. We say one almost only needs to state that to see that it is a very unattractive submission because the converse is true. We say it would undermine the integrity of the settlement regime if defendants could make admissions to the regulator in return for a reward only to retract them subsequently in civil litigation.

There are various points made by the defendants which I think I have already covered off in my main submissions relating to procedural unfairness. So they say that there is no chance of properly contesting these facts but you have seen what we say about that, which is that there are very strong procedural safeguards in the regime, inherent in the regime, laid down by the regime, and the premise is that the output to the Commission decision accurately reflects the admissions that are made.

DAF makes a point about -- they say that our case threatens the confidentiality of the settlement process because they say that there are rules in the damages directive saying that courts can't order settlement submissions to be disclosed. But the short answer to that is that we are not seeking disclosure of the settlement submissions, we are relying on the decision itself which is a public document.

THE CHAIRMAN: Yes.

MS DEMETRIOU: I think that is probably a canter through the main points. But of course given the time I reserve any other more detailed responses to my reply once I have seen how the points are developed.

Unless there is anything further I can do to assist.

MR JUSTICE FANCOURT: Can I just ask you this, Ms Demetriou, just to test the scope of your argument. Suppose the decision hadn't been a settlement decision but had been arrived at after a fully contested hearing by the Commission. In those circumstances and assuming we are dealing with facts that aren't essential facts and aren't therefore binding for that reason, do you accept that the abuse of process argument wouldn't work in those circumstances because then you have findings by the Commission which are not challengeable by way of appeal, the defendants then say, well, the Commission found those but we don't accept them, if you want to prove them you have to prove them. Is that an abuse of process?

MS DEMETRIOU: No, so we accept that is not an abuse of process and the reason we say in this case the same argument doesn't arise is both because they are admissions and secondly because if the output of the decision doesn't reflect them, then there is recourse,

there is protection there, because the Commission has to re-open it and if they fail to do it, then it is open to the parties to appeal on the basis that that procedural safeguard hasn't been respected.

MR JUSTICE FANCOURT: Is it an abuse of process if in those circumstances they simply say "not admitted" rather than saying "we deny the proper facts were the following"?

MS DEMETRIOU: No, and that happens regularly in cartel damages claims. It may be a breach of English rules of pleading, but it is not an abuse of process.

THE CHAIRMAN: Thank you.

We will take five minutes to give the transcribers a break.

(3.45 pm)

(A short break)

(3.50 pm)

THE CHAIRMAN: Mr Beard we will sit to 4.30, so you get 45 minutes, almost.

Submissions by MR BEARD

MR BEARD: I am grateful.

Members of the Tribunal, as was indicated at the outset I will go first and then Ms Bacon will pick up issues in relation to the nature and extent of essential basis, Mr Jowell will deal with matters concerning abuse, and then Ms Ford may have some additional brief

remarks at the end that she would like to add.

As you are aware, I will be addressing DAF's position that it is only the operative part of a Commission decision that is binding and not any recitals, not any recitals, nothing is to be designated as binding as some sort of essential basis.

Now Mr Brealey accused us of having a position that was not simply extreme but very extreme; we say not. Indeed, the starting point is that we actually agree with Mr Brealey on two points. First of all we agree with him very strongly that the scope of a Commission decision is defined by reference to EU law, and the second point of agreement is that it is the same decision that can be the subject of challenge in the EU courts as may well be relied upon in proceedings before the domestic courts.

But we say that our position focusing on the operative part is the simple and clear position in EU law which is reflected in the structure of EU decisions and indeed other legislation and that recitals may be aids to interpretation if and only if there is ambiguity in the terms of the infringement decisions set out in the operative part.

The core of our position and the issue we join with the claimants is that there is a huge difference between

something potentially being an aid to interpretation if there is ambiguity and something then being binding.

Even if in relation to the operative part of a decision there were some ambiguity, and that would have to be identified first of all, which then warranted reference to recitals to help clarify that ambiguity, that doesn't convert the recital or recitals in question into some sort of legally binding finding or provision and that is the essential error in the claimants' position, the confusion between potential interpretative aids and legally binding findings.

I want to deal with these submissions in five parts. First I want to focus on the EU law. I want to go back to the basics on nature and structure of EU decisions and the relevant provisions of the treaties. Then I will look at some of the EU case law that has been cited by claimants as suggesting somehow this concept of essential basis means that there are recitals which are binding.

The third thing I will do is then turn to some of the domestic law provisions and case law that have been cited. I will then look at fourthly some of the practical issues before finally summing up why this is not extreme, it is both legally right and practically sensible as a way of dealing with Commission decisions.

So if I may I will start back with the treaties. They are in volume 2 of the authorities at tab 24, some extracts of the relevant EU treaties and I'm going to start at article 288 of the Treaty on the Functioning of the European Union which is at page 9 of the bundle numbering.

Now you will see article 288 is under chapter 2, "Legal acts of the Union, adoption procedures and other provisions. Section 1: the legal acts of the Union".

288:

"To exercise the Union's competences, the institutions shall adopt regulations ..."

Sorry, I am just -- do you have it?

THE CHAIRMAN: Yes, I have got it.

MR BEARD: I am grateful.

"... shall adopt regulations, directives, decisions, recommendations and opinions.

"A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

If we go over the page, the next form of legal act:

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed but shall leave to the national authorities the choice of form and methods."

Now the Tribunal will be well familiar with the basic principles of the differences between regulations and directives. The direct applicability of the provisions in regulations mean they don't have to be enacted in domestic law whereas of course directives do.

Then thirdly:

"A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

Then finally:

"Recommendations and opinions shall have no binding force."

Now that third proposition about the decision is actually cited against us, a decision is binding in its entirety. It is suggested that in the circumstances what this means is you take the whole of the settlement decision and you treat all of it as binding and that is support for the proposition the claimants are arguing for in relation to the recitals.

We say that betrays a fundamental misunderstanding of what is going on here. The decision being talked about is the legal act of the European institutions, just as it is in relation to the regulations and directives. All of them are structured in the same way. They have a preambular section, recitals, and then there

is the operative part, the legal act.

We see this actually very neatly illustrated --

THE CHAIRMAN: That's the point made by Mr Justice Marcus Smith, isn't it, in BritNed?

MR BEARD: There are differences, yes --

THE CHAIRMAN: No, but he says the decision -- you have to be clear what you mean and he says the decision is the operative part. He talks about the total document as being the instrument, and then he explains why on the basis of EU law it is not just the operative part that is binding.

MR BEARD: Yes, and we are going to come on and show why actually Mr Justice Marcus Smith was right to draw this distinction but in a case where these issues weren't canvassed in any detail before him for reasons that were obvious from the judgment, because there was no issue raised about the matters that were the subject of recitals, there wasn't consideration of this relevant EU law and the conclusion that he reaches in that regard is not sound, with respect.

THE CHAIRMAN: I know you say he is wrong. But I don't think, unless I have misunderstood it, the claimants are saying that because of article 288 all the recitals are binding.

MR BEARD: Well, it starts with that in one of the

skeletons.

THE CHAIRMAN: That is not the way we have understood their submission.

MR BEARD: I am certainly content to proceed on the basis -- but what I do want to do is emphasise the position here, that you're dealing with legal acts and the approach that is adopted in relation to the directives, regulations and decisions is similar, and we have highlighted in our skeleton argument actually the approach that is adopted to drafting these matters which if you could leave volume 2 open because I'm going to come back to one or two provisions of the treaties, and go to tab 97 in volume 8.

This is the Joint Practical Guide of the European Parliament, Council and Commission for persons involved in drafting European legislation, so that is all the sorts of legal acts we are talking about. It is just a very helpful guide on these issues --

THE CHAIRMAN: So this is not a document that is binding on anyone.

MR BEARD: No, certainly not even the draftsman I doubt, so no. But nonetheless instructive. Page 23, there is a description of how these things are done.

You will see at 7, in section 7, it is talking about the different parts of the Act:

"All acts of general application shall be drafted according to a standard structure (title ...)"

And 7.2:

"'Preamble' means everything between the title and the enacting terms of the act, namely the citations, the recitals and the solemn forms which precede and follow them."

And then if one goes on to page 30 you will see under the guideline 10:

"The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations."

So 10.1:

"The 'recitals' are the part of the act which contains the statement of reasons for its adoption; they are placed between the citations and the enacting terms. The statement of reasons begins with the word 'whereas:' and continues with numbered points ... It uses non-mandatory language and must not be capable of being confused with the enacting terms.

"10.2. Regulations, directives and decisions must state the reasons on which they are based."

So in relation to all of these forms of legislation,

regulations, directives and decisions, or legal acts as it is put in the treaty, what you have is the introductory recitals, the preamble and then the actual act itself.

The recital is being trailed, if you follow the drafting guidance, with the term "whereas" and then you will have the formal statement before the act itself.

And of course that is actually what we see when we look at the settlement decision itself.

THE CHAIRMAN: And this is a guide just before we -- for all the institutions.

MR BEARD: Yes.

THE CHAIRMAN: For all legislation.

MR BEARD: Yes.

THE CHAIRMAN: And it says at the outset there is a more specific manual on drafting for the Commission.

MR BEARD: Yes.

THE CHAIRMAN: Are you taking us to that as well?

MR BEARD: No, I'm just dealing with the similarities in relation to approach.

THE CHAIRMAN: But they are different, as 10.4 makes clear.

MR BEARD: They are different in the levels of detail.

I think we cited in our skeleton in particular the provisions at 10.12 and 10.13 that talk about the level of detail that one would want to include in individual

acts, for example.

THE CHAIRMAN: Well, it is not just that. If you look at 10.1, I suppose you say that that's -- all of this are the reasons, is that right?

MR BEARD: Yes.

THE CHAIRMAN: All of the recitals are the reasons.

MR BEARD: Yes.

THE CHAIRMAN: And then you get to the operative part.

MR BEARD: Yes. And that is the same structure that is described for all three, all three of the legal acts which have binding effect, and it is merely to describe what -- one can see -- we haven't provided selections of regulations and directives, albeit within the bundles of course you do have the damages directive and you have regulation 1 of 2003 that reflect this, but the Tribunal will be very familiar with it.

THE CHAIRMAN: Yes.

MR BEARD: And of course what we see in the decision itself which we are talking about of course is the numbered recitals being preceded by the "whereas", and then of course when we get to what we are referring to as the operative part we have a statement capitalised which says:

"Has adopted this Decision ..."

That is at page 30 in the decision. So what is

being said there is that the European Commission having regard to its various powers that it adumbrates, having regard to the preambular recitals, takes a decision, adopts a decision that is set out in the operative part.

THE CHAIRMAN: Whether all decisions -- this is a settlement decision, but commission decisions in competition cases, whether one can say they are stating concisely the reasons for the operative part, given that they can run to several hundred pages as indicated by 10.5, I would have thought that is pushing it, isn't it?

MR BEARD: I think that is the reason I directed you, sir, to 10.12 and 10.13 where there is a consideration specifically of individual decisions and the highlighting of the fact that more detailed reasons will need to be provided in relation to those. So it is that the drafting guidance recognises that.

THE CHAIRMAN: Yes.

MR BEARD: It is more to do with the structure, because if we go back to the treaty provisions with which we are concerned here, you will see -- and it becomes reflected in the case law that we will come on to see in further part -- a clear distinction between the operative and binding part of a legal act and the reasons for it.

THE CHAIRMAN: Mm-hm.

MR BEARD: One can see that if one turns back to article

296, which is saying where the treaties don't specify the type of act to be adopted, the institutions will select it on a case-by-case basis; and if you turn over the page, legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests and opinions and so on.

So what we are seeing there and what we will go on to see in the case law is a clear distinction between reasoning underlying the legal act and the legal act itself.

I am going to move on to deal with the case law shortly but whilst we are in the treaty and to pick up one or two of the points that Mr Ward was making it is worth turning back to article 263.

Again, these provisions will no doubt be familiar to the Tribunal. But article 263 sets out scope of rounds of review that can be carried out by the Court of Justice in Luxembourg and it starts off:

"Court of Justices shall review the legality of legislative acts, acts of the Council, Commission, Central Bank and other recommendations and opinions ..." and so on.

It is the second paragraph that is material:

"It shall for this purpose have jurisdiction in

actions brought by a Member State, the European Parliament, Council or Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the treaties or any rule of law relating to the application of misuse of powers ..."

And that is in fact the set of standard heads of challenge that could be referred to. And of course these have been the subject of much academic and textbook explanation and exploration as well and to some extent overlap.

But what is clear here is that you have a right to challenge a decision, a legal act, and as we will see a legal act that adversely affects you, and you have that right inter alia on the basis, for example, that there is a failure to provide adequate reasons.

That can be a breach of law or indeed be treated as a procedural failure or there may be manifest errors of assessment of fact that also give rise to breaches of law and again confound a challenge before the European Courts.

So to be clear, it is no part of our case to say you can't turn up in the European Courts and challenge reasoning. Obviously you can. And I will come back to the cases Mr Ward refers to in that regard. We are not taking issue with the fact that you can bring those

sorts of challenges. What we are saying is that the ability to bring those challenges and the criteria that govern when you can bring those challenges and to what, they don't turn the recitals into binding elements in any legal sense.

The fact that the Commission must be in a position to justify its decision in the interests of fairness and transparency doesn't mean that when it provides those justifications they then become the decision itself or legally binding findings.

So this distinction between the recitals and the reasons, the preamble and the decision has been repeatedly emphasised in the case law, but perhaps the clearest statement is in the Adriatica case, authorities bundle 5 at tab 76. We can put the treaties away. I'm not intending going back to those.

This is a case concerning findings by the Commission of price fixing on shipping lines.

If we pick the judgment up at page 11, just so you can note, under paragraph 5:

"The decision contains the following provisions.

Article 1."

And there you have at (1) a list of shipping lines that have infringed article 85.1 by agreeing prices on ferries. And then (2), the following shipping lines

have agreed prices between Patras -- on the Patras to Bari and Brindisa routes.

The difference between the two groups of shipping lines is that in number (2) Adriatica di Navigazione are referred to and they are not in (1).

Now if one goes in the judgment to see what the complaint was, page 20, paragraph 37:

"In the present case the applicant maintains that the contradiction between the statement of reasons and the operative part of the decision has led the Commission to err in its attribution of liability to the applicant in that it has held it liable for an overall cartel relating to both freight and goods vehicle transportation services and to passenger transport not only on the single route on which it operates [which was the Patras to Bari and Brindisa route] but on all the routes on which the other companies to which the Decision is addressed operate."

And then at 39:

"It is clear from the wording of the Decision that the Commission sanctioned two infringements in this case."

Article 1.1 refers to an agreement on prices between Patras and Ancona. Article 1.2 refers to an agreement on levels of fares for trucks to be applied on the

Patras to Bari and Brindisa routes.

Now, 41, you will see that the Commission submitted that the decision doesn't relate to two separate infringements but to a single continuous infringement. That was the Commission's position. Saying that, it was relying in particular on recital 144 of the Decision and you will see it is quoted at the bottom of the page. Just picking it up five lines from the bottom, what was said in that recital was:

"These agreements formed part of a broader scheme of collusion in the setting of fares for the ferry services between Italy and Greece."

The Commission was maintaining look, if you look at the recitals what you see is a broader infringement.

And the court considered this over the page, 42:

"Undeniably, recital 144, which speaks of a single infringement, does not reflect the same thinking as the operative part."

And then the critical passage:

"It should be borne in mind that it is in the operative part of the decision that the Commission must indicate the nature and extent of the infringements which it sanctions. It should be noted that, in principle, as regards in particular the scope and nature of the infringement sanctioned, it is the operative part

rather than the statement of reasons that is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made for the purposes of interpretation to the statement of reasons contained in the decision. As the Court of Justice has already held, for the purpose of determining the persons to whom a decision which finds there has been an infringement applies, only the operative part of the decision must be considered provided that it is not open to more than one interpretation."

Then in 44 it says:

"In the present case, the wording of the operative part of the Decision presents no ambiguity."

And it goes on in 45 saying:

"Given that the operative part of the Decision is not ambiguous, in its examination of the various pleas put forward in this case, this Court must begin from the position that the Commission has established and sanctioned not one single infringement relating to all routes but two distinct infringements ..."

That is how it deals with matters. But it is paragraph 43 that I emphasise here. It is specifically dealing with how you distinguish between the operative part and the recitals and what the legal significance is of those recitals, those reasons, and it makes it

absolutely clear that you don't even have reference to them unless there is ambiguity in the operative part, so it didn't even need to do that here because there was no ambiguity in the operative part of the decision. But if there is ambiguity, then yes, you can have reference to the recitals to assist you in understanding what the scope of the legal act is.

But that is a completely different approach from saying let's go and look through the recitals, see which ones are connected with the outcome in the operative part to some degree or other and the degree in question varied depending on which of the claimants was putting forward submissions today, that is a completely different exercise and one that the court is here deprecating because it is saying you don't look at those recitals unless there is ambiguity in the operative part.

What it is clearly not suggesting is that those recitals are in any way legally binding.

Interpretative aids do not become binding just because they are useful, relevant or indeed critical to understanding a particular legal act.

A recital doesn't become binding in a regulation, a directive or a decision just because it is important for the interpretation. The travaux preparatoires in

relation to any of these European acts don't become legally binding just because they are legally important just as the case would in fact be in domestic law. I'm not going to stray into domestic law yet but one can immediately see as soon as you think about interpretive aids the idea of a promoter's first speech in the House of Commons that fulfilled the Pepper v Hart criteria being treated as a legally binding act is a quite remarkable idea in those circumstances and that is the key confusion here.

The next case I want to go to is Air Canada but before I do that I need to take a quick diversion to article 16 of regulation 1 of 2003. The reason I do that is because it is referred to in Air Canada and since the claimants haven't referred in any detail to article 16 or taken the court to it, it is perhaps just instructive.

Authorities bundle 1, tab 16.

Although it didn't feature in submissions this morning, in the skeleton arguments article 16 -- sorry, I am just, since we are opening a regulation, one can see the structure again if one starts on the first page. Citation of the relevant legal powers, a whereas, then you have the numbered recitals running through, and then of course as you get to page 7 you get the capitalised

statement:

"The Commission has adopted this regulation ..."

And then you get the legal act. And the relevant bit of the legal act we are dealing with today in here is on page 13, article 16, "Uniform application of community competition law":

"When national courts rule on agreements, decisions or practices under article 81 or 82 of the treaty which are already the subject of a Commission decision they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with the decision contemplated by the Commission ..." and so on.

This is the obligations without prejudice to rights and obligations under 234. Now, as I say, it wasn't emphasised by the claimants in their openings this morning. In their skeletons they suggest that this is a further basis on which you should treat recitals as somehow being binding. With respect, it doesn't take their case anywhere further forward. That is really for two reasons.

The first is, and the most important reason, is of course that here we have a situation where we are dealing with a decision and the inquiry we are engaged in is working out what the decision is. And we say the

decision is the operative part and therefore the second reason is there is no conflict between --

THE CHAIRMAN: When you say what the decision is, if you are having -- assume the decision is the operative part.

MR BEARD: Yes.

THE CHAIRMAN: And that is what "decision adopted by the Commission" means.

MR BEARD: Yes.

THE CHAIRMAN: If you are trying to assess whether what someone else does is counter to the decision, then you have to understand the decision otherwise you won't know what is contrary to it.

MR BEARD: Well --

THE CHAIRMAN: Don't you? Go back to your ambiguity point.

MR BEARD: Yes, yes.

THE CHAIRMAN: If to understand it you need to look in the way you suggested one can look at recitals as an interpretative aid, would that be permissible?

MR BEARD: Yes.

THE CHAIRMAN: So there you could look at the recital to see whether something is contrary to the decision or not. Was that --

MR BEARD: What you need to do is to decide whether or not the decision was in fact ambiguous. If the decision is not ambiguous, you don't have to have any regard to the

recitals; if the decision is ambiguous, you can look at the recitals to resolve the ambiguity. At that point you have the decision in question.

THE CHAIRMAN: So it qualifies or explains the decision as necessary.

MR BEARD: Well, only to the extent that it is necessary. I mean, it is a very different approach that is being adopted in those circumstances because you don't, for example, spend your time identifying whether or not particular reasons were relied upon in order to reach the decision which is the exercise that is being encouraged by the claimants here.

THE CHAIRMAN: Take a simple example rather than doing it in abstract terms. Here article 1 says collusion on the prices of medium and heavy trucks.

MR BEARD: Yes.

THE CHAIRMAN: It doesn't tell you what medium and heavy trucks are. That could be ambiguous. My idea of a medium truck before I read this might be different from yours and everybody else.

MR BEARD: It may well be.

THE CHAIRMAN: To know what they are, you have to go to one of one of the recitals. That you would say is permissible?

MR BEARD: Perfectly fine.

THE CHAIRMAN: In that sense, the recital informs the operative part.

MR BEARD: It informs. Absolutely.

THE CHAIRMAN: And you can refer to it and rely on it. Because if you're --

MR BEARD: You don't rely on it. What you're doing --

THE CHAIRMAN: Well, in the sense that if a national court was taking a decision about a truck that doesn't come within the definition. So it tells you what is binding or not in that way.

MR BEARD: Yes. What you are doing is identifying -- you are clarifying the ambiguity in the decision. Yes, we don't dispute that. That fits entirely with the Adriatica approach and your example, sir, of medium and heavy trucks may be a very good example. That is very, very different from, for example, the idea that is being put forward about needing to identify all the encounters and meetings and so on.

THE CHAIRMAN: We will follow that up in due course. I just wanted to clarify what you mean when you say what the decision is.

MR BEARD: Yes. So once you have defined what the decision is. And it may well be that you have a situation where the operative part of the decision isn't ambiguous, after all the draftsmen of the operative part of the

decision are not seeking to make it ambiguous, but yes, if there is terminological issue in relation to the operative part then one can understand that a source of trying to understand what that means would be the recitals.

THE CHAIRMAN: And equally when it says by colluding, colluding can mean lots of different things. To understand what they mean by colluding you look at the recitals to see what actually in this article 1 collusion actually means.

MR BEARD: No, that would not necessarily be the case because what you are doing there is you are not then identifying the scope of the infringement. Whilst one can understand that what you are talking about in relation to trucks is what any infringement concerned, when you are talking about identifying collusion in those circumstances we wouldn't accept that you would treat that as being ambiguous.

But even if you were right, sir, that you do treat the concept of collusion in the wording of article 1 as being ambiguous, that doesn't put you in a position of carrying out necessarily a wide ranging exercise in trying to explore what it is that has been found. Because it is the breach of article 101 that is found, over a certain period in relation to the particular

products in question, and once that has been found, you do not need to identify for the purposes of that definition of infringement the dynamics of particular factual matters or interactions in order to identify the infringement. There is no ambiguity there. Just as in relation to Adriatica you didn't need to be discussing the particular circumstances or arrangements or points of meeting that would occur in relation to the various shipping liner conference arrangements.

So the point we make in relation to article 16 is that it doesn't advance matters any further for two reasons. First of all because it is talking about the decision and in those circumstances the decision is the legal act for the reasons that I have outlined and I will come back to in relation to Air Canada. But more than that, in this case there is no opposition to or dispute of that decision. It is accepted that there is an infringement. There might be arguments about the precise scope of that infringement, for example in relation to the nature of the trucks concerned and how that might need to be clarified, but that is not suggesting that any decision that this court or tribunal would make would in any way risk running contrary to the decision of the Commission and in those circumstances you don't have a situation in fact in which article 16

is engaged.

So you have a situation in this case where article 16 isn't actually engaged because there isn't any risk of a decision diverging from the decision of the Commission and it doesn't assist the claimants in relation to their overall submission in relation to the legal status of the recitals because it is concerned with an identification of the Commission decision in question.

MR JUSTICE FANCOURT: That would mean article 16 would only apply if a national court was effectively retaking the very decision that the Commission had taken.

MR BEARD: Well, you can end up with all sorts of situations where first of all it is possible that someone is bringing a case or has had a case before the Commission and then does seek to have a national regulator take a different decision in relation to the same matters and that is precisely what that is intended to stop. So that is exactly what it does.

MR JUSTICE FANCOURT: It's a very narrow effect it has in that case.

MR BEARD: I think that first part is of narrow effect but I think it is worth bearing in mind this decision is contemplated by the Commission as well so the practical application of it will be that in many circumstances

what you have is a situation where if you know that the Commission is seized of an investigation in relation to some matter, then a court will not adjudicate in relation to it, and without going back to the underlying case law there is a case called Masterfoods which was all to do with ice cream exclusivity where there were challenges going on in the Irish courts and complaints going on at the European Commission level and one of the discussions was could you carry on as an Irish court dealing with the same sorts of matters that were being dealt with in Brussels by the Commission.

The court said no, you can't do that, you have to wait until the Commission has effectively dealt with these matters, and article 16 is effectively a codification of that. So it does have real impact.

MR JUSTICE FANCOURT: That's the second part of article 16, a separate provision to deal with that.

MR BEARD: Yes, well, it is also to do with the second part of part 1 as well, on the decision being contemplated by the Commission.

MR JUSTICE FANCOURT: So anyway, you say if the Commission reaches a decision X and gives it reasons A, B, C and if a national court decides A, B and C are wrong, that is a permissible conclusion for the national court to draw?

MR BEARD: Well, we are dealing here with a follow-on case

where it is accepted that there is an infringement and that is the decision and so we as defendants accept that we cannot go behind that infringement and therefore insofar as A, B and C are the content of that infringement decision, no, the court can't go behind that.

If it is to do with the reasoning that leads up to that decision we say those reasons are not legally binding because of the way in which these matters are dealt with and defined in European law and in those circumstances yes, you can as a matter of legal formality challenge those particular reasons if they are --

MR JUSTICE FANCOURT: Even if that takes away the whole foundation for the decision made by the Commission.

MR BEARD: We say that is perfectly proper in circumstances where the European structure does not treat any of those particular reasons as binding.

THE CHAIRMAN: The European structure is binding on addressees. It is a different sense of binding for the purpose of subsequent litigation, isn't it? It is not really looking at that at all.

MR BEARD: I'm sorry, it is not ...

THE CHAIRMAN: It is not really looking at what is binding in subsequent proceedings. It says it is binding on

addressees, but ...

MR BEARD: Yes, it's saying it's binding on addressees, but there's no suggestion that that renders it binding in relation to subsequent proceedings or in relation to proceedings where matters are being challenged. Indeed it would be bizarre if the case law of the European courts were saying actually these recitals don't have legal effect and are not legally binding when you are dealing with them before us, but somehow they are collaterally legally binding when they are being relied on in the context of a follow-on action which is relying on a legal act. That is what we say in relation to it.

THE CHAIRMAN: That is why article 16 is not simply stating what is in article 288. If it was, it wouldn't be there. You wouldn't need it. It is doing something additional, isn't it? Article 16 of the regulation. It is not simply reproducing article 288 of the treaty, it is doing something further.

MR BEARD: It is certainly not doing what 288 of the treaty does. 288 of the treaty sets out what the legal acts are and what this is saying is that national courts should not be taking decisions that run contrary to those matters.

THE CHAIRMAN: Yes, but to take Mr Justice Fancourt's example and make it more specific, suppose article 1 has

decided that the parties colluded on prices over this period and the reasons for that are that they met on -- their representatives met on 1 January where they exchanged information on 1 February and 1 March where they exchanged information. Article 16 says this court or this tribunal can't take a decision running counter to the decision adopted by the Commission. You say it is still open to the court to find they didn't meet on 1 January or collude or exchange information, if they met, they didn't meet on 1 February and they didn't meet on 1 March.

MR BEARD: Yes.

THE CHAIRMAN: And that is not --

MR BEARD: It's not running counter to that decision.

THE CHAIRMAN: -- counter to the decision which has the statement that they did collude based on those three meetings and nothing else.

MR BEARD: We say that is the legal position in relation --

THE CHAIRMAN: That is a slightly odd result.

MR BEARD: It is not an odd result in circumstances where you treat the infringement as a legal act built into the decision and you are defining that in the terms that the European law scheme does. I think the problem arises that there may well have been an undue degree of optimism that once you had a Commission decision

essentially you were getting the benefit of a whole range of factual findings that were set out in recitals and claimants are disappointed that that is not actually reflective of what is legally binding under the European legal scheme.

Essentially they thought it was going to be easier to turn up to a court with an infringement decision and say in those circumstances we do not have any difficulty in proving factual matters, and of course the reason why this is of is particular importance is because the extent to which there are arguments about how things happened and what happened, those matters are not impugning the infringement as found in the decision, but they do go to important issues in relation to causation which of course are not matters that are at all dealt with by the Commission when it is engaged in this sort of investigation.

THE CHAIRMAN: Well, no one is suggesting, I think, that this is -- there is anything in this decision that is binding on what if anything was the actual effect on specific prices paid by these claimants in buying trucks. Of course they are going to have to prove that.

MR BEARD: Yes.

THE CHAIRMAN: That is not the point we are engaged with.

MR BEARD: Well, that is not the point we are engaged with

today but no doubt what will be said by claimants is we can treat X, Y and Z within the recitals as binding and in those circumstances we will try and argue from that to suggest that there is some sort of causative link. Now, we will dispute that and we will dispute it in relation to the various factual matters that arise further down the line.

THE CHAIRMAN: Which you are clearly free to do.

MR BEARD: Which we are clearly free to do. But what we're doing here is testing the extent to which you can actually bank as binding findings of fact by the Commission for the purposes of all of this whether or not there are further arguments on causation, whether or not you can bank these findings of fact. We're not pretending that even if you could bank them, somehow the claimants make out their case on causation. We made it absolutely clear that is not the case. But the point we are testing today is a more limited prior set of factual findings which the claimants want to be able to rely on and want to be able to prevent us from disputing or putting them to proof on in relation to causal matters.

THE CHAIRMAN: Well, I think that is probably a sensible place to stop and we will reconvene on Thursday --

MR BEARD: Yes, I was going to ask, I was discussing with Mr Jowell and Ms Bacon, would it be possible for the

Tribunal to sit from 10 o'clock on Thursday, without wishing to place any inconvenience on the Tribunal?

THE CHAIRMAN: Yes, very well.

MR BEARD: I'm most grateful.

THE CHAIRMAN: 10 o'clock on Thursday.

MR JUSTICE FANCOURT: Is that to gain extra time or to rise earlier than we would otherwise by half an hour?

MR BEARD: We will aim to rise earlier but I don't want to be unduly optimistic.

THE CHAIRMAN: You make no promise, yes. You are not bound by that.

(4.38 pm)

(The hearing adjourned until 10 o'clock on Thursday, 5 December 2019)

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