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

6 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 3

Friday, 6 December 2019

(10.30 am)

PRESIDENT: We will try to keep both doors open to get some draught. The problem sometimes is noise outside at the back if there is a hearing in the court next door.

Yes, Mr Beard.

Housekeeping

MR BEARD: Before Mr Ward commences dealing with the detailed recitals there are just a couple of things I wanted to pick up from yesterday.

The first was in relation to the comments of Mr Malek about where particulars of claim which were denials or non-admissions actually in pleadings set out specific or positive cases or reasoned bases.

We have provided a note on that. We have explained at the outset why there is a difference between what you see in the schedules and what you see in the pleadings and we have given some examples from the various pleadings illustrating how it is -- that is in the table at the back -- that we explain the position on denials or non-admissions in various examples.

Obviously the pleadings are very extensive so we have not tried to do a comprehensive exercise. But given the points that were raised yesterday, we hope that's of assistance and the explanatory material at the

outset sets out --

HODGE MALEK QC: I would like the same from all parties, I think it would be really helpful to know, because when it comes to disclosure, normally you don't get disclosure of facts which are admitted, as you know. We have this general point that you have admitted the facts set out in certain parts of the recitals as part of the settlement. It is really important for me to understand where there is a positive case that something that goes in the recitals is a real live issue.

MR BEARD: In this example we have not set out where in the pleadings we have admitted facts that for example are raised -- they exist in the recitals because that is one of the points that does arise, that where people have pleaded the facts that are set out in recitals, we have quite properly pleaded back to those and where we admit them we do so. That's entirely aside from the arguments about the legally binding nature of those recitals, we have engaged with them. But that is not exemplified in this table.

HODGE MALEK QC: What I am looking for is a table by reference to the pleadings which deals with the recitals where you're highlighting examples in the fourth category which is where there is a denial and a positive case. That is what I am really looking for.

MR BEARD: We have given some examples.

HODGE MALEK QC: Hopefully within the next week or so I will have a table from all of the parties dealing with that. They don't need to give it today. You know what I am looking for. It will be highly relevant when it comes to disclosure.

MR BEARD: I think you may have more gifts. People didn't envisage you would want to wait a week so I think there has been activity overnight.

HODGE MALEK QC: I'll take it now.

PRESIDENT: Mr Jowell is about to offer one, is that right?

MR BEARD: Yes, and I think Ms Ford brings Christmas gifts as well. (Handed)

PRESIDENT: You have given copies to the claimants?

MS BACON: Sir, ours will follow. It is being produced and it will follow after the short adjournment or possibly after the break.

There is one issue which concerns confidentiality because we have done ours by reference to Ryder in the first instance but of course VSW don't have the Ryder defence because of the constraints of the confidentiality ring. We will do a separate one for VSW so that may solve the problem but that will not come today I am afraid.

MR HARRIS: Sir, may I make an enquiry? Is it intended to

be a comprehensive document by reference to every paragraph of the pleading where there is a recital and then a non-admission with a positive case with now the positive case, because I apprehend that the ones that have been handed --

HODGE MALEK QC: I'm only interested in where there is a pleading that deals with a matter that is in the recitals where there is a denial plus a positive case.

MR HARRIS: But every one, right? I am not sure that is what has happened so far.

HODGE MALEK QC: If possible but you don't need to do it today. As long as I have it in a week's time then I'll have exactly what I'm looking for. I will look at what we have here.

MR BEARD: It may be that having looked at what we have, we can take it up again at a later juncture today.

The other point to bear in mind is as was raised yesterday, this issue does not just arise in relation to denials, there are non-admissions where the pleadings are unduly vague but there is then a positive case put. I think, sir, in exchanges yesterday you indicated that those may well be material as well.

HODGE MALEK QC: That would be material. If it was a non-admission and a positive case, it's almost

equivalent to a denial and a positive case.

MR BEARD: I see the point. I think the difficulty is we don't pretend this is in any way close to comprehensive given the length and detail of the pleadings.

HODGE MALEK QC: As long as I have it in a week's time then that's fine.

MR HARRIS: Would the Tribunal find it helpful for us to extract the actual pleadings and put them in the same document or to just give a list of those paragraphs in the pleading where there is --

HODGE MALEK QC: A list of the paragraphs because I will have the pleading in front of me when I go through it.

MS DEMETRIOU: Sir, I wanted to make one point in relation to Mr Beard's submissions which I have only just seen. It is a shame they were not provided to the claimants earlier. I see they go in fact beyond simply providing a list of paragraphs and they actually make submissions on the abuse of process point in circumstances where we have already had all of the argument on that. So once I have read it, I would like the opportunity to be able to respond, either orally or in writing.

PRESIDENT: We were not envisaging this, I think, as an opportunity for more submissions on abuse of process --

MS DEMETRIOU: No, my Lord, but that is what they have done.

PRESIDENT: We were just seeking to identify where and -- so we can find and see for ourselves to what extent a positive case is put forward.

We have not looked at this yet, obviously.

MS DEMETRIOU: I am just looking at it for the first time. It is a shame that it was not provided to me last night, or earlier this morning.

PRESIDENT: Well it was no doubt produced under a lot of pressure.

HODGE MALEK QC: I have now clarified what I am really looking for. I am sure everyone is going to give me a new schedule by the end of next week and I will focus on that.

MS DEMETRIOU: Sir, I understand, but my point is that here there are submissions on abuse of process in circumstances where we the claimants are entitled to the last word and that was not what the Tribunal asked for. So in my submission either the Tribunal should give this back and they should just produce a list of the paragraphs or I should be entitled to respond to it in writing if necessary.

MR BEARD: What it does is it sets out why it is that there is a disparity between the schedules and the pleadings and that was something that was raised by Ms Demetriou yesterday. So yes it does refer to her submissions but

it is an explanation as to why there is that difference and why the positive case is to be seen in the pleading.

PRESIDENT: I think it's things like -- I am just looking at it quickly -- your paragraph 2.7, that it goes beyond simply ... and so on. Just give us a moment. (Pause).

HODGE MALEK QC: What we will do then, in relation to DAF's note, we will not rely on this note and we will hand it back for now. What I want from every party is by reference to their defence and pleadings, which paragraphs of that defence relate to which recital insofar as there is a non-admission or a denial and a positive case being asserted so that when I look at the pleadings I can highlight those paragraphs in my own mind and say, yes, that relates to recital X, I can see they put a positive case.

MR BEARD: Understood.

PRESIDENT: We will return the DAF note. The other two notes we have had are much shorter, Ms Demetriou. On a very quick scan, I am not sure the same problem arises. If you look at them by the end of today --

MS DEMETRIOU: Only one of them has reached me but once the other one does I'll look at them both.

PRESIDENT: You will no doubt get the other one.

MR BEARD: Can I briefly deal with two other matters arising from yesterday? It was again in relation to matters

raised by Mr Malek. First of all, there was a question about the extent to which the issues on the scope of bindingness of a Commission decision had been considered in textbooks.

The review -- we are not going to pretend it is comprehensive but the review we have undertaken does not indicate any discussion of these things. There are statements for instance in Bellamy & Child and so on but not any discussion. The closest you get is in a book by someone called Nazzini on competition procedure where there is a discussion about these issues and we don't concur with his conclusions in relation to that discussion but that is as far as we have identified anything.

HODGE MALEK QC: If I can have a copy of that at some stage?

MR BEARD: Certainly. We can provide you with a copy of that.

The other question that was raised was in relation to -- I am sorry, there is one point I should pick up. In the course of doing that there was remarkably a case that has not made it into the bundles which is actually in line with the BritNed authority. I will provide you with a reference to it. It is actually an earlier Servier case. It is [2016] EWHC 366 Chancery and the relevant statement is at paragraph 24.

PRESIDENT: Is it in the Servier damages claim?

MR BEARD: Yes. It is Mr Justice Henderson, early on. We say it is obiter because there was not any detailed argument so it is in the same boat as BritNed in our submissions.

PRESIDENT: In the Tribunal library we have Nazzini's book so you needn't provide it.

MR BEARD: We will provide the reference then.

Then the final issue was in relation to cases, whether or not there are other cases where these matters have been considered.

Now, this is a matter of anecdote not survey across the European Union. We do know there are other follow-on damages cases going on where these sorts of issues are arising. As far as we are aware, there have been no cases that we know of where there has been any proper assessment of the European law in relation to these matters.

We do know of the cases where under domestic law there has been consideration of whether or not Commission decisions are to be treated as binding but we don't have English translations of those and we understand that some go in one direction and some go in others and they depend on the domestic law at issue there.

PRESIDENT: That is to some extent relevant to Mr Jowell saying we should avoid any disparity across the European Union in the way different countries deal with it. He made that point and I said, well, we don't know what is being done elsewhere. But if you have some information, that would be helpful.

MR BEARD: This is anecdotal information and I do stress that we understand that this is based on the domestic law so what is being done is they are taking the Commission decision and applying a domestic law view on how you should treat things as binding. You get different outcomes so we understand some cases were only operative part binding, other cases were much wider part of decision including recitals binding. So this is not a comprehensive survey and we don't say it is reliable. What it does indicate is these sorts of issues are coming up across the EU, albeit they are not being necessarily dealt with in EU law terms as we say, and I think everyone agrees, needs to be done and I can see that in due course this may well be one of these matters that is going to warrant a reference.

PRESIDENT: Yes, but nobody is asking us to do that today.

MR BEARD: Not today. Not today.

PRESIDENT: Presumably your client has quite a good oversight of that because you are defendants in many

countries where Trucks claims are brought.

MR BEARD: There are Trucks claims, true, but they are at different points. Some of these will be Trucks claims and that's why I think we have the anecdotal evidence. But we are also conscious that there are other follow-on claims being brought in other jurisdictions and we are just not pretending we have a proper overview.

That is as far as I can go. What we haven't got is anything where we can look at a decision from another jurisdiction and say ah, here they looked at Adriatica and Dutch Banks and so on and analysed things along the lines of the arguments that we have been raising. We have nothing there that can be of assistance.

PRESIDENT: That is very helpful. Thank you.

Submissions by MR WARD

MR WARD: Thank you, sir. We dealt yesterday with the issues of principle as to the correct approach to which of these recitals is binding. I am not going to re-open those issues but instead apply our analysis to the recitals individually.

By way of a word of warning, this is going to start rather slowly but then accelerate rather rapidly as there is quite a lot of detail in the argument on the first few recitals and then quite rapidly you will be hearing me say in our submission this is the same.

I am confident my submissions will get done this morning and I hope before 1 o'clock.

PRESIDENT: I think it is important that you do complete this morning; if not, more like 12.30.

MR WARD: That is very much my expectation, sir.

May I ask you to turn up whichever version of the decision is most convenient for you. We start at paragraph 46 which is the first section under the heading "Description of the conduct". Here we have three recitals which in our submission need to be read together because they describe collectively a form of information exchange infringement of article 101. Of course, as the Tribunal is well aware, the mere exchange of competitively sensitive information can be an infringement on its own.

It is our submission that recitals 46 to 48 would make a perfectly good or if you like bad infringement, even on their own without the rest of the facts. We see just by way of brief overview recital 46 begins by explaining all of the addressees exchanged gross price lists and information on gross prices, so that obviously feeds in immediately to the definition -- to the description of the cartel at article 1. Most of them engaged in exchanging computer based truck configurators. All of these elements constituted

commercially sensitive information.

"Over time the truck configurators containing the detailed gross prices for all models and options replaced the traditional gross price lists. This facilitated the calculation of the gross price for each possible truck configuration. The exchange was on both a multilateral and a bilateral level."

Then recital 47 explains why, if it's not already obvious, this information was commercially sensitive. It says:

"In most cases, gross price information for truck components was not publicly available and information that was publicly available was not as detailed and accurate as the information exchanged between, amongst others, the addressees."

In other words, you couldn't just get this from the website like top level prices.

"By exchanging current gross prices and gross price lists combined with other information through market intelligence, the addressees were better able to calculate their competitors' approximate current net prices depending on the quality of market intelligence at their disposal."

This is an explanation of why this information was so important from a competition law point of view.

Then 48 talks in more detail about what the role was of the configurators:

"The exchange of configurators helped the comparison of own offers with those of competitors which further increased the transparency of the market. In particular it could be understood from the truck configurators which extras would be compatible with which trucks and which options would be part of the standard equipment or an extra. All of the addressees, with the exception of DAF, had access to a configurator. Some configurators only granted access to technical information such as bodybuilder portals."

In our submission, this is a clear basis of a finding that this was an information exchange cartel.

And now I need to go a little bit more slowly back through those recitals to try to explain what the objections to them are and why we say they are misconceived.

In the first of those recitals, 46, there is objection taken to the second sentence which it is said is not admitted. Here there is an important --

PRESIDENT: Sorry to interrupt you. There are of course two aspects in this. The first sentence is admitted or the first part of it at least, maybe all of it, but it is not said to be binding as a matter of law.

MR WARD: That is right.

PRESIDENT: And you are addressing the binding question, so it is really the first sentence as well.

MR WARD: Absolutely, sir. I have made my submissions in the generality and what I was going to say about the second sentence is this is where DAF has a point about what the meaning of commercially sensitive information was. You raised that point on Tuesday. I wanted to make some submissions about that if that would also be helpful. The submission is set out in the large schedule next to recital 46. And you will recall -- I am so sorry, for the actual footnote one needs to go to bundle B at annex 2 to the schedule. I am not sure we have it in the schedule itself. The most useful place to see this footnote is in bundle B, tab 38, page 35. I am sorry, it is probably elsewhere as well.

This is the composite schedule complete with annexes which contain the different defendants' submissions.

PRESIDENT: That is 20 September?

MR WARD: Yes. And if you turn to page 35, this is annex 2, where the defendants put together their answers and objections to each schedule, each sentence of the schedules. This is where DAF say that they dispute that the information was commercially sensitive. Our

submission is it is just not open to them to do so but it is illuminating to see what they say and that is in the footnote. They say they dispute it is commercially sensitive in that:

"... in respect of information that distorted normal competition between manufacturers and increased transaction prices for DAF Trucks ..."

And they explain there is a difference between a list price and a transaction price. Well, in our submission, this is what DAF is doing here, is substituting its own definition of commercial sensitivity which introduces an element of causation in here. So it is not just that it is commercially sensitive but it causes an increase in transaction prices.

DAF itself of course says that the Commission made no finding of causation so it cannot be arguing that that is what the Commission is actually saying. In our respectful submission the effect of the binding nature of recital 46 is that it is just not open to them to deny the information is commercially sensitive in the sense that it gave rise to an infringement.

We can see explained in recital 47 what it is that was commercially sensitive about this. It was non-public domain information that enabled

the defendants to better calculate their competitors' approximate prices. That in my respectful submission is not a matter that DAF is free to contest.

PRESIDENT: You don't say that commercially sensitive information means information which increased the transaction price?

MR WARD: No.

PRESIDENT: That is not the meaning of commercially sensitive.

MR WARD: No.

PRESIDENT: You may have a separate argument on causation that it had that effect, the exchange, but that is not the meaning you give to it.

MR WARD: Exactly, sir.

The next argument is over the third and fourth sentences of recital 46, which say:

"Over time the truck configurators containing the detailed gross prices replaced the use of lists and this facilitated the calculation of gross prices."

There are a series of objections to this taken in the Iveco skeleton. The first one arises a number of times through the course of the recitals and that is the complaint of vagueness. It is said on a number of occasions that the recitals are too vague to plead to. Sometimes they are described as allegations.

If you look in this annex 2, they complain these allegations are too vague to plead to but of course, they are high level because this was a settlement decision.

As Ms Demetriou explained, that means we don't have a full description of the cartel with footnoted references to underlying documents. But even if they are vague, this is the form in which they were admitted.

So when the defendants admitted them, they plainly understood the contents sufficiently well to do so. But this is another example of the defendants' case that the claimants are in fact worse off because this was a settlement decision.

In my respectful submission, there may be debate about what precisely these allegedly vague allegations mean but they can be binding and it can be a matter of submission later exactly how far-reaching they are.

On this particular case, what is said is that the term "over time" is insufficiently precise. So it says:

"Over time, truck configurators containing detailed gross prices replaced the price list."

That simply means it is not open to them to deny the use of configurators at some point during the cartel. Exactly what "over time" means we may have to address in

due course by reference to the Commission file.

Iveco also makes the point on this sentence that it does not contain any legal assessment. That is a point made a number of times through the course of the recitals but that was something you heard full argument on yesterday so I do not intend to repeat or recycle the submissions made yesterday.

May I turn now to recital 47? This, as I have said already, is a recital that explains why the information exchange was anticompetitive, in other words it was not publicly available and it enabled the better calculation of competitors' approximate net prices. This time we switch to Daimler and they have no less than four objections to the binding force of this recital.

Firstly, they complain "in most cases" is vague and imprecise. I've already given my answer to that. They say the proposition can be tested this way: what if a particular exchange of information was not anticompetitive? Would that require the partial annulment of the operative part?

That is in Daimler's skeleton at paragraph 11. In my submission, the answer is no, because what the Commission says is "in most cases", it doesn't say "in all cases".

They then complain that the second sentence of

recital 47 is some form of a finding of effect and as this is an object infringement, it is irrelevant. But in my submission, that is a completely misconceived objection. This second sentence of recital 47 is part of the Commission's analysis of why the information exchange was anticompetitive. The reality of the gross price exchange was they were better able to calculate competitor net prices.

That is why the information was important for competition and part of the explanation as to why this collusion was so serious as to give rise to an object infringement. Because of course an object infringement is one where the conduct reveals a sufficient degree of harm to be characterised as an infringement without specific proof of effects.

This is part of the explanation of why this information exchange was so harmful.

There are two more arguments from Daimler which I will deal with very briefly. The next one is an attack on the wording "depending on the quality of market information intelligence at their disposal" which is the last few words of the recital. They say, well, exchange of future pricing information can be found to infringe without this, so it is redundant. It is one of the strands in the defendants' argument. Anything that

is technically redundant or formally redundant in the sense that, well, you could have had an infringement without this, this must therefore be non-essential basis.

But in my respectful submission that is wrong. This is an important part of the explanation of how the cartel operated and again, why this information exchange was anticompetitive.

Then finally they say, well, the last sentence of the recital which we are grappling with here is no more than a generalised theory of harm and cannot be used to avoid the national court undertaking an actual assessment of any alleged harm.

We agree. Causation and loss are matters for this court for the forthcoming trial.

And then finally, recital 48 under this head, all part of the same overarching finding in my submission. This is about the impact of the configurators. Here the very short point is taken again by Iveco that this is all just purely a factual matter, not part of legal assessment. You have my submissions on that already, both on principle and why this is bound in to this finding which is of anticompetitive information exchange.

PRESIDENT: Aren't 47 and 48, really the two go in parallel?

47 is dealing with the gross price information.

MR WARD: Yes.

PRESIDENT: 48 is dealing with the configurators and although there are slight differences in wording, they are sort of saying the same thing?

MR WARD: They are. Exactly so, sir, which is why we say these three recitals should be looked at together.

We now move on to the remainder of section 3 which comes under the subheading which is worth noting at 3.2, "Nature and scope of the infringement". It does not say "background facts" or "context" or anything of that kind.

This ties into the submission I made yesterday that all of this, according to recital 71, all of these factual things constitute infringement. Here we will be able to pick up speed fairly quickly.

The first recital here, recital 49 is a high level description of the collusive conduct overall and it introduces the slightly greater detail that follows.

If I just invite the Tribunal to read recital 49 rather than me reading it out, it is simply a summary of how this cartel operated for 15 years.

PRESIDENT: Yes.

MR WARD: It is evidently essential basis. If none of this happened, it is very hard to see what was left of the

operative part of the decision. What happens in the recitals that follow is more and more detail and in some cases examples are given of how this collusive conduct operated. So we see at recital 50:

"These collusive arrangements included agreements and/or concerted practices on pricing and gross price increases in order to align gross prices in the EEA and the timing and passing on of emissions technology."

That is actually very similar to article 1 in the operative part and yet again issue is taken with it in two respects.

The first -- this is Daimler's skeleton -- the first objection is to the word "agreements" because what Daimler say is that word cannot be binding because article 1 of the operative part makes a non-specific reference to "colluding". It does not use the word "agreements".

This is in truth a clear example of where recitals are needed to interpret the operative part. What does collusion mean? One can of course see there is a clear explanation at recitals 68 and 69 of what is meant by collusion. If I can ask you to turn forward to those, even though you've seen them before:

"These two recitals contain specific findings that the infringement can be specified either as agreements

or concerted practices ..."

And the oddity in Daimler's argument is that those two sentences are admitted to be essential basis subject to a caveat which I will come to when we get there.

We absolutely do not understand this objection.

Then the other objection taken is to the words "in order to align gross prices in the EEA" because the defendants are very anxious not to be bound by anything which has any flavour of effect at all. But in truth, this is just again a description of how the infringing conduct bore upon competition and again a component of the object infringement that was ultimately made in recital 81.

PRESIDENT: "In order to align" doesn't deal with effect, it is dealing specifically with object, isn't it?

MR WARD: It's object. But this is an object infringement and it's part of the essential basis for the finding of object infringement.

PRESIDENT: Yes, it doesn't establish an effect.

MR WARD: No.

PRESIDENT: Even if binding.

MR WARD: Sir, I agree but this is where certainly the direction of travel of quite a few of these complaints come from.

If I may move on, recital 51 I will not read out.

It is very long. It contains much more detail on where the collusive contact took place and at what level. There is a series of specific findings about the nature of the collusion in my submission obviously central to understanding what is meant by collusion in the operative part.

PRESIDENT: Can I ask you a bit about recital 51? There is quite a lot in it. The operative part is colluding on pricing and gross price increases and then, separately, timing and passing on the costs on the Euro emission bills.

Focusing on the first, "colluding on pricing and gross price increases", you have explained how 49 and 50 explain what collusion, what sort of collusion it was. What we have in 51, there are some what might be said to be examples but to some extent, some of the things said might possibly go further, might they not?

MR WARD: In what way, sir?

PRESIDENT: Well, in some cases they also agreed their respective gross price increases.

MR WARD: Yes.

PRESIDENT: Well, that goes beyond an exchange of information.

MR WARD: Indeed, but this is not purely an exchange of information cartel. Exchange of information is one

element of it but again what the operative part says is simply "collusion on pricing and gross price increases". It does not say "by exchanging information on pricing and gross price increases". Collusion on those things includes exchange of information, indeed we have pleaded this in our particulars of claim, it does actually also involve specific agreements in certain respects.

PRESIDENT: So you say that is also then interpreting what the collusion was.

MR WARD: Yes. It is indeed quite simply the answer to one of the points that has been taken. I have heard Mr Pickford say in the past that this is really just an information-sharing cartel and I can't recall if that is how it is pleaded by DAF, but this recital is part of the answer to that, that actually it does go further.

PRESIDENT: And then the other point further down, just after the footnote 19 reference, saying:

"Occasionally the participants also discussed net prices for certain countries."

MR WARD: Yes, that is --

PRESIDENT: Looking at article 1, certainly article 1 suggests this was gross prices and --

MR WARD: Well, with respect, sir, we would say no. This is another very important example. What article 1 says is "pricing and gross price increases" and again it is an

issue at large in the litigation what is actually meant by "pricing". Again, DAF certainly have sought to argue the cartel is nothing more than concerned with gross price lists and in our submission there are a series of references in here to net prices.

You can see another one in recital 47 in the penultimate line that shows that the meaning of pricing is broader than gross list prices.

PRESIDENT: Well, 47 is a bit different because that is saying gross prices and then it says the result of getting gross prices. That is a rather different point, it seems to me. This is actually saying that the collusion sometimes, occasionally involved discussion of net prices.

MR WARD: And the defendants would very much like to deny that. They would like to say there is simply no connection at all between these gross list prices that they spent 15 years fixing through Europe, no connection at all with that and any prices anybody actually paid. That's the argument for the trial.

PRESIDENT: That is the causation point, Mr Ward. What I am talking about is the finding.

MR WARD: But that is why this finding is so important.

PRESIDENT: Yes.

MR WARD: And it informs the meaning of pricing.

PRESIDENT: I see. That is what I wanted to get your submission on. So you say article 1, the reference to pricing -- and this helps you understand what that means.

MR WARD: Yes, exactly so.

So the objection taken to this paragraph is not the one that you put to me sir, it is just that it is vague and general factual findings and that is in the Iveco skeleton, paragraph 45. But in my submission, this is a key finding about how this collusion actually took place.

The next recital, 52, is the one I used as an example in argument yesterday.

PRESIDENT: Sorry to interrupt you. You say key findings as to how the collusion took place. I think you go further, if I have understood your answer to my question, to say key findings as to what was actually being colluded about?

MR WARD: Yes, sir, absolutely.

I was going to return to recital 52 which we looked at yesterday. You will recall the meetings are admitted but not what was actually discussed at the meetings.

What we have here are two illustrations of what in my submission is quite obviously serious infringing conduct under article 101 and what is argued here, this

time by MAN, is well, the quashing of this particular recital would not lead to the quashing of the decision as a whole. Of course I would agree with that. It would not. But this is one of the elements of infringement that would have to be challenged if, instead of admitting all of this, the defendants had wanted to challenge it.

This again is capable of being viewed as freestanding infringements of article 101, what was done at these two meetings.

So in my respectful submission, it is again evidently essential basis for the overall finding of collusion. And one can say precisely the same about recital 53. This again looks like and indeed is a further, if you like, freestanding allegation of collusion -- finding, sorry, not allegation:

"The evidence shows that all of the addressees were involved in discussions about using the introduction of the euro currency to reduce rebates. The parties involved discussed that France had the lowest prices and agreed that prices in France had to be increased."

On its own, that is an infringement of article 101. If they don't really think it happened, they could have appealed it.

Then at 54 is further examples of the -- further

narrative about how and where the collusion took place and this time it explains that the discussions were held in respect of the introduction of the Euro 4 standard compliant trucks, similar to the ones that had previously been held on the Euro 3 standard.

This is an important part of the explanation of how the collusive explanation took place. Again the point is only taken against us that well, this could be contradicted without undermining the operative part. I give precisely the same answer I have already given.

And then recital 55. More of the same. Competitor meetings were arranged, there were regular exchanges, the topics covered included technical topics and delivery periods, prices normally gross prices, so not always gross prices. Frequently they exchanged commercially sensitive information such as order intake, stock and other technical information by email and phone.

PRESIDENT: Does that go beyond that last thing, beyond article 1?

MR WARD: No, sir, for reasons explained in recital 81. If I could invite you to turn that up, this is the object finding. You have already seen it and we concentrated on the first bit:

"The anti-competitive behaviour described in

paragraphs 49 to 60 above has the object of restricting competition."

Obviously what we are looking at now is within that bracket.

"The conduct is characterised by coordination between the addressees [which were competitors] of gross prices directly into exchange of planned gross price increases, limitation and timing and introduction of technology, complying with new emission standards and sharing of other commercially sensitive information such as their order intake and delivery times. Price being one of the main instruments of competition, the various arrangements and mechanisms adopted by the addressees were ultimately aimed at restricting price competition within the meaning of article 101."

So, in other words, the Commission's view is that all of these mechanisms of exchange were part of if you like the softening of competition which gave rise to restricted price competition overall.

PRESIDENT: Well, I am not quite sure I understand that. It seems it gave rise to restricting competition overall but they say -- the last sentence relates to price.

Suppose -- let's try to it test it this way. Suppose that last sentence of recital 55 were challenged then that would need a modification also of a little

part of recital 81.

MR WARD: Yes.

PRESIDENT: But would it have any bearing on article 1 of the operative part?

MR WARD: It could do. Just like in ABB, you could say we seek to annul it to the extent it is said that the collusion involved anything other than, say, gross price increases.

PRESIDENT: No, anything other than pricing and gross price increases. But it is not stated that it involves anything else, in the operative part.

MR WARD: No, indeed. But then just like in ABB, the operative part said nothing at all about power cable accessories but what was said was that in the body of the decision it was said there was collusion over power cable accessories and the court entertained a challenge which said there was not collusion over accessories --

PRESIDENT: I do not want to go back to the judgment. I thought it was said that the operative part was sufficiently broad that it could cover that as well.

MR WARD: Yes, it was.

PRESIDENT: I am not sure for myself that it necessarily is here.

MR WARD: Sir, the answer --

PRESIDENT: It may be a small point.

MR WARD: I think with respect it is a big point. The answer to it lies in what is said in recital 81, that this information exchange was itself aimed at restricting price competition, so it's a form of collusion over pricing. It is not unintuitive to see why that would be so. So the point about order intake and stock is to understand what the relationship between supply and demand is for each competitor, in other words how soft their pricing may be, how much stock they have to shift, and the other technical information explains precisely what the offering is they are making.

So whatever the detailed technical characteristics of their trucks are, that is also an important parameter of competition so that if DAF is deciding what price to offer, it has a much better idea of how soft Daimler's prices are and precisely what the trucks are that Daimler are offering.

So in my respectful submission, the last words of recital 81 tie that back in to the anticompetitive object which is then described in the operative part of the decision.

Recital 56 is a further description of how the collusion proceeded over the later years that there were exchanges, information was exchanged in spreadsheets. They used standard spreadsheets to exchange their

information. And it also talks about the quality of that information, that it was future gross price increases, either basic truck models or with all of the available options, and usually no net prices, so in other words sometimes net prices. And then information on intended future gross price increases was exchanged at the level of German subsidiaries and forwarded to respective headquarters.

Again this could easily have been a finding of infringement on its own. The objection taken here is in a familiar form. They say nothing in particular terms for example on the use of spreadsheets but in my submission this is just the same argument we have had many times, that each individual infringement is not itself a sufficient basis for the operative part.

Then recital 57 again talks about how the conduct evolved over time:

"The exchange on planned future gross price increases continued over the years and as of 2007 regularly included delivery periods of the truck producers. As of 2008 it became more formalised using a unified template."

The objection here is vagueness and what Iveco says is the terms "planned future", "regularly" and "over the years" are too vague.

I reiterate my earlier submission. This is precisely what was admitted. The effect of it is they are not free to argue there was no exchange of planned future price increases or they only occasionally included delivery periods or it did not become more formalised over time. Again there can be scope for argument about precisely what was meant but that is the short answer.

Recital 58: again it is a complaint about vagueness in part:

"The exchanges put the addressees in a position to take account of the information exchanged for their internal planning process and the planning of gross price increases for the coming year. Furthermore the information may have influenced the price positioning of some of the addressees' new products."

On the first sentence, again this is an example of the explanation of why these exchanges were so anticompetitive. It is not some spurious finding of effects, it is part of why this is an object infringement.

On the second sentence, the word "may" appears. We don't press this very hard or very far. It just prevents the claimants from arguing that this information was not even capable of influencing the

price of their products. Obviously it is a tentative finding by the Commission.

Recital 59 is another series of explanations of how and where the collusion took place and indeed again what was exchanged. Again, I would submit these are clear examples of the kind of collusion at German level which is described in summary terms elsewhere, such as in recital 54.

The objection is that these are just illustrations. I have given my answer to that objection.

Then recital 60. This is another recital which is about particular instances of exchange of information on gross prices. It involves MAN and it has been admitted by MAN, although they say they have two refinements they would want to make to this language on the basis of things which are said on the face of the documents, from what they have said it sounds as if these are points that could be made by way of interpretation of the decision but we will see what Mr Jowell has to say about that.

Then we get to a new subheading which is "Geographic scope". Here, what is said is recital 61 says:

"The geographic scope of the infringement covered the entire EEA throughout the entire duration of the infringement."

The point which is taken by Iveco is that that is not what article 1 says which just refers to "collusion in the EEA", albeit for the period specified which is of course 15 years.

Our submission is that this is again an example of the recitals being available to interpret what is meant in article 1 by "in the EEA" for that period. Because otherwise the victims of the cartel would not know if it covered their country and the defendants would be free to say for example that it extended to the UK for example maybe just for one year.

But that is all precluded by the terms of article 61. It is essential basis as it determines the substance of the operative part in the language of the Lagardère case.

Then we turn to the duration of the infringement. Here the defendants have made a point we accept is right. You will see that it says at recital 62:

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

That is not correct. The operative part of the decision essentially says that the parent companies' infringement started from that date but for some subsidiaries the start date was different. We

conjecture that in recital 62, the word "addressee" perhaps ought to have been "undertakings", but either way we do accept that of course where there is inconsistency like this, the operative part takes precedence, just like in the Adriatica case that Mr Beard showed you in bundle F5, tab 76. So we are not seeking to assert that this somehow overrides the inconsistent dates in the operative part.

Then we turn to the legal assessment. Here, as you are aware, some of this has been accepted as essential basis but only what one might call the very high level conclusions about the application of the law and nothing at all about the factual content.

We start, please, with recital 68 and 69 where the first sentence -- sorry, this recital 68 is accepted, subject to one caveat. This is the recital which says:

"The conduct described in section 4 above [meaning section 3] can be characterised as a complex infringement, either classified as agreements or concerted practices, within which the addressees knowingly substituted practical cooperation between them at the risk of competition."

The objection taken by DAF is the words, to quote what they say, "any finding that the addressees

knowingly or intentionally committed an infringement is not necessary to establish an object infringement". But of course as you will be well aware, the language there of knowing substitution of practical cooperation just is the legal test for concerted practice. Just for the Tribunal's note, that is the Dyestuffs case which is in bundle F3, tab 51 and on page 35 you can find paragraph 64. It is trite competition law.

That is a non-objection in our submission.

At paragraph 69, the first sentence is accepted as essential basis which again states that "this conduct had the characteristics of agreement and/or concerted practice", but in Iveco's skeleton objection is taken to the second sentence which says:

"The addressees were in particular involved in the above described anticompetitive arrangements concerning the sale of trucks through several layers of competitor meetings and other contacts which took place at headquarter level and German level."

This is said to be merely a summary of factual findings made elsewhere, well so it is but it is of course repeated there as core to the basis of why indeed this was found to be agreement and/or concerted practice.

Then we come to the section dealing with single and

continuous infringement. Recital 70 is legal principles and then there is a heading "Application to this case" which runs from 71 to 78. The defendants accept there is essential basis in the first and last of those recitals.

In the first one, recital 71, it is accepted that the first sentence is essential basis in that the infringement constitutes a single and continuous infringement. They also accept, largely accept recital 78 which essentially states the same conclusion.

But what they object to is the factual analysis which provides the basis for that finding and which runs between the two. And that is the factual analysis which serves to show why the legal test for single and continuous infringement is satisfied. So, starting with recital 71, objection is taken to the second sentence which says:

"At the same time, on the basis of the facts described above, any one of the aspects of the conduct has as its object the restriction of competition and therefore constitutes an infringement."

But that is a building block in the case of single and continuous infringement. The purpose of a finding of single and continuous infringement is to knit together those isolated incidents into a single whole

which renders all of the participants jointly and severally liable for the entirety, not just their own individual conduct.

Again, for your note, we can see that in the Del Monte case which is in bundle F2, tab 35, at paragraph 587.

Then the third and fourth sentences are objected to and they describe the single anticompetitive aim of the collusion. So it says:

"The single anticompetitive aim of the collusion was to coordinate each other's gross pricing behaviour ... [etc]. The collusive practices followed a single economic aim."

That too is a legal requirement for a finding of single and continuous infringement. Would it be helpful to turn that up or can I just give you the reference?

PRESIDENT: Well, isn't it set out in recital 70 effectively?

MR WARD: It is, perhaps in a little less detail than one can find in the cases but a single economic aim is a specific requirement. Maybe I can show you that in Del Monte? It is in F2, tab 35, page 73, paragraph 591:

"It must be pointed out that the concept of single agreement or single infringement --"

PRESIDENT: Just one moment.

MR WARD: I am sorry, sir.

PRESIDENT: Yes, paragraph 591.

MR WARD: "It must be pointed out that the concept of single agreement or single infringement presupposes a complex of practices adopted by various parties in pursuit of a single anticompetitive economic aim. The fact that the various actions of the undertakings form part of an overall plan because their identical object distorts competition within the Common Market is decisive for the finding of single infringement."

So you need a single economic aim and an overall plan.

PRESIDENT: Yes. Well I think when recital 70 says "according to settled case law", that is really what they are referring to.

MR WARD: I agree. These paragraphs which I can now take very quickly indeed all explain what this plan was and how it came about.

It is sufficient in my submission if you just -- it would be sufficient if you wouldn't mind just reading briefly those paragraphs through from 71 through to 77. It is just an explanation of this common plan and its overall aim. (Pause).

Sir, just by way of emphasis, we see recital 72, in the last line a reference to "an EEA-wide plan".

Recital 73, reference to "common anticompetitive object". Recital 74, second line, reference to the same object. Recital 75 is another explanation of how and why this collusion worked and then recital 76 is actually dealing with another legal point which is intention, intention to contribute to the common objectives. That is also an element of the legal test for single and continuous infringement. I can take you to or simply give you the reference to the Coppens judgment which says so in terms. That is at volume 3 of the authorities under tab 55.

Would it be of assistance to go to the authority?

PRESIDENT: No, I think we don't need that.

MR WARD: It is paragraph 42.

PRESIDENT: Some of this comes down to the basic division between the two sides, other than DAF, of whether all the factual building blocks to get to the conclusion of A overall plan, B identical object and, you say, C intention of each addressee to contribute --

MR WARD: Yes.

PRESIDENT: -- you know, various facts that are relied on to get there are therefore all essential basis or you draw the line at the conclusion.

MR WARD: I would test it this way: if they thought this was not a single and continuous infringement and they had

wanted to challenge that finding because this material was wrong, they could have appealed it.

If in truth there was no common plan or no economic aim, then they could have said these recitals are wrong, we are not liable for a single and continuous infringement. And that is really to revisit in short form the argument that we had yesterday:

HODGE MALEK QC: Are you saying that you have the conclusion which you say forms part of the -- it goes to the operative part but you are saying that the facts and matters that support those conclusions, they are covered as well and that is where you draw the line?

MR WARD: Yes, in the sense that I pose this thought experiment: if you said that this was wrong -- if the defendants thought this was an incorrect description of the underlying facts they then they would have been entitled to challenge that in Luxembourg. Not just the conclusion whether the facts as described were a single and continuous infringement but whether it really happened in this way. If it was their case it didn't happen in that way, there was no common plan, there was no coordination between them etc, they were free to make that case. Instead it is all admitted.

Can I turn then to the next section, "Restriction of competition" at 4.3, where again there are some limited

albeit important admissions that some of this is essential basis. It is paragraph 81.

We have already looked at this. The first sentence is accepted as essential basis, even though the paragraphs it refers to are not. And then the second and third sentences though are not accepted as being legal basis and the complaint is that they are not part of the legal assessment because they are merely a high level summary of the facts.

But they are not just factual statements, they are a very short description of why the infringing conduct did amount to an object infringement. So in my submission, those are also essential basis.

Then we come to effect on trade where there is a very carefully worded admission which is worth looking at -- of essential basis I mean. If one turns to the schedule which explains the defendants' case, recital 84 -- I am so sorry, it is 85. Yes, I need to deal with both of these actually separately.

84 says:

"The truck sector is characterised by a substantial volume of trade between the Member States as well as the Union and the EFTA countries of the EEA and affects the competitive structure of the market in at least two Member States."

And the defendants' position is that none of this is essential basis but there is at least a partial admission to the first part before the words "affects the competitive structure". In our submission, this is the factual finding which is the basis of the finding in the next sentence of the recital, that there was effect on trade between Member States.

There is we think a typographic error in this which makes the last part rather difficult to understand. Where it says "and affects the competitive structure", we think it should be read to say "and the infringing conduct or the cartel affects the competitive structure". The reason we say that derives from the Commission guidelines which are footnoted to this paragraph. Can I show you that briefly?

It is in bundle F2 of the authorities bundle, under tab 41.

PRESIDENT: That is a wrong reference.

MR WARD: I am so sorry, it is the wrong reference. F4/57, I am so sorry. These are the guidelines on the concept of effect on trade.

If we could please turn to page 3, this is the concept of trade between Member States and recital 20 says:

"According to settled case law, the concept of trade

also encompasses cases where agreements or practices affect the competitive structure of the market."

And then at 12:

"The requirement there must be an effect on trade between Member States implies there must be an impact on cross-border economic activity involving at least two Member States."

And there is a footnote reference on recital 84 to paragraph 21 there, albeit not paragraph 20. We think that is the way recital 84 ought to be read, that what is being said is the infringement affected the competitive structure on the market.

And then recital 85 --

PRESIDENT: Just a second. (Pause). So you say what it should mean or should say is either the conduct or the infringement?

MR WARD: Something like that.

PRESIDENT: Well, probably the conduct, because they haven't found the infringement yet.

MR WARD: I would be just as happy with that.

PRESIDENT: Until they have gone through --

MR WARD: But plainly this is not the biggest point in our submissions. When we were struggling with what this might mean, this struck us as being the probable explanation.

PRESIDENT: It is only making the point that if this all took place, it would have an effect beyond one Member State and therefore the gateway to the application of EU law is passed.

MR WARD: Yes.

PRESIDENT: It is a jurisdictional point which I would not have thought was really in issue anyway.

MR WARD: I note the point. Is this a convenient moment?

PRESIDENT: Yes, I think it would be helpful.

MR WARD: I do not have much more to do.

PRESIDENT: I think our transcribers need a break. You have what, another 15 minutes?

MR WARD: At the most.

(11.52 am)

(A short break)

(12.02 pm)

MR WARD: Sir, we were on effect on trade and I was about to turn to recital 85. This is where I mentioned earlier there is a highly caveated admission. If I ask you to turn up I think it has been called the Ryder schedule which sets out the defendants' positions. It is page 24 of that schedule. It is a rather carefully worded acceptance of essential basis. Just to remind you what the recital itself says, it is an application of the law to the facts:

"In this case, taking into account the market share and turnover of the addressees within the EEA, it can be presumed that the effects on trade are appreciable. Furthermore, the geographic scope of the infringement which covered several Member States and the cross-border nature of the products affected also demonstrate the effects on trade are appreciable."

So it is two alternative findings they have there. The caveated acceptance of essential basis is:

"The finding that the effects on trade are appreciable between Member States is essential basis, which is relevant only insofar as this relates to the effect on trade test and establishing the Commission's jurisdiction."

Well, we are grateful for at least some concession there but in our submission, the recital is binding in its entirety. The first half of it is a sentence based on a presumption arising from market share and turnover and the second half of it is a specific finding of fact. Iveco says this is simply the factual basis for the finding. Well it is certainly factual and it is the basis for the finding and for that reason we submit it is essential basis.

Then we turn to article 101.3, in other words the possibility of justification. Recital 86 sets out the

law. Recital 87 applies the law to this case:

"On the basis of the facts before the Commission there are no indications that the conduct of the addressees described entailed any benefits or otherwise promoted technical or economic progress."

That recital is not admitted and yet recital 88 is accepted as essential basis, which says the Commissioners therefore reached the conclusion.

We are a bit puzzled by that, but we think quite what the tactics of that are obscure but recital 87 is also essential basis.

Then I have two recitals in the remedy section that we contend are also essential basis. I will deal with them in the same way because the -- I will deal with them together because the same objection arises to both.

Recital 102 is the first:

"Given the secrecy in which the arrangements of the infringement were carried out, in this case it is not possible to declare with absolute certainty the infringement has ceased. It is therefore necessary for the Commission to require that the undertakings to which this decision is addressed bring the infringement to an end."

Indeed in the operative part, which is article 3, it makes precisely that requirement.

Then under "Fines", the next section, we also seek to rely on 104:

"In this case, based on the facts described, the Commission considers that the infringement was committed intentionally."

Now, Daimler picks up the baton on this and argues that neither of these recitals are part of the essential basis for the infringement decision which is contained in article 1. Our answer to this is nevertheless, these are binding on the national court as a result of article 16 of regulation 1/2003. And of course as we have seen, and I know the Tribunal is aware anyway, that provision provides that when the national court rules on agreements, decisions or practices under article 101 which are already subject to a Commission decision, it cannot take decisions running counter to the decision adopted by the Commission.

Our submission is these are aspects of the Commission decision. It would be running counter to that to conclude, for example, the infringement was not committed intentionally.

Now I can see and would accept that I think what Daimler are arguing is that articles 2 and 3 may be separate decisions from article 1. I do not accept that that is right but even if it were true, it would make no

difference to our submission because articles 1, 2 and 3 of the decision are all decisions on agreements or concerted practices etc and to contradict them would run counter to those decisions.

Sir, unless I can assist further, those are my submissions. I think Mr Brealey is going to advance submissions on just a couple more of the recitals.

Submissions on recitals 115 and 116

MR BREALEY: I think it is only two. I am not sure Mr Ward disagrees with me.

Recital 115, it is the first sentence. I remind the Tribunal if one goes back to recital 81, they accept the essential basis there:

"The anticompetitive behaviour described in 49/60 has the object of restricting competition in the EEA-wide market."

That is accepted as essential. But when it gets to 115 they say it is not essential, and yet clearly anybody who knows competition law, infringements are the most harmful restriction in the competition by their very nature. We would say, well, if 81 is essential, 115 follows it.

The only other recital that we pray in aid is 116. This shows the difference between conclusions and the why. So 116 has a statement of the market share,

which I understand is confidential, I am not sure why, and the entire EEA. One goes back to recital 85, they admit it is essential that there is an effect on trade which is appreciable. So they admit the appreciability but then when you ask the question why, you get an answer of that in 116, but that is not essential. And we say that just doesn't make sense.

So that actually is a good indication of the difference between the building blocks, the conclusions and the why. Why is it appreciable rather than -- have a look at 116. We admit it is essential that it is appreciable. That finding, it is appreciable, it is essential, but not the why. So those are the two extras that we pray in aid.

PRESIDENT: So, we turn to the defendants.

We know that you have as it were shared out the relevant recitals. We think it would make sense and would be much more convenient for us if we took the recitals in the order they appear in the decision.

MS BACON: That is our intention. There will be a bit of bobbing up and down but that is unavoidable because of the way that we divided it up.

Sir, I am going to start with recital 46 and yes, before I do so --

PRESIDENT: You do 46. Just so I am clear, you deal with 46

and 48 but not 47, is that right?

MS BACON: Yes, that is right. Mr Harris is dealing with 47.

Before I start, Iveco's Christmas present has I believe been handed up to the Tribunal or is about to be. As I explained, this is only the Ryder part of the schedule and we will provide the VSW part of the schedule next week. My thanks to those behind me who have been working through most of the night to produce that.

PRESIDENT: We are very grateful. We appreciate that.

MS BACON: I am dealing with recital 46. What is in issue here is the second, third and fourth sentences. The first and the fifth have been admitted and Iveco has indeed now admitted the fifth sentence. That wasn't clear on the original schedule. I am going to be working --

PRESIDENT: Sorry, the first --

MS BACON: And fifth sentences.

PRESIDENT: Are admitted?

MS BACON: They are admitted by all.

PRESIDENT: But they are not said to be legally binding?

MS BACON: No. But as I understand it, the purpose of the exercise of admissions was, as indeed in the Servier case, to enable the Tribunal to focus on the recitals or

parts of recitals that are not admitted. So in my submission, it is not really necessary for the Tribunal to reach any conclusion on whether the first and the fifth sentences are binding in circumstances where both of those have been admitted by now all parties.

What is not --

MR JUSTICE FANCOURT: There won't be any later application to withdraw any of the admissions, I take it?

MS BACON: Not that I am aware of.

MR JUSTICE FANCOURT: If there might be then we might need to consider it.

MS BACON: There hasn't been up until now. The Tribunal is now proceeding on the basis that exactly as happened in the Servier cases some of the recitals have been admitted and they are set out quite plainly in the admission schedule and that was the purpose of the exercise in order for the bindingness issue to be focused on what is not admitted.

PRESIDENT: But we must proceed on the basis that there won't be an application to withdraw an admission unless it is consented to.

MS BACON: I agree. That must be the basis on which the Tribunal proceeds and all of us have been working to addressing the Tribunal on the recitals that are not admitted or not admitted by all.

PRESIDENT: Yes.

MS BACON: So the first and fifth sentences are, as I have said now, admitted by all. What is in issue are the second and fourth sentences.

There are a number of points to be made about those. As with Mr Ward, it may be that as we go through all of these recitals we can speed up. Certainly there are a number of points to be made about this first one.

The first is the nature of the statements in the second to fourth sentences of this recital. As you will see, these are points of factual detail concerning the type of information exchanged, none of which come anything close in our submission to assessments which are what I yesterday called decisional in character.

I showed you Lagardère yesterday which used the expression "legal assessments" as you'll recall. Bearing in mind the debate that we had towards the end of the afternoon about whether this sort of assessment is a strictly legal or factual one, a possible alternative expression might be evaluative assessment. These are sometimes mixed questions of fact or law. But in our submission that is what it has to be at the minimum to start to fall in the essential basis category because it is -- in the operative part of the decision one has evaluations, legal or mixed legal and factual

evaluations of the facts.

But none of the statements in the second to fourth sentences are that. They are not evaluative statements. They are not decisional in character. They are simply general statements referring factually, purely factually to the ways in which the information exchanges took place.

PRESIDENT: They are not just dealing with the way they took place. The second sentence is not dealing with the way the exchange took place. It is a factual statement.

MS BACON: Well, it is a factual statement. I am going to come and specifically address the second sentence. But the third and the fourth sentences are specifically dealing with the way in which information exchanges took place, explaining that over time, truck configurators replaced the traditional gross price list. Truck configurators are as I understand it programmes that enable you to put in specific configurations of trucks and get a price out.

PRESIDENT: Isn't that just a statement of how your client and the other OEMs produced their prices? It's not a statement of how the exchange took place.

MS BACON: It relates back to the first sentence. It is fleshing out in factual detail the first sentence because the first sentence talks about engaging and

exchanging computer based truck configurators, so the third sentence adds to that by explaining that over time those truck configurators replace the traditional gross price list. So it is a how statement, how it happened.

PRESIDENT: It is just a factual statement of what sort of price lists the OEMs produced. In the earlier period, they had actual price lists and in the later period they had configurators, and that is just a simple factual statement, I would have thought. If it is right, it is non-controversial. It hasn't been admitted.

MS BACON: It is not admitted by all because there are specific points in the defences which go to that and Iveco in particular make a specific positive case regarding the nature of truck configurators that Iveco had. So that is why it is not admitted as a matter of fact.

PRESIDENT: And Iveco still had a detailed gross price list at the same time, didn't it? That is the point being made.

MS BACON: There are specific points about the gross price lists and the extent to which gross price lists were available too. Sir, I am in agreement with you, it is a statement about the way in which there were gross price lists or not, as the case may be.

The fourth sentence is similarly a how sentence.

It is a factual statement about how the exchange took place.

But the overarching point is that none of this sort of factual information would ever find its way into the operative part of decision. It is points of factual description, however one characterises it, that are a long way from defining the scope of the infringement. Nothing in the case law comes close to finding this sort of factual statement to be essential basis.

Now, I said I was going to come back to the second sentence. That was my next point because Mr Ward suggested that this statement is in some way essential but it is quite clear it is not essential to the finding of an infringement to say that all of the exchanges of information involved commercially sensitive information. Or indeed that over time, truck configurators were used or that the use of those facilitated the calculation of gross prices.

As you will see from the admissions schedule, some at least of the defendants admit that some of the exchanges in question involved commercially sensitive information but it is not necessary to a finding of infringement for there to be any finding that all of the exchanges of information did so.

PRESIDENT: But if there was a finding that there was no

commercially sensitive information exchanged, there would be no infringement by exchanging information, would there?

MS BACON: It does depend on what is meant by commercially sensitive information --

PRESIDENT: Well, commercially sensitive is explained.

MS BACON: Yes, yes --

PRESIDENT: But there's a certain common sense about this. If you publish your price list and then you meet your competitor at a trade fair and say here is the price list that we published yesterday, that is not an infringement. It is not commercially sensitive because it has been released.

MS BACON: There are wrinkles on the extent to which information was publicly available, to which there are specific pleadings. But the problem with --

PRESIDENT: The point I am making is that to say you were not exchanging commercially sensitive information would destroy the finding that this restricted competition.

MS BACON: That is why there are admissions that some of the information exchanged was commercially sensitive and there are various specific points in the pleadings that go to that but it is not necessary to say that all of the information exchanged was commercially sensitive --

PRESIDENT: So there is a positive case that will be brought

out by your schedule that there were certain specific bits of information that were exchanged that were not commercially sensitive. That is the point you are seeking to make?

MS BACON: There are various points in the schedule that explain what was available and what was not available and therefore what was commercially sensitive and what was not.

PRESIDENT: There must be a significant degree of exchange of commercially sensitive information to have an appreciable effect on competition, otherwise to that extent it is an essential ingredient of the infringement.

MS BACON: Yes. As you will see from whichever recital schedule you're looking at, I am using the consolidated schedule from 20 September, you will see that Iveco admits as a matter of generality that the addressees exchange gross price lists and that some of the exchanges in question involve commercially sensitive information. Similarly, for example, Daimler says:

"The second sentence is admitted save that it is not admitted that all of the elements referred to in the first sentence constituted commercially sensitive information."

So there are partial admissions to that in the

admissions schedule. What is not admitted is that all of the elements contained commercially sensitive information. The point I just made to you, it is not necessary to reach that finding or essential to reach that finding for the purposes of the infringement and that is the test in the case law.

PRESIDENT: What I am saying in response is there has to be a finding that there was a significant degree of commercially sensitive information to have an appreciable effect on --

MS BACON: Or some degree.

PRESIDENT: Well, appreciable effect on competition.

MS BACON: Yes. The appreciable effect on trade for example is admitted and the object is admitted. There are all these elements.

PRESIDENT: The infringement is admitted.

MS BACON: The infringement is admitted.

PRESIDENT: So it has to be an exchange which had an appreciable effect in creating transparency between the parties, the addressees, which otherwise would not have existed. So whether over the 15 years one or two of the price lists exchanged had already been published, that may be. But there clearly has to be a significant degree of commercially sensitive information for this infringement to stand.

MS BACON: Yes. The problem is that this sentence is overly general and one can appreciate that if that were binding, you would find yourself in the situation where the defendants would then be potentially precluded from arguing that certain exchanges were commercially sensitive.

It comes back to --

PRESIDENT: Your quarrel is what you say is it is the "all".

MS BACON: As far as Iveco are concerned, it is the "all". It is an overly --

PRESIDENT: You are speaking I hope for everyone --

MS BACON: Mr Beard is going to make a specific point about DAF because Mr Ward referred specifically to DAF's footnote so Mr Beard is going to follow me and set out his position.

PRESIDENT: That is on what "commercially sensitive" means but on the "all" point, that is your point?

MS BACON: That's my point on that sentence, that it's overly general and it's not necessary or essential to the infringement to make that finding.

HODGE MALEK QC: Then if it listed specific matters, I am sure you would be saying you don't need that either.

MS BACON: Well, if it listed specific matters, some of those might be admitted and some might not.

PRESIDENT: But you'd say none is an essential basis.

MS BACON: We would say that it's not essential basis because it's points of factual detail. We don't deny the underlying infringement.

PRESIDENT: I know you don't deny. No need to say that again and again. The underlying question is what is the essential basis for the statement that you Iveco have infringed article 101.

MS BACON: What I was going to go on to say is because we don't deny that, as I said yesterday, it would be obviously open to the claimants to make any submissions in due course at some point if any of the denials in our pleadings, our detailed pleadings, contradict the underlying infringement that has been admitted.

PRESIDENT: But what we are looking at now, following the argument we have had, is what is the essential basis for saying that Iveco has infringed article 101.

MS BACON: Yes and the problem is one can't match up an overly general statement such as the one in the second sentence of recital 46 to the operative part and say it is essential to that.

PRESIDENT: To interrupt you, the problem is, as Mr Malek has pointed out, if instead they had said the following 37 pieces of information are commercially sensitive, you would say none of that is the essential basis. So what is one left with?

MS BACON: That is not what is said. The exercise is not for the Tribunal to rewrite the recitals of the decision in a way that extracts propositions which are essential basis because we have already identified the propositions that are essential basis. And the approach to trying to extract more general propositions is not the approach the claimants have followed. They have simply come along and said these recitals wholesale are essential basis.

As you will recall, a slightly different approach was followed in the Servier case when we did try to extract more general propositions from the recital.

PRESIDENT: Well, we were dealing with -- not everybody here will be aware -- with I think a judgment of several hundred pages so I do not think that comparison is very helpful.

MS BACON: But the point is rather than trying to extract specific propositions which are said to be essential basis from these, the claimants have taken the approach of saying the entirety of these recitals are essential basis. And that is the claim --

PRESIDENT: I know, but it does not mean we necessarily go down that route. We are looking at it recital by recital.

MR JUSTICE FANCOURT: If that part of recital 46 had said

"some of these elements constituted commercially sensitive information", would that be part of the essential basis?

MS BACON: Well, first of all it would have been admitted by Iveco so it would not be in issue anyway. Secondly, even if it had not been admitted, I am not sure that it really would be essential basis because it is still making a factual statement rather than an evaluative statement of the kind that would be in a decision with a decision identifying the infringement, the nature and the scope of it.

What you are getting to if you are talking about some of them constituting commercially sensitive information is really getting to the details of the information exchanged and the type of the documents and perhaps even the effect of any exchanges. That is not really decisional in nature.

PRESIDENT: Well, suppose this was only an information exchange cartel, as Mr Ward pointed out there are other anticompetitive collusions that you or your colleagues will be coming on to, but if it is purely information exchange and the decision says some of the information exchanged was commercially sensitive and enabled competitors better to calculate each other's prices, if you challenged that and annulled it, that would be the

end of the decision and the operative part would fall away.

MS BACON: Yes. That is not what this decision does. It's a lot more than that.

PRESIDENT: No, because it is more than an information exchange.

MS BACON: But that's I think coming back in a way to the centipede question. What we have to answer is the essential basis looking at the facts of this case.

PRESIDENT: No, with respect, I do not think it is the centipede question. If it is a pure information exchange and there is the statement in the recitals that the information that was exchanged, that some of it was commercially sensitive and enabled the competitors to calculate each other's prices in a way they otherwise wouldn't have done, that is just one overall finding.

MS BACON: If that was --

PRESIDENT: And that is why it is an infringement of article 101, plus the fact that they are competitors, I suppose, the parties.

MS BACON: Yes.

PRESIDENT: And if you annulled that finding there are no other findings here that are relevant. So it is not the centipede. That would lead to annulment of the operative part finding and infringement.

MS BACON: With respect, I think the example is quite helpful because in that case, if that was the sole nature of the exchange, you would be annulling the operative part. And going back to the case law that I took you through yesterday, the occasions when you go and look for essential basis are where you can't annul the operative part because the finding is not in the operative part.

So in that case you have an operative part that finds that there is an infringement, it sets out the date and sets out the parties as is required by Air Canada. And if on the basis of the reasoning in the operative part the addressee said, no, there wasn't any information exchanged at all, they would be applying to annul the operative part.

It wouldn't be the kind of case where you would say I am accepting the operative part but what I want to annul is this quite independent finding. In that case, you would be annulling the operative part and the entire rationale for looking at findings that are essential basis that arises in cases like Lagardère for example or Provincie Groningen, where you are accepting the operative part but you're seeking to annul some separate decisional level finding that isn't there, that wouldn't arise. You would simply be mounting a challenge on the

facts of the case saying in this case, the facts don't substantiate the finding that there was an infringement because in fact there was no information exchange and the fact that the information exchange was freely available on the market for everybody to see.

That is not a case in which you would say the finding that there was an information exchange consisting of commercially sensitive information is essential basis. You would never need to do that because the essential part of the infringement would be set out in the operative part and that is what would be the target of your action for annulment.

That is why I said yesterday it is quite important to understand the reason why the court referred to things being essential basis as having specific legal effect.

It is in those cases where it has to do so because otherwise it wouldn't be possible to run the action for annulment that is sought by the applicant in the individual case. That is where the line of cases came out of and Lagardère is a very good example of that, but the other cases that I showed you yesterday also explain why that is the case. The point is that the infringement is supposed to be set out in the operative part.

In your example, sir, it is such a good example because it illustrates how that would work in that case. Indeed, the same would apply if there were two or three findings and all of them were sought to be annulled. That does not turn any of those individual findings, supposing there were said to be three information exchanges, it does not turn them into essential basis simply because all of them are challenged because your challenge would still be to the operative part.

Exactly the same was true in the HSBC case that was cited yesterday. The challenge was to the operative part. And one therefore does not need to look in that case at the specific finding that there was commercially sensitive information. That is part of the reasoning that leads to the conclusion, the decisional conclusion in the operative part that there is a particular infringement. There is nothing vague or ambiguous about this.

In this case, returning to this case, there is nothing vague or ambiguous about the operative part which is clarified by something in this recital. One point that is made by Mr Ward is in his skeleton argument -- I do not think he pursued it specifically this morning but he said:

"This recital is indispensable to understanding what

is meant by pricing."

But there is no lack of clarity on that because the operative part spells out clearly that the infringement relates to both prices and gross prices.

There is nothing that the addressees didn't understand --

PRESIDENT: When it says prices and gross prices, I can understand gross prices but what are prices?

MS BACON: Pricing is a general statement.

PRESIDENT: So if it is prices and gross prices, what does it mean; net prices?

MS BACON: No.

PRESIDENT: What does it mean?

MS BACON: If you turn to the operative part --

PRESIDENT: We are fairly familiar with it by now.

MS BACON: Yes. It says "pricing and gross price increases".

PRESIDENT: Yes, pricing could mean gross, net, it could mean both, it could mean configurators, it could mean not configurators. How do we know what it means?

MS BACON: There are specific pleas to points like net pricing in the defences. The operative part does not specifically say net pricing.

PRESIDENT: It doesn't say whether it is or it isn't.

MS BACON: No, it doesn't. It says "colluding on pricing

and gross price increases".

Sticking with this particular recital there is nothing in this recital that clarifies some lack of clarity in the operative part. Nothing has been identified specifically. There is a problem with the operative part that this recital assists with. This doesn't define what is meant by gross prices. It does not define what is meant by prices generally.

PRESIDENT: Well, it says it includes configurators.

MS BACON: That is the means of exchanging information. It is an explanation of how the information was explained through using truck configurators.

The other point to make about this recital before I hand over to Mr Beard to deal with the specific DAF point is the vagueness point. We do maintain the point on vagueness, expressions such as "over time" are entirely vague.

Now, Mr Ward says two things. He says first of all, well, we admitted it. That is not an answer because that is the abuse of process argument. It is not the question of whether this is binding. The second point is to say, well, in due course the court will have to have a debate about what "over time" means but that is entirely unsatisfactory if you are elevating something in the recital to the level of a decision in

the operative part.

You will have seen from Air Canada yesterday -- and I took you to the paragraph, 35 -- that the principle of effective judicial protection requires particularly clear and precise statements of infringement in the operative part because that is what the court acknowledged would bind the addressee.

Undertakings are entitled to know precisely what the infringing conduct is and that is stated in the operative part of this decision. But looking at a statement like "over time", that could never be the kind of statement in a decision that was binding on the addressees with specific consequences flowing from that because "over time" says nothing about the specific time period.

By contrast, what we do have in the operative part are references to specific dates which is sufficiently precise and certain. Sir, those are my submissions on recital 46.

PRESIDENT: Yes, and you were saying Mr Beard had some points?

Submissions on recital 46

MR BEARD: I was going to pick up one or two points that were made by Mr Ward particularly in relation to DAF's position in relation to recital 46.

I think it is worth making the preliminary observation that the exercise we are engaged in is taking materials in a settlement decision which were intended solely for the purposes of an infringement finding and, in those circumstances, operate at a high level of generality and trying to get them into and treat them as somehow being binding for the purposes of a pleaded case where they really aren't suitable for that exercise.

We see that actually in 46 and in particular, the point that is raised in relation to commercially sensitive information. Now, in the course, Mr Chairman, of exchanges with Ms Bacon, there was a reference to this term being explained and that it was a matter of common sense. Now, with respect, it is not a term that is explained. It is not a matter of common sense and I took down the words that Mr Ward used to explain what it means. It says:

"It is commercially sensitive in the sense that it leads to an infringement."

Now, that, with respect, is no proper definition of that term. It is for that reason that you can't end up treating that as some sort of binding finding. It is a particular example of the point that Ms Bacon was making about the inherent vagueness of the terms that

are being used there which may be suitable for the generality of the assessment you are making when it comes to reaching an infringement finding by the Commission as a public authority but are not valuable and cannot be treated as binding for these purposes because they are too vague.

It is for that reason that the DAF pleadings say not admitted because we don't know what that term precisely means and it is also why DAF specifically says, clearly for the avoidance of any doubt, we capitalise the meaning of commercially sensitive and say very clearly none of the information exchanged fell within that category. That is what we do in our pleadings and that is what we have done in explanation in the schedule and that is what that footnote is to do with.

Now, Mr Chairman, you referred to the fact that, well, perhaps if the information was mostly commercially sensitive or significantly commercially sensitive, what in fact, sir, you are doing there is trying to work out from your knowledge of the ingredients of competition law what the minimum thresholds would be in order to meet the requirement for that sort of information exchange to amount to an infringement but that is not what that recital actually does.

One can't change the terms of the recital. As

Ms Bacon says, what the recital says is something that cannot be treated as binding, given its ambiguity and given the fact that, as Ms Bacon has rightly said, challenging some or all of that information being commercially sensitive, whatever that may mean, does not undermine the final infringement finding.

You see that there is another example in 46. If you go down to the fourth sentence, which is also not admitted, this exchange of configurators "facilitated the calculation of gross price for each possible truck configuration". Now, on a literal reading of that, what is being said is, well, this configurator exchange enabled every possible truck configuration price to be ascertained. That is what was being facilitated.

That is just not a plausible statement ever to be made or to be treated as binding. It is not admitted by DAF and others because it is plainly not something that each of them could admit to because of course it pertains not only to their trucks but to everybody else's trucks but more than that, as you can see from the specific pleadings that we put forward, where recital 46 has been relied on in pleadings what we see is a case being put forward as to what our actual configurators could and could not do, the technical specifications that they could provide.

They were not providing sales prices or anything of that sort. They were providing technical configurations which enabled to some extent the identification of gross pricing and the question is, in relation to that, could the exchange of those configurators facilitate the gross price identification for each possible truck by others? We say plainly that is not the case.

The idea that that sort of building block, which I think was the language used by the Tribunal at one point, should be treated as binding and necessary in circumstances where it plainly is a generality of statement made by the Commission pursuant to an infringement would be quite wrong. In those circumstances, we do adopt the submissions of Ms Bacon in this regard but emphasise that what we are engaged in here is an attempt by claimants to take generalities that may be used by the Commission for a particular purpose and try to misapply them in this context.

That is why building blocks should not be considered as binding and it is only the high level findings that Ms Bacon has identified that should be treated as essential basis.

PRESIDENT: Next, we go to visit 47?

Submissions on recital 47

MR HARRIS: Sir, yes. I am going to deal with 47 on behalf

of Daimler but before I do so, can I just draw your attention to one good example of a non-admission or a denial followed by a positive statement on our case as regards the third sentence of 46. This is a very good illustration of exactly the sort of problem that we face if this is said to be binding as against the defendant.

If you would like to turn it up, it is in the Ryder core bundle. Mine is marked A1.1. You ought to find in there the tab that has the amended Daimler defence.

PRESIDENT: Have all parties seen this?

MR WARD: I do not have this.

MS DEMETRIOU: I do not have this.

PRESIDENT: Well, we have just been told.

MS BACON: That is the problem I alerted you to earlier, that VSW don't have this --

PRESIDENT: Apparently nor does Royal Mail or BT.

MR HARRIS: Well --

PRESIDENT: By all means refer to it if you and your clients are happy to do so but if it is confidential to some of the parties, be careful. You can give us a reference and we will look at it later.

MR HARRIS: Well, the reference is in paragraph 24D.

PRESIDENT: You say it is in the Ryder bundle, which tab is it?

MR HARRIS: Tab 9.1 of that bundle. The paragraph begins on

internal page 138 and the part to which I would like to draw your attention is on 141 which strictly speaking is paragraph 24D(b) and then there is a (iii) at the bottom of 140. It is not confidential information. But the point, if you were just to cast your eye over (iii), starting at the bottom of 140 --

PRESIDENT: Yes.

MR HARRIS: So what had happened is in the so-called Ryder schedule at the time when we were giving just non-admissions, we had said as regards this sentence that it was not accepted that all truck configurators -- so if anyone wants to follow this, this is in the Ryder schedule with the blue headings. As regards recital 46, the fourth column along is the Daimler defendants' response. This will enable I think Ms Demetriou and others who don't have the pleading to follow this point perfectly well for the moment. We say:

"The third sentence is only admitted only insofar as it concerns Daimler. However, it is not admitted that all truck configurators contain detailed gross prices or that the truck configurators contained detailed gross prices for all models and options."

So that was the headline point. Then the further detailed work that has been done in response to the pleading against us on this point, whether in Ryder

or in the other cases, is as you can see set out. So there are two types of configurator. Some do this and some do that and then actually you need more things.

It is a prime example, I think, Mr Malek --

HODGE MALEK QC: That is the sort of example I wanted, yes.

MR HARRIS: Yes, exactly. I only say that before I turn to recital 47 because it is illustrative of the very fact that if this is binding against me and if others have the same sort of point, then I am going to be precluded from explaining to the Tribunal at trial as necessary that actually it is a more complicated story and there are positive averments to be made that are material. So that is that.

Then there are two other footnote points on 46: Daimler's submission certainly is that one could have a substantial and appreciable exchange of commercial was confidential information in just one meeting so as to amount to an infringement.

Picking up on the interchange that you had, Mr President, with Ms Bacon, one doesn't need to have that over several meetings. Equally, one could have 10/15 meetings where there are insignificant or non-appreciable or fairly banal exchanges. Yes, they are technically commercially sensitive but even in accumulation, they are of no appreciable consequence and

that is relevant to the point that Ms Bacon was making about the or.

Then lastly in argument, you, sir, mentioned to Ms Bacon that, ah, yes, but it is also said that there is an effect on trade here. Strictly speaking, there is a presumed effect on trade here. That is recital 85. That can't be prayed in aid in our respectful submission as regards the appreciability or otherwise. If you were to turn to 85 you would see that.

With just those introductory remarks, I can be I'm pleased to say, and you will be no doubt pleased to hear, much shorter on 47 because we have the submissions of Ms Bacon as regards if you like general submissions and those that were added to them by Mr Beard.

That really takes care of the first sentence of recital number 47. The critical words there, just like the critical opening word of sentence 2 of 46 is "all", the critical words in the opening sentence of recital 47 are "in most cases". "In most cases" means that some of the cases, some of the factual examples, some of the information that is being talked about in that sentence wasn't of the variety that is there described.

So we must be entitled in our submission, the OEMs, to be able to say this is an example when you actually look at the detailed pleadings and the detailed

evidence, that isn't a "most" case. It is a "not a most" case.

So for instance, there may have been a case where the information that was exchanged was publicly available and/or was as detailed and accurate as the information that was exchanged between the OEMs. And in those circumstances, we say that the defendants should be entitled to contest that and it can't be held to be binding against us. Or, put another way, it can't be said to be essential to the finding of an infringement in article 1.

In just the same way as in HSBC, there were some overturned findings about particular meetings with particular traders doing particular things and they were successfully challenged but they didn't result in the overturning of the operative part of that particular decision.

So that is all I have to say about the first sentence. The second sentence, again I can take this quickly. We have the same complaint that it is a highly generalised description so I will not repeat those submissions. Then we have a different point which is that in the middle of that sentence -- I beg your pardon, at the end, it talks about depending upon the quality of the market intelligence at their disposal

but it doesn't explain in any given instance, let alone in most cases, what other intelligence is required in order for this to have been a relevantly useful tool in order better to be able to calculate the competitors' approximate net prices.

So the Commission is saying that it is relevant to know what the quality of other market intelligence at their disposal was to assess the utility of this exchange and hence its contribution or not to the infringement but we don't know what that was. If that is said to be binding against us, that would preclude us from coming along in any given instance and saying, actually, given the equality of market intelligence at our disposal or other defendants' disposal it is of no utility in better being able to assess the prices of other people.

Although I will not turn this up, there are several examples, at least in our pleading, where we say this is information that we had but this is material that we didn't have. By itself, this particular piece of material is of no particular utility.

Or alternatively, we will say actually, we had a whole variety of other market intelligence at our disposal, so for instance there is lots of pleading about mystery shopping exercises, garnering data from

dealers here and there, and in fact any information that was exchanged is of no supplemental utility. In fact, it was useless.

Yet those points, if this is a binding finding against us, will be lost.

HODGE MALEK QC: Would it be because if you say, well, I accept the whole of the second sentence but I did not have any other market intelligence at my disposal, which meant that I couldn't do the calculation.

MR HARRIS: I am sorry.

HODGE MALEK QC: What I am saying is the premise of what you are saying is if you are bound by this, there would be a finding that you were able to approximate current net prices. But there is a qualification at the end. What is stopping you saying I fall within the qualification depending upon the quality of the market intelligence at their disposal?

MR HARRIS: I would turn that round, Mr Malek, and say in those circumstances it's meaningless to say that this sentence is binding against us because on any given instance, we will be able to turn round and say, okay, look at the facts of this particular case, look at the quality of the market intelligence at our disposal or the disposal of others and it doesn't lead to any utility of the exchange of information.

So I would be content with that. All that would mean is we can come along and contest in a factual sense any given instance which means that a finding of bindingness doesn't take anyone anywhere.

HODGE MALEK QC: The point I am making is where you have a qualified binding and you have a number of defendants, it does leave the door rather open for the defendants to say that doesn't apply to me because it is a general finding but there is a qualification at the end and it doesn't say to whom that qualification applies or what it really means.

MR HARRIS: I take that point and I agree with that, which really, as I say, means to me that this is not of the quality or variety of a sentence in a decision which can meaningfully said to be binding.

HODGE MALEK QC: Well, it can still be binding but you just say I did not have the quality of market intelligence to do what is stated there.

MR HARRIS: I take that point, but at the risk of repeating myself --

HODGE MALEK QC: Don't repeat yourself.

MR HARRIS: The final point we take on 47 is of a slightly different variety. This may be an open door at which I push. If and insofar as this is intended to be or sought to be presented by the claimants as being, this

second sentence of recital 47, any kind of finding of effect in the sense that we were in effect better able to calculate any given net price, then that is something that is still completely up for grabs at the trial.

So that is more of a --

PRESIDENT: I think that is not what I would understand by effect. Effect is whether it actually led you to charge a higher price than you otherwise would have done. It is certainly not a finding that you did. That is effect. What is said here is that that knowledge meant you were able to work out what your competitor was likely to be charging to customers. Whether that had any effect on how you priced is a quite separate question.

MR HARRIS: Yes. That is essentially the point that I am making. For the sake of absolute clarity, we are drawing that distinction.

PRESIDENT: Yes but it certainly does not lead to the second conclusion.

MR HARRIS: This leads me simply to round off by saying Mr Ward's submission as regards this second sentence was largely that this is an important part of how the cartel operated.

Well, that goes nowhere as regards the submissions on bindingness or essential basis. That may be the

case, it may not be the case, but it is irrelevant.

MR BEARD: I do not want to make any submissions on 47 but picking up an observation by Mr Chairman, the interpretation of this clause I think will be a matter for debate as to whether or not what it is actually saying is simply this type of exchange of gross price information could in principle mean that if you have sufficient market -- other market intelligence then you might be able to do this and I think that is how we read that.

PRESIDENT: Able to do what?

MR BEARD: To better be able to calculate competitors' approximate net prices.

PRESIDENT: That is what it says.

MR BEARD: Yes. I am only taking issue with the characterisation, Mr President, that you put on the transcript in relation to that. I think there is an argument about what precisely that phrase will mean. But that is for another day.

PRESIDENT: Yes.

MR HARRIS: That may be a convenient moment. May I ask for the same indulgence after lunch?

PRESIDENT: To take jackets off?

MR HARRIS: In the trenches it is warming up.

PRESIDENT: Not only in the trenches.

48 is Ms Bacon, isn't it? It would wrap up this section. As Mr Justice Fancourt suggests, let's get that finished.

MS BACON: Just sweeping up the dregs of 47, perhaps the Tribunal when you have the opportunity to read our schedule that has been handed up, you will see that the second sentence of 47 is one of those to which we put forward a specific denial for reasons given in the paragraph cited in our schedule. That will no doubt be the case for many of the other recitals but I thought I should just mention that now while we are dealing with this section.

PRESIDENT: We will look. We appreciate the work that has gone into them and we will look at them very carefully.

MS BACON: As regards 48, it is really an a fortiori point following on from the points that I have already made regarding configurators. The points made in recital 48 are not definitive findings in any way, but rather general references to the evidence about the specific way in which configurators were used. You can test the question of whether this could be essential basis in the way used in the case law by asking yourself, well, just hypothesise that you challenge that, would that lead to a qualification in the operative part of the type that you see in a case like Coppens, where you see in the

final judgment -- you have both of the judgments in the bundle but in the final Coppens judgment the operative part of one of the articles of the decision was annulled insofar as, and then there is a qualification relating to Coppens' involvement in a particular aspect of the SCI.

It would be somewhat bizarre if there were a finding of the European Court that for example article 1 of the operative part is annulled save to the extent that it could be understood from the truck configurators which extras would be compatible with which truck. It would be a complete nonsense. That is just a factual statement about the way in which truck configurators worked.

Secondly, nothing in the operative part requires this level of granular detail for anyone to understand what the scope of the infringement found was. So it is a particular point of detail in the evidence as to the kind of application that was used by the addressees, ie these truck configurators, but it really does not go to anything in the operative part.

Nor is this recital necessary to solve any ambiguity or lack of clarity in the operative part. It is a very good example of evidence or reasoning that lies behind the decision that is ultimately reached rather than

being in any way itself decisional in character, or indeed evaluative.

PRESIDENT: If as you say that is too general, but if as stated above in 46, save at a certain time, your clients' configurators came to replace the gross price list, say for argument's sake in 2005, and if you were to challenge successfully the statement that this helped -- exchange of configurators helped comparison of own offers with those of competitors and you say that is wrong, it didn't, wouldn't that lead to the operative part being amended to stop and reduce the period of Iveco's infringement?

If you no longer had gross price lists, you had configurators, and exchange of configurators would have no effect on increasing transparency in the way there set out.

MS BACON: That is another example of the kind that if this was only a particular kind of infringement and you annulled the fact on which it is based, would that lead to the annulment of the operative part?

PRESIDENT: Well, qualification in the Coppens sense.

MS BACON: One would then be using the facts to annul the temporal finding in the operative part. You wouldn't be annulling the operative part and finding for example that one had to qualify article 1 save insofar as there

was a particular exchange of configurators at a particular time. One would use the facts set out in the recital and insofar as there was any correction, it would be to the temporal aspect of the decision. Time is something we have admitted is part of essential basis. It is in the operative part. But this is a factual detail.

Of course, if one looks at challenging facts as we have already rehearsed in argument, that may annul certain aspects of the operative part. But truck configurators are a granular point of detail that form part of the overall factual matrix that leads to the finding of infringement of the operative part.

It is not very much more informative than the identification of the precise hotel room in which people met. That is part of the evidential basis but it is not part of the finding of infringement.

PRESIDENT: Yes.

MS BACON: So, unless --

PRESIDENT: Anything else on 48?

MS BACON: No. Unless the Tribunal has any further comments on 48, that completes that section.

PRESIDENT: Five past 2.

(1.05 pm)

(The short adjournment)

(2.05 pm)

HODGE MALEK QC: Just looking at the schedules, I think Iveco's schedule is just in the format that I like. I note this one is only a draft version, if you can find there are any other references where there is a positive case --

MS BACON: Yes, we were intending to update it, given the extra time, and we're going to have to do a comprehensive job on the VSW pleading as well so we will send you an updated version next week.

HODGE MALEK QC: The same with the other ones. They are all saying these are just examples. I just want the full thing. Thank you very much.

PRESIDENT: Yes, Ms Ford.

Submissions on recital 49

PRESIDENT: 49, is it? Yes, thank you.

MS FORD: This is a high level summary of the collusive contacts that the Commission found were engaged in by the addressees over the period 1997 to 2010 and it tells you about the occasions on which meetings took place; it tells you about the means of communication which were deployed, emails, phone calls; it introduces the two different levels at which it has been found contacts took place, the headquarter level and the German level, and in my submission the defendants could contradict any

particular element of the summary facts in this recital and it wouldn't annul the operative part.

So for example, they could take issue with the proposition that meetings took place at product demonstrations and that wouldn't undermine the operative part. They could take issue with whether the addressees used phone calls as well as emails to communicate and that wouldn't undermine the operative part. They could claim that no meetings took place at headquarter level at all, that it was all undertaken at subsidiary level, and that wouldn't in my submission undermine the operative part either.

So, in my submission, applying that test, you come to the conclusion that the entirety of this recital is not binding. I do accept that there is a minimum irreducible amount of conduct that the defendants can't derogate from but as I submitted yesterday, the recitals themselves are not designed to articulate that irreducible minimum and it is possible to seek to articulate propositions which encapsulate the core content, the core conduct that the defendants cannot deny occurred and the Tribunal has been endeavouring to do that in various exchanges with various counsel.

My submission is simply you don't find those propositions articulated in the recitals because that is

not their function, so the recitals themselves are not binding.

PRESIDENT: Yes, thank you.

So 50 is Mr Harris?

Submissions on recital 50

MR HARRIS: Yes. There are three points in relation to recital 50, Chairman and members of the Tribunal.

The first is to note that the defendants all admit and have accepted as binding by reference to article 1 that they have engaged in colluding on pricing and gross price increases, the timing and the passing on of costs for the introduction of emission technologies for the types of trucks.

So the heart of this recital number 50 is already accepted as binding and admitted in fact.

What this then leaves are disputes as to the phrase "agreement and/or concerted practices" and as to the meaning of the phrase "in order to align gross prices".

I will take them in turn. Defendants' contention is that in article 1, the words at the beginning "by colluding", that does not convey that there have been agreements.

A collusion can be an agreement and/or a concerted practice and what we should not be bound by as essential

basis is that any given case is in fact an agreement, because any given case could be a concerted practice. That is the extent of the dispute on that point. So it is acceptable that any given case is an agreement and/or a concerted practice, but we need to be able to address you at trial on whether a particular exchange or a particular meeting is less than an agreement, even if it amounts to a concerted practice.

What you will see when you go through the pleadings is precisely that sort of plea. When you have pleaded against us, dear claimant, that this is an agreement, actually we deny that and aver positively that by reference to this piece of information or that remark in that document it is not in fact an agreement, although it is obviously a -- well, it is a concerted practice because it has to be one or the other.

There are a few cases where it is accepted that it is an agreement. But there are far more where it is not accepted as an agreement when you look at the detailed pleadings.

PRESIDENT: I am not sure for myself that is in any way contradictory to the first -- to that sentence. "Agreement and/or concerted practice", it's not saying that any particular one is an agreement.

MR HARRIS: In which case we can move on, yes.

HODGE MALEK QC: It is clearly open to you to plead one or the other.

MR HARRIS: In which case we can move on. To some extent this is a point of making absolutely clear what the defendants' position is.

That leads on to potential and nothing is advanced. Mr Ward took you to recital 68 but that just says "either/or". He said it proves his point but it does not take the matter any further.

That leads to "alignment on gross prices", those are the words in the middle of recital 50.

We take issue with this as being a finding that is essential to article 1 where it says "colluding on pricing and gross price increases" because one can have an exchange of prices, whether it be "pricing" or "gross price increases", but that does not necessarily mean that it is in order to align the gross prices.

I can take a simple example of when one wants to find out by exchanging with one's competitors what one's competitors are going to do as regards their pricing precisely so you don't align, so you can steal a march off them in the market in order to for example obtain market share.

The supplemental or additional finding of "aligning gross prices" is not a necessary element of the finding

in article 1 and can be disputed by the defendants in any particular given instance.

PRESIDENT: Isn't it the same as the finding in recital 71, which I know paradoxically someone else is going to deal with, but if you look at what in our copies is at the top of page 17, the single anticompetitive economic aim --

MR HARRIS: No, no --

PRESIDENT: -- was to coordinate each other's gross pricing behaviour?

MR HARRIS: No, with respect we say not. There are particular elements. I think Mr Ward may have even read out what the constituent legal elements are of an SCI.

PRESIDENT: I am looking at the statement:

"The single anticompetitive aim was to coordinate each other's gross pricing behaviour."

Isn't that statement, the "aim was to coordinate each other's gross pricing behaviour", effectively saying the same thing as in recital 50, "in order to align gross prices"? It is put in slightly different words but it seems to me to be saying the same thing.

MR HARRIS: I think Mr Beard will address you in part on 71, but my point remains the same, that what is not accepted by the defendants as forming a necessary or constituent or essential basis element of the article 1 finding of

collusion is that there has been an alignment of the gross prices as opposed to an exchange.

PRESIDENT: It does not say there has been an alignment, it says that's the object, the purpose. Whether it was achieved or not is another question.

MR HARRIS: In that case, I rephrase. Whether it be a has been or an object the intention of, that is not essential to article 1 because you can have and you have had collusion on pricing and gross prices for reasons that are not to do with alignment. They are about finding out and then you can take different action. It is not alignment action.

PRESIDENT: But the single aim here is found to be to coordinate each other's gross pricing which seems to me the same thing as to align gross pricing.

MR HARRIS: That is the point of contention, we don't accept that coordinating is the same as aligning.

PRESIDENT: What is the difference?

MR HARRIS: Aligning means bringing into alignment, whereas coordination is you can coordinate your prices at a completely different line or level from somebody else's. There could be a step change between them. And indeed it could be that somebody else is moving forward and then you take advantage of that information and you deliberately move downwards in price, so that is the

opposite of alignment. But it is still coordinating what you do with your price by reference to what somebody else is doing with its price.

It is not the same thing as the necessary acceptance that we have all given as to this being an object infringement because the object infringement is obviously to prevent, restrict or distort competition but that is not necessarily by way of alignment.

PRESIDENT: Yes.

MR HARRIS: So those are the submissions on recital 50.

Submissions on recital 51

MS BACON: I have a long one. I am putting on my hardhat.

Recital 51. This is a quite lengthy summary in general terms of meetings that took place during part of the infringement period and the content of those meetings, and as you'll have seen from the various admission schedules, parts of this are admitted, others are not.

This is the kind of recital that you would see in any competition decision setting out the nature of the meetings or contacts that led to infringement.

To say that this kind of factual narrative is essential basis and therefore binding would frankly run -- completely undermine the careful distinction drawn in the case law between the operative part and the

recitals.

It is not the kind of narrative that for example the court in Air Canada would have regarded as forming part of the minimum content of a decision that was required to be articulated in the operative part. There is no suggestion there that in addition to the identification of the nature of the infringement and so on, the parties, the temporal and geographic scope, there are huge parts of the recitals that simply set out the factual narrative of when and where the meetings took place and what was discussed, that any of that would be regarded as binding on the addressees or on the national courts, and remembering that in Air Canada precisely this issue was discussed, the bindingness of the decision and what parts of the decision for the purposes of a damages action.

So that is by way of preliminary comment but looking at the detail of the recital, you can see that none of this is decisional or evaluative in its nature. And rather, it is factual descriptions of the mechanics of an infringement and moreover, in pretty much all cases, at a very high level and generic nature of the description.

Not only that, but a number of the statements in this recital are extremely vague. For example, the

statement that occasionally the participants discussed net prices for some countries or, in the second sentence, in some cases the participants agreed their respective gross prices or, in the fourth sentence and the seventh sentence, the comments about regular or regularly, it is difficult to see how this kind of vague sentence and vague statements could ever be binding in a meaningful sense in a way that prevented the addressees, the defendants from contradicting that in domestic infringement proceedings.

Just taking the example of regular or regularly, that would not prevent them on any particular occasion when an allegation is made of saying, well, this was not one of those occasions when there was such an agreement. And indeed, those contradictions are brought out in the denials in the detailed pleading and you will see from our own schedule and no doubt the schedules of the other defendants that there are specific denials that agreements were reached on particular occasions. There are specific denials with a positive case, for example that the document that is relied on to establish that an agreement was reached does not in fact state that an agreement was reached or other reasons for denial, such as an explanation of the nature of what was going on within the companies which meant that the agreement was

inherently implausible.

So the suggestion that specific agreements were reached when it has been pleaded in detail by the claimants has been met by a specific response which in many cases as I have said is in the form of denials.

By saying that all of this is binding, claimants are trying to shut out the defendants from making those kind of assertions in their pleaded defences.

Not only that, but there is an a fortiori point that follows on from Mr Harris' point in relation to recital 50 because here there are specific statements regarding agreements but the problem is, as Mr Harris said, the operative part does not refer to agreements as such, it refers more generally to collusion, and in addition recital 68, as you have already seen, which is accepted as being essential basis, refers to conduct that can be characterised as a complex infringement and classified as agreements or concerted practices.

So the recital that we have admitted as essential basis does not come down to saying that this is an agreement as such but characterises it in terms as agreements or concerted practices.

PRESIDENT: So you have admitted it as essential basis?

MS BACON: Yes.

PRESIDENT: Recital 50 is not admitted as essential basis,

is it?

MS BACON: No, but Mr Harris' point was similar to the point that I just made. He pointed at the fact that the operative part said collusion and he went on to develop the point that that was not specifying agreements. You responded by saying this is okay, isn't it, because this says "agreements and/or concerted practices", and he said in that case -- he seemed to accept that was the answer.

PRESIDENT: Because he explained the defendants all want to say some are not agreement.

MS BACON: Exactly but the point applies a fortiori in this recital where it specifically said agreements, where elsewhere in the decision, specifically in recital 68, the conduct is characterised as agreements or concerted practices. So for the Tribunal to regard this particular recital with references to agreements as binding would be to go beyond the specific finding in the operative part, beyond the finding in recital 68 which is accepted as being essential basis, and indeed doing so in a way that is not either necessary or essential because as you know, nothing in article 101 requires there to be an agreement as such and that is why mainly recital 68 does not stipulate that there was an agreement as such.

So there is a problem of vagueness, there is a problem of contradiction, there is a high level problem that none of this is the kind of material that one would or should find in the operative part of a decision and still less in those circumstances the kind of material one regards exceptionally as being essential basis where there is an omission or lacuna or lack of clarity in the operative part. It is simply a normal part of factual narrative that you would get in any competition case.

HODGE MALEK QC: One thing that comes clear from Volvo's note on recitals 51 and 52 in a certain sense is what you have is the general plea in the recitals but despite that, claimants feel they have to give more detail and they give specific examples and that is being put to you and then you have to respond to it.

The question is if you are bound by this, does that affect in any way how you respond to it?

MS BACON: That is a very pertinent question. The question is how does that affect how we respond in cases where you have a very vague statement such as "occasionally" or "regularly" or "on some occasions". Does that mean we are shut out from saying in response to specific pleas? If not, what is the meaningful sense in which it is binding? Because one can identify there's a

meaningful sense in which the operative part is binding. You can't deny there has been an infringement of that nature. But if you have a sentence that occasionally some of the addressees exchange information of this nature in relation to some countries, then that does not take us any further forward.

At trial, the claimants are still going to have to particularise the occasions on which they say that information was exchanged and we are still going to have to respond to it. That is exactly why I said there is no meaningful sense in which this can be binding because it is so vague and general and does not purport to make a comprehensive statement but is simply saying "some". Some times, some places, occasionally, regularly, and so on.

HODGE MALEK QC: It also feeds into the issue of how this abuse of process argument works. Is it going to be an abuse of process for you where you are confronted with something like 51 and sentence 5 as analysed by Volvo, is it going to be an abuse of process for you when they give you specific examples of what is taken out of the generality there, and you come back and say no, that didn't happen. Is it really an abuse of process for you to deny in those circumstances?

MS BACON: Yes and that is exactly the problem because of

course they have to descend to particulars in order to establish causation. It is not good enough for them simply to say there are some occasions because we are talking about things that could make a large amount of difference, whether something happened on one day or the next month or the next year, some time in the time period, because of when claims are made and the chain of causation that is said to have led to an increase in prices. So the particulars are important and none of that is in here.

I am not going to stray into Mr Jowell's argument but it does highlight a general problem, but it also highlights a problem for the purpose of the binding nature issue, which is if you do have a general statement, to what extent is that meaningfully binding, and we would say it is not meaningfully binding in the way that the operative part is meaningfully binding because it does establish something that we cannot contradict.

PRESIDENT: What about the sentence that I put to Mr Ward: "In some cases they also agreed their respective gross price increases". Suppose that is alleged against you, you say that is vague, we don't know which of those cases you are referring to.

MS BACON: Exactly.

PRESIDENT: Either there may be something in the identified document but if not, then the claimants say we can't give any better particulars because these were secret discussions and not documented.

MS BACON: That is not what they say. They have gone through a great deal of material and they have pleaded in extensive detail specific meetings, specific documents, specific agreements that are said to have been made on particular occasions involving named individuals from the addressee companies. There is an enormous amount of detail and they have done that in their pleadings and we have responded to it.

PRESIDENT: Suppose you say it is open to you to plead and say, no, we never discussed gross price increases. Sorry, we never agreed gross price increases.

MS BACON: Well, that is a point. If we said none of this conduct ever took place, we would be effectively denying the infringement.

PRESIDENT: Not none of this conduct generally, the specific conduct which is found I think particularly in this recital, that in some cases you discuss gross price increases, so it is rather vague --

MS BACON: That is in the operative part. There was collusion --

PRESIDENT: It says you agreed price increases.

MS BACON: We do have a number of denials in relation to alleged agreements. We say that is not in the operative part. The operative part refers to collusion.

PRESIDENT: What I'm asking you is you say it is open to you to say Iveco never agreed on price increases with any other OEM.

MS BACON: Yes, it is open to us because that is flatly consistent, squarely consistent with the operative part. The operative part does not refer to agreements.

PRESIDENT: It says colluding and that is rather vague.

MS BACON: Then that is defined. We accept that can be further specified by looking at recital 68 which says "agreements or concerted practices".

PRESIDENT: It could be. But if somebody reads the operative part and says colluding and wants to interpret what is meant, they wouldn't just pick one recital, they would look at the whole decision to interpret what is meant, rather like interpreting a contract clause which is not clear. You look at the rest of the totality of the contract and they see what is meant is that on some occasions, there was agreement on gross prices.

So you are using that to understand the general word colluding and you would not interpret it just by looking at bits of the decision that you want to look at, you would look at the whole of it.

MS BACON: Well, to be fair, the answer to that is we are not cherry picking. We have gone to the part of the decision that says "legal assessment". The paragraph I have referred to, 68, is the paragraph under the heading "Application to this case".

That is exactly where we accept there is a decisional level finding. It is an evaluative assessment of the conduct saying that this is agreement or concerted practices.

PRESIDENT: What conduct?

MS BACON: The conduct that has been described in the same way as in any competition decision or indeed state aid decisions, we have looked at some of those as well. There is a factual narrative. None of that is regarded as being binding in any of the cases that we have looked at. None of the cases we have looked at come close to importing this kind of factual narrative which you find in every decision in -- and I accept in this decision we have a somewhat short decision. State aid decisions can be five pages or 50 pages or even longer. The same is true of a competition decision. The level of detail or the number of pages of decisions makes no difference.

In none of the cases that we have looked at do you find the wholesale factual narrative effectively imported into the essential basis, and it would not be

meaningful because of the reason I gave you yesterday for why one looks at essential basis. It is something exceptional where one has a lacuna or lack of clarity in the operative part.

There is none of that here in relation to this particular paragraph. We have accepted that the word "collusion" can be further specified and where you look for that specification is in recital 68 which is in the relevant part of the decision where you expect to find the findings as such.

MR JUSTICE FANCOURT: It's the conduct described in section 3.

PRESIDENT: Exactly, recital 68, if you look for the clarification, there it is, it's the conduct described in section 3, so it takes you back.

MS BACON: In the same way that other decisions say "in light of the above". For example, in the Provincie Groningen case I took you to yesterday the decision says "in light of the above". Does that import all of the above into the operative part? No. As we saw yesterday, there were quite key passages in the decision which was were not regarded as essential basis.

PRESIDENT: That may be but to say none of it, so what does collusion mean? It means conduct. That is all you are left with.

MS BACON: No, it means agreements or concerted practices. That is directly specified in recital 68 which it is common ground is essential basis.

PRESIDENT: And that itself is a bit vague because agreement or concerted practice on pricing, you think, well, what sort of agreement about what sort of pricing?

MS BACON: Well, it is specified. Agreements or concerted practices on pricing or gross price increases.

PRESIDENT: What sort of pricing?

MS BACON: This is an issue that one gets in any kind of competition case where you get a description of the kind of infringement that is accompanied in any case by a detailed description of the facts.

PRESIDENT: Yes.

MS BACON: It is not said that one has to look at that detailed description of the facts -- on this occasion, there were agreements on this, on that occasion so and so met.

PRESIDENT: No, this indeed very specifically does not refer to particular occasion. It just says sometimes agreement on gross price increase. So it is not generalised, it is a summary claim.

MS BACON: But on the particular question that you are putting to me, I think the start of this debate was is there anything wrong with the "sometimes there were

agreements on gross prices" and I have given you the answer to that. Gross prices is in any event in the operative part. But the word "agreement" is not, it's not there, and it is not in recital 68 either and there would therefore be a contradiction.

There is no basis on which that can be resolved other than by saying that the essential basis is in paragraph or recital 68 which is exactly where you would expect to find the finding of the decision in the legal assessment.

PRESIDENT: Yes, well, we have heard that. What is your next point?

MS BACON: Those were my submissions on recital 51 and I am handing over to someone else on recital 52. I am not sure who. Mr Jowell.

Submissions on recitals 52 and 53

MR JOWELL: Chairman, members of the Tribunal, recital 52 is expressed in terms, as you will see in the opening words, which purely relate to illustrative examples of discussion from the early period. The first point we make is that illustrative examples are quintessential matters that are not liable to be essential basis for a decision, in their own very terms.

Mr Ward accepted that an appeal on these illustrative examples would not lead to a quashing of

the operative part of the decision or indeed any part of it. Instead he sought to suggest that these could constitute what he called freestanding violations of article 101.

That is nothing to the point because the infringement does not relate to freestanding violations of article 101. It relates to a single and continuous infringement.

So, a party coming to court and saying that one of these examples or even all of these examples were wrong or inaccurate could not successfully challenge the operative part of this decision. And that is what matters when it comes to deciding essential basis.

Even if we are wrong about that and these are some of the caterpillar's legs as Mr Ward put it, then at most, that would apply to the fact that these meetings took place and related to the general matters that are described in the operative part of the decision.

The detail that one sees here about the nature of the agreements, well, at most that is the hair on the caterpillar's legs. It is certainly not matters that are essential to the operative part.

That is what we have to say about recital 52. As regards recital 53, the position is even more clear because these recitals really stray into matters about

the use of the euro currency to reduce rebates and a particular discussion in relation to France which are nowhere mentioned or alluded to in the operative part of the decision.

So if the defendants wish to take issue with the detail of those descriptions as they do, they should be entirely permitted to do so because these are inessential matters in relation to the decision.

Unless the Tribunal has any further questions, those are my submissions on the recitals.

PRESIDENT: Thank you.

Submissions on recitals 54, 55 and 56

MS FORD: Sir, I am dealing with recitals 54, 55 and 56 and I make largely very similar submissions to those I made in relation to recital 49:

The first sentence of recital 54 is essentially a high level and relatively vague summary of the collusive contacts that the Commission has found took place in a particular time period and it refers in general terms to the subject matter of those exchanges and it refers to the two different levels at which those contacts have been found to take place.

And again, my submission is any particular individual instance of the conduct to which the Commission is referring could be contradicted and it

would not result in annulment of the operative part.

The second half of recital 54 is then a specific example of a particular meeting and as Mr Jowell indicated, insofar as the decision gives specific examples, if that example is then undermined and knocked out, then that does not undermine the infringement of the operative part as a whole. So nothing in this recital is essential basis.

Recital 55 and 56 are both concerned with the German level exchanges. 55 concerns the earlier period and 56 concerns a period in which the Commission says they became more formalised. 55 gives generalised statements about the occasions on which the meetings took place, the means of communication that were used and the topics which were discussed. And again I am addressing everything except the last sentence in that submission.

Again, each of those elements could be individually challenged without impugning the operative part in my submission.

In relation to the last sentence, I would gratefully adopt the point that the Tribunal made in relation to that. That, in our submission, concerns matters which fall outside the scope of the operative part. The operative part clearly sets out what collusion has been found and it relates to pricing and gross price

increases and then concerning the cost for introduction of emission technologies and in our submission the matters in the last sentence of 55 fall outside the operative part.

Recital 56 is describing how the German level meetings then became more formalised and it refers to the use of spreadsheets, the contents of the exchanges and the frequency with which they took place, and again in my submission nothing in the operative part turns on these sorts of details about whether or not spreadsheets were used or information on available options was indicated separately, or whether or the extent to which information was or was not forwarded to headquarters.

So again in my submission, these are details which could be challenged and which do not undermine the operative part and so are not binding.

Unless I can assist further on those three recitals, those are my submissions.

Submissions on recital 54

MR HARRIS: Can I bring to your attention, sir, a specific point about recital 54 as a further illustration of the danger of bindingness on some of these detailed granular points.

Do you see sentence 2 of paragraph 54:

"For example, during a meeting on 10 and 11 April

which was attended by, amongst others, representatives of the headquarters of all of the addressees ..."

So what you are being invited to do is declare that that is essential basis and binding so that there can be no further factual exploration of it. But it transpires that that is wrong. So in my pleading in Ryder and Dawsongroup, we explained that in fact the representative from Daimler's HQ was invited to attend but didn't actually attend. And then I will not take you through all the detail but it then explains how he was sought to be brought up to speed to some degree on what had happened. But there is a series of detailed factual pleadings over half a page about how that worked or didn't work. So that is the first point. There is a factual error in there.

Then the second point is again, without looking at the detail but over two full pages of pleading, by reference to the documents which underpin the plea at recital 54, which documents had been pleaded specifically against us in the manner to which Ms Bacon drew your attention, we have gone back on each one of those and there are several instances where we specifically deny that there was an agreement in the documents which found the factual pleas against us.

So agreements are alleged and we have explained that

that is denied because, denied in light of, denied, have a look at this further thing. I hope that provides an illustration of the sort of points that we were talking about before.

If you want the references to those, that is in the Daimler --

PRESIDENT: It will be in your schedule, won't it?

MR HARRIS: When it comes, yes, precisely.

PRESIDENT: Yes, 57.

Submissions on recital 57

MS BACON: 57. Much of this is admitted. It is admitted there were exchanges on gross prices, the new emission standards technology and delivery periods. It is admitted that as of 2008 the German exchanges used a unified template for the purposes of exchanging information. What is not admitted or not uniformly admitted are the various vague and general factual qualifiers to the descriptions.

For example, the expression that gross price increases were planned future gross price increases, or the description of the frequency of the exchanges as taking place regularly, or the duration of the exchanges as being over the years. Those kind of vague and general statements or adjectives are not admitted for essentially the reasons that I discussed when exploring

recital 51.

They don't make any final determination and they couldn't be binding in any meaningful way, given the lack of specificity, nor can they be said to clarify the operative part, they don't clarify it given the fact that they are lacking in detail and vague.

PRESIDENT: When you say they are vague, I understand that about "regularly" but to talk about a price increase as a future price increase as opposed to an existing price increase, is that vague?

MS BACON: Well, it is making a comment, a general comment about intention.

PRESIDENT: No, it is just saying --

MS BACON: Planned future.

PRESIDENT: Yes, it is not an exchange on what the prices are now.

MS BACON: But it goes to trying to ascertain whether something is at a particular time planned and there are detailed pleadings on whether some of the price increases were in fact planned or whether they were already current and available in the market. And that is set out in the detail of the pricing. There are a number of occasions where an allegation is made in relation to a future price increase and that is denied on the basis that it is actually a current price that

was being discussed.

PRESIDENT: That is saying it is wrong, it is not that it is vague.

MS BACON: The point is here there is no detail that on a specific occasion there was a future price increase. It is a general comment about planned future price increases but with no specificity as to when this occurred. It is simply "over the years".

So those kind of statements are not admitted and Mr Ward's only real answer to that was to say, well, yes they are vague but yes, that is what they signed up to. That is what the addressees admitted by signing up to the settlement decision. You have my comment on that. That is conflating a different issue. It is not the issue for this hearing and today.

PRESIDENT: Yes.

Submissions on recital 58

MS FORD: Sir, recital 58. Dealing first with the first sentence of recital 58, it has already been canvassed that there is a distinction to be drawn between on the one hand the question whether a recital is binding and on the other hand the question of how the recital should be interpreted and I say that that distinction is relevant to this sentence in two ways.

The first is insofar as this recital is to be

understood as saying something about the effects of the information exchanges, then that falls outside the scope of the operative part of the decision because it finds an object infringement, so findings of effects are not necessary.

Secondly, insofar as the first sentence is to be understood as saying that all exchanges put the addressees in the position to take account of the information exchanged, their internal planning process etc, then in my submission that sentence cannot be binding because it is not necessary to the operative part to say all such exchanges had such an effect.

Turning to the second sentence of that recital: this sentence is extraordinarily vague. Mr Ward quite rightly accepted that it is a tentative finding. It says the information may have influenced the price positioning of some of the addressees' new products. So it is really very difficult to know what is actually meant by this. Did it or did it not influence pricing and of which products. In circumstances when it is that vague and that inconclusive, in my submission that sentence simply cannot be binding.

HODGE MALEK QC: And you don't know which addressee either?

MS FORD: You don't.

HODGE MALEK QC: So you say either that may be accurate,

it may not apply in any event, but more importantly you say it is not actually an evidential point?

MS FORD: It cannot be, it's --

HODGE MALEK QC: You can say X happened, that is a finding. If X happened on the balance of probability, that is also a finding. If it says X may have happened, assuming you interpret it as being less than 50%, it is not really a finding at all. It is just a possibility.

MS FORD: Indeed. It does not have sufficient content to be said to be a binding finding in any event.

Moving on to 59, I can deal with that quickly because essentially 59 is giving illustrative examples. For the reasons I have already submitted, illustrative examples can themselves fall away and would not undermine the operative part of the decision so this recital is not binding.

PRESIDENT: Just one moment.

Is there any finding about discussions on Euro 4 and Euro 5 standards other than the last sentences of recital 59?

MS FORD: I would want to check and confirm to you.

MR WARD: Sir, I can help with that. The only other mention is in recital 54 which is also said of course to be non-binding.

PRESIDENT: 54. Yes, that is Euro 4.

MR WARD: Yes.
PRESIDENT: But Euro 5 --
MR WARD: Euro 5 is only in 59. I am so sorry, sir, I misunderstood the question.
PRESIDENT: Yes, so if the last sentence, the finding in the last sentence of 59 was successfully challenged, will that undermine and lead to modification of article 1 in extending to include Euro 5?
MS FORD: Well, these are said to be illustrative examples. They are not said to be --
PRESIDENT: Well, if there were no evidence, it's the only evidence, how can the conclusion survive? The evidence has to be in the decision, doesn't it?
MS FORD: There is recital 50 as well which refers to Euro 3 to 6 standards, so there's a more general statement, and of course article 1 makes a finding to that effect. If in practice one were able to challenge and undermine all evidence which suggested that there had been collusion in relation to a particular standard, that of course would have the effect of undermining the operative part insofar as it makes a finding in relation to that standard.
HODGE MALEK QC: So 59 is only an illustration of Euro 4 and Euro 5. You are saying it is caught more generally under recital 50, is that what you are saying?

MS FORD: I am, yes, and I'm relying on the way in which the Commission is describing the content of recital 59. It describes it as examples and it says they illustrate the nature of the discussions in which the representatives of the German level took part.

So the purpose of this recital in the Commission's exposition is to give illustrations of the nature of the discussions.

MR BEARD: It is worth noting there is not a freestanding reference to Euro 6 anywhere apart from the Euro 3 to 6 reference in paragraph 50. So Euro 6 is not specifically considered, it is just picked up in the operative part.

PRESIDENT: Yes. Thank you.

Submissions on recital 60

MR JOWELL: Recital 60. I think as Mr Ward indicated this recital is very largely admitted. The only two respects in which MAN takes issue with it are that first, it is not accepted that the MAN information related to November 2010 and January 2011; as we explained in our skeleton argument, it actually related in our submission to December 2010.

Secondly it is not accepted that the handwritten note reproduced the contents of the list that is also adverted to in this recital if "reproduced" is used in

the sense of a literal reproduction, in the sense it is not accepted that it is replicated in full or that the information necessarily derives from the list.

Now, I think really just stating the nature of those disagreements shows that those aspects of this recital can't possibly be binding and indeed, it would not be desirable that they should be made binding. I really have nothing further to say about that. Thank you.

Submissions on recital 61

MS BACON: Recital 61, the operative part of the decision finds an infringement which is EEA-wide in scope.

The problem with this recital is that it goes further and it says that the geographic scope covered the entire EEA throughout the entire period of the infringement. And that is the part that it is not admitted, or not admitted by all.

As to that, the point that the geographic scope covered the entire EEA throughout the entire duration of the infringement goes further than the operative part in a way that is not essential to the decision. It goes beyond the substance of the operative part because it says something on the geographic scope and the time period during which the agreement is said to have covered the entire EEA that the operative part does not. What you have here is not something that is either

expressly or implicitly in the operative part, but a finding that on its face contradicts the scope of the operative part.

And on that there are two responses, which is that --

PRESIDENT: Sorry, you say it contradicts?

MS BACON: Yes, because it says it covered the entire EEA throughout the entire duration of the infringement which the operative part does not say. It simply says -- the operative part simply says that the infringement was EEA-wide in scope. It does not say that it was throughout the entire --

PRESIDENT: I appreciate that it goes beyond it, which I think was your first point.

MS BACON: Yes.

PRESIDENT: I do not quite understand why you say it contradicts it.

MS BACON: Beyond is probably the right word. It is something that is not in the operative part and it is therefore akin to the CMA case that we looked at yesterday, to remind you that is in tab 20 of the first authorities bundle, which found that comments in the recitals of a decision regarding an agreement that was not the agreement referred to in the operative part didn't form part of the essential basis of the operative

part.

In that case, there were two distinct agreements but the same principal applies. The operative part here makes a statement that infringement covered the EEA and here there is something that goes far beyond that and beyond that in a way that is very material and is denied and we have specific denials in relation to the conduct covering the entire EEA throughout the entire period of infringement listed in our denial schedule.

It is not necessary to import this into the operative part to clarify any ambiguity because the operative part does not need to say, nor is there any lacuna in the decision in the operative part when it does say that the infringement was EEA wide. That is sufficient for the purposes of the finding of the infringement and the identification of the geographic scope.

MR JUSTICE FANCOURT: The operative part says in the EEA. It does not say EEA-wide.

MS BACON: In the EEA. It does not say that in every country of the EEA the infringement was continuing throughout the period of the single and continuous infringement.

So what is sought to do here is to use the recitals to import a finding which is not necessary to the

operative part. That is all I think that needs to be said about this quite short recital.

PRESIDENT: Yes.

Submissions on recital 62

MR BEARD: Dealing with 62. 62 in the schedule was said to be a concern. It is said by Mr Ward not to amount to essential basis. It is just interesting to look at 62. 62 is the duration of the infringement recital and it is also of course mirrored by 89 which is the duration of infringement summary.

Now, Mr Ward rightly accepts that both of those recitals are inconsistent with the operative part because it is not correct to say that in the operative part all the addressees started their participation in the infringement as found on 17 January 1997. That is simply not borne out in the terms of the operative part. In other words, this is a case which, like the recital which Ms Bacon has been referring to, goes far beyond what is in the operative part.

Therefore to look at it --

PRESIDENT: This is inconsistent?

MR BEARD: Yes, this is inconsistent. Mr Ward puts it in terms of, well, "the operative part takes precedence" was the language he used. We say that is the wrong way of looking at these things. The operative part is

binding and what you have here, we accept that you need to have a duration for an infringement, but it is actually illustrative of the fact that you shouldn't be seeing recitals as binding because you have recitals that are inconsistent on supposedly crucial matters and one simply sets them aside. They are not essential basis at all.

So effectively, you don't have any valid recital finding on the duration of the infringement in these recitals. We say that is perfectly understandable because you don't need to have some sort of essential basis finding in these recitals because you are engaged in the wrong exercise.

Just to be clear, it is of course correct in section 6 of the decision that you have consideration of individual liability by undertakings but of course that is predicated on the prior account of the nature and scope of the infringement if you are looking at these recitals.

PRESIDENT: Don't you need a duration for each individual?

MR BEARD: For the individual liability, yes, but the point I am making --

PRESIDENT: So you need that to get to the operative part in article 2, don't you? To get your fines on each company.

MR BEARD: Yes, undoubtedly in order to impose penalties on individual undertakings you have to look at the liability.

PRESIDENT: If they have imposed a penalty which is inconsistent with the duration, that would be a ground for annulment of the penalty, wouldn't it?

MR BEARD: We are dealing with a slightly separate issue here. The point we are dealing with is back at 62. Here you have a component of what you might assume was necessary for a finding of infringement. If you are going to look at recitals as binding and consider these things as important, you would expect you would have a recital spelling out the duration of the infringement overall.

What the claimants concede is you don't have any such recital that provides the essential basis for the duration because the thing you have here and in 89 is wrong. The only additional point I was making was that the references to the liability of the individual undertakings that comes in section 6 doesn't redeem that.

So it is illustrative of the broader point. You would expect there to be -- on this case that you need essential basis in the recitals, you would need to have an accurate recital setting out the essential basis in

relation to a duration. You don't have it here. There is no claim that there is essential basis recital in relation to duration in 62 and 69, yet still obviously --

PRESIDENT: Well, you do have it.

MR BEARD: -- you have a finding in the operative part of duration.

PRESIDENT: You say there is no recital setting out duration. Of course there is. It is just common ground that it has an error in it. It is not saying there is no recital there.

MR BEARD: Well, you don't have a recital that is set out that provides an essential basis for the finding in the operative part. And that is why the claimants don't maintain its essential basis.

So they don't maintain that there is any essential basis provision in relation to the overall duration of the infringement in this decision.

They do say the liability findings in relation to individuals but you don't have an essential basis finding in relation to the decision.

PRESIDENT: I thought their case was -- perhaps I misunderstood -- that the whole of section 3 is the essential basis. That was my understanding.

MR BEARD: I understood Mr Ward to say 62 wasn't essential

basis. We can go back and check the transcript.

PRESIDENT: We needn't check the transcript. Mr Ward, can you clear that up?

MR WARD: Our position on 62 is there is obviously an error in it. We don't seek to argue that 62 is binding in the face of what's in the operative part. It is like the Adriatica case where there is an inconsistency between the two, and that is why I used the phrase "precedence", that what's in the operative part is plainly binding on the court, not an inconsistent recital that appears to be simply wrong.

We think it is just typographic but whether or not it is typographic, I am not here urging upon you that the effect is that some Volvo subsidiary that apparently only started its participation in the cartel on 20 January 2004 in fact started on 17 January 1997. Our submission I hope is a bit more realistic than that.

MR BEARD: With respect to Mr Ward, I hear what he says but I don't understand whether or not he's maintaining that that constitutes essential basis.

PRESIDENT: Mr Ward, are you saying that as corrected, it needs to be corrected, reading the decision as a whole, as corrected it is the essential basis or that one just should disregard it altogether?

MR WARD: No, if it was correct I would be arguing it is

essential basis. I am not pressing that point upon you because it is plainly incorrect.

MR BREALEY: Can I just interject on that answer?

MR WARD: I thought it was.

MR BREALEY: You have recital 62 which refers to the addressees. The addressees are defined in 1.2, that is section 1.2 of page 5 of the decision, and it says addressees and it refers to the undertakings.

It may well be that when the Commission is referring to addressees at recital 62, it is actually referring to the undertakings, that is to say the MAN undertaking, the Daimler, Iveco, etc, and if that is so, that is correct. So I do not necessarily accept that recital 62 is wrong.

HODGE MALEK QC: Do you need recital 62 at all, given what is in the operative part?

MR BREALEY: You don't but whether you can say it is not an essential basis -- I agree, if it is in the operative part it is in the operative part but I am not accepting that it is necessarily wrong.

HODGE MALEK QC: But you don't need it at all?

MR BREALEY: No.

MR BEARD: Our point is if you don't need it, it is not essential. It is not very sophisticated but it is nonetheless true.

Submissions on recital 68

MR BEARD: I think I am back up dealing with 68. 68 obviously has a typo in relation to section 4. The broad position is that in relation to the cross-references back, we rely on the position that has been taken in relation to all of the cross-references to section 3. But insofar as what is found is that there is a complex infringement contrary to article 101, we recognise that that can be seen for these purposes as essential basis albeit that that is what is then found in the operative part.

Insofar as it is talking about consisting of various actions which can either be classified as agreements or concerted practices, we end up back in some of the discussions we had in relation to recitals 50 and 52. I will pick that up a little more fully in relation to recital 71, if I may. But the start of that we see as essential basis. Undoubtedly you then move on in 68 beyond that basic proposition to a somewhat vague statement which we say is not necessary for the final operative part.

PRESIDENT: Which bit of 68 is not binding? Or put it this way, is not the essential basis?

MR BEARD: Well, the treatment of various actions as being potentially -- where you have something characterised,

and this essentially pre-empts the point I will make in relation to 71, where you have a situation where you have a single continuous infringement being found in the operative part, there is no need to make findings that any of the particular actions or conduct which go to make up the single continuous infringement, the single infringement, are themselves autonomously agreements or concerted practices which could autonomously infringe article 101.

None of that is necessary for the out-turn finding. Mr Ward in his submissions referred to the idea that you needed a patchwork of infringements to reach a single continuous infringement finding but that is not correct.

What you are doing by making a single continuous infringement finding is identifying conduct at different times and deciding that that conduct at different times should be treated as a whole and treated as a single and continuous infringement. It is not a necessary ingredient of that that each part of the conduct is itself an unlawful agreement or concerted practice.

PRESIDENT: I have misnoted it. I thought we were told that recital 68 was accepted as an essential basis.

MR BEARD: Yes. The fundamental part of it is, but to be consistent with 71, that latter part I need to clarify the position in relation to.

PRESIDENT: So it is not insofar as it suggests that the individual actions were themselves an infringement, is that right?

MR BEARD: Yes because that is also consistent with the position in relation to recital 71 and also consistent with the points that have already been made by others in relation to recitals 50 and 52.

PRESIDENT: So that is the bit that is not accepted.

MR BEARD: There is a further caveat in relation to 68. If and insofar as it were to be read as suggesting that there was knowing infringement then there would be an objection to 68. But this goes back to the point that Ms Ford was making which is there is a distinction in today's exercise, which is looking at what propositions might be treated as binding, and the actual interpretation of those particular propositions because there will be argument about what some of the details of these propositions mean in any event.

As I say, I will come back to these points in 71.

Submissions on recital 69

MS BACON: Recital 69. The first sentence is accepted as being essential basis. The second sentence has a quite different character and the second sentence of 69 says:

"The addressees were in particular involved in the above-described anticompetitive arrangements through

several layers of competitor meetings and other contacts which took place at the headquarter level and the German level."

This is therefore a point, again, of factual detail, and again vague factual detail, describing the mechanics of the infringement in a way that in our submission could not meaningfully be binding because of the vagueness in the generality. "Several layers of competitor meetings and other contacts". What in that could meaningfully be said to be binding? Similarly, "took place at the headquarter level and the German level". What in that is binding preventing us from pleading to relevant allegations that are made by the claimants in detail.

None of this is decisive about the nature or scope of the infringement or indeed about anything. None of these details come close to being essential to the finding that is in the operative part. It's background factual detail of a very high level of generality. That is why the second sentence in this recital is quite different to the first sentence, which we do accept as being essential basis.

PRESIDENT: Thank you.

Would that be a sensible moment to take a five-minute break?

(3.20 pm)

(A short break)

(3.28 pm)

Submissions on recital 71

MR BEARD: So, 71, the first sentence of 71 which says "in the present case the conduct described in [should be section 3] constitutes a single continuous infringement", that is accepted for these purposes as essential basis.

The remainder of it isn't. We encounter in the second sentence in fact a fuller version of the problem that I raised in relation to 68:

"At the same time, on the basis of the facts described above, any one of the aspects of conduct including in respect of any one of the products and in respect of any one of the Member States has as its object a restriction of competition and therefore constitutes an infringement in its own right."

That read on its face is a remarkable proposition. It is not remotely reflected in the operative part of course, because what that is saying is any aspect of this conduct in relation to any Member State in relation to any one of the products is itself an infringement.

Now, that, going beyond the terms of the operative part, plainly is not essential basis. First of all

it is incredibly vague just to be talking about any one of the aspects of a conduct. It is very unclear what it is referring to.

Secondly, it is not necessary for the operative part because as I have already indicated, you don't need to make multiple findings of autonomous infringements in order to have a single continuous infringement. Furthermore, as I have said, it goes well beyond the scope of the operative part and indeed, it is actually not consistent with for instance recital 50, on which Mr Harris commented, where there was a discussion about collusive arrangements including agreements and concerted practices on pricing and gross pricing, but there the implication is you can have non-infringing conduct which taken with other conduct then constitutes the infringement overall.

So we say the second sentence plainly is not essential basis and would be inappropriate to treat as binding.

Then in sentences 3 and 4, we are talking about objectives and aims and the simple point here is even if one is to accept the propositions in recital 70 about the nature of the case law on infringements, those particular aims are not necessary for the finding in the operative part.

In other words, there may well be other aims that could be found. There could be criticism of these particular aims and you would still have the operative part as stands.

PRESIDENT: I do not understand that, Mr Beard. There could be other aims, there could be a wholly different decision, but this is the decision.

MR BEARD: Yes.

PRESIDENT: Unless there is evidence set out in the decision that there is an overall plan and with a single aim, you can't uphold single continuous infringement so the decision has to set out what it says is the aim. Somebody else might say there was a different aim but this is what this decision has found as the basis of its inclusion.

MR BEARD: The point I am making is when we are applying the essential basis test as has been described by Ms Bacon in particular, we are asking ourselves if there could be a variation in the particulars of the finding of aim here which are described as coordinating each other's gross pricing behaviour and the introduction of certain emission standards. If there was a variation in the terms of that aim, could you still have a sufficient aim of collusion between the addressees in order to result in the operative part and we say yes, you could.

It may well be that there isn't, there ends up not being a great discussion about these sorts of issues in practice. But if you are asking whether or not they are essential basis, we say those sentences can't be because you could vary the precise terms of the aims and objectives referred to and still end up with the final operative part. You just have to have an overall anticompetitive aim.

PRESIDENT: But you have to establish what it is?

MR BEARD: You do. Absolutely.

PRESIDENT: You can't just say, "This has a single anticompetitive aim", and expect to uphold a decision that there is a single and continuous infringement.

MR BEARD: That may well be right. The point I am making is slightly different.

PRESIDENT: Surely it is right, isn't it?

MR BEARD: When we are applying the essential basis test, if you could vary the terms of this aim --

PRESIDENT: But where else in the decision is there evidence on which you would vary it?

MR BEARD: Sorry, the point is I do not think one has to look through the decision in order to find the basis on which one would vary it. That wouldn't be the relevant test. The question is for the purpose of these proceedings, is it impossible and are the defendants

precluded in these proceedings from putting forward evidence that says, actually, the aims in question were not precisely these aims albeit they amounted to an anticompetitive economic aim of collusion that could lead to the operative part infringement.

We say yes, they can. Whether or not they will is a separate matter entirely because what you need for the operative part is that single anticompetitive economic aim but it does not have to be precisely characterised as it is in the decision in order for that operative part to be maintained.

In other words, it could be different. You still have the operative part. If something can vary and still maintain the operative part, then it can't be treated as an essential basis in that regard.

So whilst the finding of an overall aim may be part of the essential basis, the characterisation of it that we see in those sentences does not need to be.

I think that deals with 71 and I think I hand the baton to Mr Jowell.

Submissions on recitals 72 to 77

MR JOWELL: These paragraphs which I am now dealing with, 72 through to 76, deal with some of the detail relating to a single and continuous infringement.

PRESIDENT: Yes.

MR JOWELL: Our primary case is that articulated by Mr Beard already, that the only essential finding is of a single and continuous infringement. And it is not necessary to go any further or any deeper. However, Mr Ward wishes you to examine also the constituent elements of a single and continuous infringement and so I would like to deal with that as an alternative submission on our part.

If the Tribunal will forgive me, could I go to an authority that would very briefly and succinctly summarise the requirements for a single and continuous infringement. It is in volume 4, at tab 70.

If you could go to page 15 of the bundle.

PRESIDENT: It is International Removal Services?

MR JOWELL: No, it should be Team Relocations.

PRESIDENT: Yes.

MR JOWELL: If I could invite the Tribunal quickly to read paragraphs 34 to 38, they are not long.

PRESIDENT: Yes.

MR JOWELL: So we see three constituent elements: the plan with a common objective, the intention or contribution of the undertaking to that plan, and the awareness of the offending conduct of the other participants.

It is important to note however what they mean by intentional contribution. That can be established by, as it says, by it being reasonably foreseeable, not

actual intention in the literal sense.

If one then looks at the recitals against that backdrop, one sees in the recital that Mr Beard dealt with, at the third paragraph of 71 which identifies a single anticompetitive economic aim, one sees in recital 72, in the very last few words, "within the framework" -- it links up to "the collusive contacts were", and then the last few words, "within the framework of an EEA-wide plan, having a single objective". So that is requirement number 1.

Then if you go forward to recital 76, we see in the last sentence of 76:

"The addressees ..."

And then one can leave out the rest because we say that is inessential until one gets to:

"... could reasonably have foreseen the general scope and the essential characteristics of the infringement as a whole."

So that is the awareness and the intentionality.

PRESIDENT: Yes.

MR JOWELL: So we say those are the only findings that are essential if you wish to go to that further level below of the constituent elements.

I think somebody also wants to say something further about 76. No. Forgive me.

Forgive me, I am through all the way to 77. That includes 77 as well. My junior is noting that that also covers 77. So I am relieved to hear that nobody wants to say any more about 76 so I think that we can move on to 78.

Submissions on recital 78

MR BEARD: 78. This one is a relatively quick one. We accept this is essential basis. Indeed, going back to the points I was making about 71, what you have there is an exposition of there being a common design without having to particularise it and that is what amounts to the essential basis here.

We place the normal caveat that this should not be read as implying, knowing or intentional commission of an infringement, but I won't reiterate Ms Ford's wise submissions about the difference between interpretation and bindingness for these purposes.

Submissions on recital 81

MS BACON: Recital 81. The first sentence is admitted as essential basis. Mr Ward says that the consequence of this is that because it refers to by way of cross-reference behaviour described in section 3, then all of the cross-referred paragraphs must also be binding.

So Mr Ward's caterpillar is by now a very hungry

caterpillar and wants to gobble up all of paragraphs 49 to 60. But that does not follow because this sentence is an evaluative and decisional statement that the conduct described has the object of restricting competition but that of course does not mean that all of the factual narrative that is being evaluated must in itself be binding. It is a typical distinction between the operative part which is the evaluative statement and the recitals which are the reasons for evidence.

So under the conventional characterisation of parts of EU legal acts, the recitals that are referred to here are the evidence or the reasoning and they are not the decisional statement.

The remainder of this recital is admitted in part. So it is admitted that there was an exchange of information on gross prices and on the timing of the introduction of emission technologies which is in any event already in the operative part so that adds nothing. Most but not all of the defendants admit that there was also an exchange of information in relation to order intake and delivery times, but this is in any event not essential basis because that particular point is not in the operative part, as the Chairman noted in the exchanges earlier today with Mr Ward.

The points about order intake and delivery times are

not in the operative part either expressly or implicitly, so that is again something analogous to the CMA case where the grounds contain something that goes beyond the operative part and which therefore cannot be the essential basis of the operative part.

As to the statement that there was coordination, that is not admitted and it is again not a finding made in the operative part which refers simply to collusion.

The statement about coordination in the second sentence is in any event very vague. What does it prevent the defendants from disputing? As Mr Harris said earlier today, coordination does not mean alignment. It could equally extend to something which is quite non-aligned. The defendants have coordinated their submissions this afternoon but we are not all making the same submissions. We are making quite different submissions in relation to different recitals. It admits of a multiplicity of meanings and for that reason it is too vague in our submission to be binding upon us.

The final sentence suggests that the mechanisms adopted by the addressees were aimed at restricting price competition. That sort of point has already been dealt with because this is clearly not a necessary part of the decision in the operative part, which doesn't

have to have any finding on intention for the reasons given in our skeleton argument.

What is necessary is the finding in the first sentence of this recital that the conduct has as its object the restriction of competition which we have admitted as being essential basis.

The other point to make about the last sentence is that the general reference to various arrangements and mechanisms adopted by the addressees are also too vague to constitute a specific binding finding in any event.

PRESIDENT: Yes, Mr Beard?

MR BEARD: I think we are now at --

PRESIDENT: 84?

MR BEARD: -- 84. Yes, 84 in relation to appreciability.

Submissions on recital 84

MR BEARD: The real answer lies essentially in 85, that it is accepted that the first sentence of 85 is essential basis, and there you can see how the effect on trade finding is being made by way, as Mr Harris already adverted to, of a presumption that there are effects on trade that are appreciable, and in those circumstances, whatever 84 means, and I think everyone accepts that it looks rather odd as it is, precisely how it should be rewritten, that does not mean it is part of the essential basis for the finding of appreciable effect in

these circumstances.

It is very much a building block and it is a slightly coded building block given its wording. In those circumstances, we say it is plainly not essential basis.

PRESIDENT: I think Ms Bacon it is you again.

MS BACON: This is another point on appreciability. This recital is admitted insofar as it finds appreciable effect on interstate trade in the way explained in the admissions schedule. The rest of the recital is simply the factual basis of that finding. So for example the fact that the infringement covered several Member States is not a finding in itself, it is simply a part of the reasoning or the evidence for the finding of an appreciable effect on interstate trade.

There are no specific findings made at all regarding for example market share or turnover or the extent of cross border trade because they of course don't need to be in order to establish the infringement in the operative part.

Submissions on recitals 87 and 88

MR HARRIS: Sir, and members of the Tribunal, I am to deal with 87 and 88.

Sir, this is a little bit of a damp squib if there is any real dispute here. The key point to note is that

the OEMs accept the essential basis of recital 88. So recital 88 says that the Commissioners therefore reach the conclusion that the conditions provided for in article 101.3 or 53.3, so the equivalent in the EU law, are not met in this case.

So that is binding. Nobody seeks to go behind it. It is perfectly clear what that means.

PRESIDENT: 87 is not going to be an issue in this case, is it?

MR HARRIS: This is why I say it is a damp squib. We don't understand in light of the fact that 88 is binding and essential what on earth 87 adds to it.

PRESIDENT: Mr Ward, just a moment.

Mr Ward, it is not really of concern to you --

MR WARD: It is not. As I said in my opening remarks though what concerned us was that they were not prepared to admit it. We are not quite sure what the tactical game is over there, but it concerns us.

MR HARRIS: There is no tactical game at all. The point is that we need to be able to say, as is common ground on the questions of causation and quantum, that any given act of conduct had any particular effect.

If in the course of doing that during the argument about causation and quantum it turns out that there has been, to use the language of article 101.3, a benefit or

an advantage, so be it. That is what will happen at trial. We shouldn't be precluded from that.

So it is a non-issue, this point.

PRESIDENT: Well, I don't know. If what lies behind it is that you may want to run an argument on when there is quantum of loss saying, well, you must set off against that loss the following benefit and therefore any damages fall to be reduced --

MR HARRIS: No. No. And we are not going -- all we are saying is we have to have a free rein, as I understood to be common ground, that the effect of any given act of conduct is X or Y or Z. If it so happens that one of them has a benefit or an advantage, we can't be precluded from that because at the time of the Commission decision it said you don't comply with the exemption requirement.

HODGE MALEK QC: If it does have a benefit or an advantage, how are you going to use it?

MR HARRIS: Certainly not to seek to undermine that which we accept is essential basis. This is why I say it is all a bit of a damp squib. We are not trying to unpick or play a game with the finding that we didn't meet the exemption requirements. And if you like the icing on the cake is of course that 87 simply refers to on the basis of the facts before the Commission. But you,

members of the Tribunal, are going to be met with facts that were not necessarily before the Commission. That is the whole point of some of the detailed pleadings. So again, it is a meaningless addition to add to the list of so-called essential bases.

PRESIDENT: Yes.

MR BEARD: Sorry, just on the point, Mr Chairman, that you raised about the interaction between 101.3 issues that Mr Harris has dealt with and we adopt his submissions in relation to that, you could still in relation to quantum issues have issues about any putative price rise that is being referred to inuring to the benefit of claimants and there being set-off issues without that falling within the scope of 101.3.

PRESIDENT: Yes. I mean benefit must mean here benefit within the terms of 101.3.

MR BEARD: Yes, and the only reason I'm raising it is just by reason of your passing comment, Mr Chairman.

PRESIDENT: I think that must be how it is read.

MR BEARD: I am not demurring in relation to that. It was the wider proposition that you floated, sir. I wanted to make sure that we had set out our position on that.

PRESIDENT: Whether binding or not, it can't mean anything else.

MR HARRIS: We agree with that, sir, yes.

We now skip. We have left sections 3 and 4 and the next one is 102 which is a section 7 submission. Of course, section 7 of the decision is entitled "Remedies". So it is of a completely different genre and type than those which purport to give either the legal assessment in section 4 of the infringement or in section 3 the background facts setting up the infringement.

So as you will recall from the generic submissions, one of our points is that section 7 can't meaningfully contribute to the essential basis of the infringement finding. What it is going to is a completely different generic type of issue, namely what should be done about it now we have found the infringement. What is going to happen in the trial is you are going to take the infringement and the essential basis of the infringement and you are going to ask what did that cause and how much if anything is that worth.

So we have now moved beyond that. What we say is this can't be -- none of this in section 7 can be essential basis for the acts that are going to take place at the trial.

PRESIDENT: The invocation of article 16, we cannot take any decision which is contrary to the decision of the Commission.

MR HARRIS: I accept that.

PRESIDENT: That is not just article 1.

MR HARRIS: I accept that. I am going to come on to that.

Then we turn to the recital 102 and we look at the first sentence and what it says is the dispute seems to is it centre around the word "secrecy". Now, "secrecy" does not feature anywhere, whether it be in article 1 as regards infringement or for that matter anywhere else in the remedies part of the dispositif of the decision. So it is nowhere in article 2 and it is nowhere in article 3 and it is nowhere in article 4.

Of course that is not surprising because it makes absolutely no difference and it is not essential to either the infringement finding or to the remedy or to the list of addressees or to whether or not you have to cease and end the infringement promptly whether or not something is secret. That is the simple answer to secrecy. It is neither here nor there.

Let's say I were to establish that not a single one of any one of the meetings or instances of conduct anywhere in section 3 and 4 was secret. It doesn't make a scrap of difference to article -- certainly not article 1, but nor to 2, 3 or 4. Put another way, is there any ambiguity or lack of clarity in article 2, 3 or 4 on the question of anything relating to secrecy,

and the answer to that is no. So on that basis, you can't be essential basis.

I think there is not really any meaningful dispute about the second sentence of recital 102 for very similar reasons. Article 3 of the dispositif says "we shall immediately bring to an end the infringements, we shall refrain from repeating any act or conduct or any act or conduct having the same or similar object or effect", and that is extremely clear. It couldn't be clearer. Therefore nothing in the second sentence of recital 102 contributes in any meaningful way, let alone in an essential way, to understanding the clear prohibitions and admonitions and orders in article 3.

So that is the end of that.

And then that one takes us to recital 104. So you have my points about section 7 generally. And then what this adds in recital 104 is that the infringement was committed intentionally so that one -- we are back now in the territory of article 1 as opposed to 2, 3 or 4. And this is a simple point. Article 1 doesn't refer to "intention" in the sense of knowing that what you are doing is an infringement. And it doesn't have to because an infringement, as opposed to what is going on in a remedies/fining section, doesn't have to have subjective knowledge or subjective intent to be

committing it.

So it can't be essential to the infringement. And insofar as it bears upon the fine then that has no relevance to what is going to be happening at our trial.

PRESIDENT: I do not quite understand that. I mean it does have direct relevance to article 2. Indeed, isn't it the essential basis for article 2?

If that were set aside, recital 104, all the fines would have to be annulled. But if we were to find that the infringement was not intentional, we would be coming up with a judgment which is inconsistent with the decision.

There is no power to fine under the treaty itself, it comes from, as the previous recital states, it is from article 23 of the governing regulation and there has to be, as the essential condition for a fine, a determination that it is either intentional or negligent. Here there is that determination. So isn't it absolutely the essential basis for article 2?

MR HARRIS: Well, the answer is that you don't have to have -- in order to have a fine, you don't have to have it as intentional. You can also have it as reckless.

PRESIDENT: It could be negligent. But here they found -- they made the finding. It was not negligent, it was intentional. So that is the essential basis on which

they have found. Indeed, in some respects, this might be one of the key conclusions and it is a conclusionary finding within Ms Bacon's sense in the whole decision because one can see the financial consequences for all the defendants.

MR BEARD: Sorry, I am grateful to Mr Harris, can I just add: the issue here is any decision that this Tribunal takes in relation to matters that are considered by the Commission as the basis for its fine, that is not a decision that you will be taking that is running contrary or counter to a Commission decision because the Commission decision is to impose some sort of penalty and then it goes through an exercise of deciding whether a penalty is appropriate.

You are not engaged in any exercise of that sort.

PRESIDENT: Of course on your approach I quite understand that. It is irrelevant. But on the other approach, the defendants' approach where you look not only at the operative part but the essential basis for the operative part, that is the circumstances in which it seems to me it is the essential basis for article 2.

MR BEARD: Sorry, I'm making the submission I take as read that we're not dealing with my position in relation to this, we are dealing with the question of assessing essential basis. The point I am making is the doctrine

of essential basis that this Tribunal is seized with that is developed by Ms Bacon is one that is predicated on the operation of article 16 requiring that essential basis.

The point I am making is that article 16 is concerned with a court or tribunal not reaching a decision that runs counter to a Commission decision but where a Commission decision is dealing with a fine rather than a finding of infringement, the fact that you in the context of a damages case might make different findings from that which the Commission relied on in relation to fining matters is not running counter to the Commission decision.

PRESIDENT: We have your point.

MR BEARD: We say that is the position.

PRESIDENT: Thank you.

Submissions on recitals 102 to 115

MR HARRIS: Well, sir, I appreciate that may not have found great favour but that is the same response in part to the next recital, 115, that it won't be at trial an attack upon the fining part of this decision. So there will be nothing that will be going on at trial in causation and effect by reference to the infringement decision that runs counter to the --

PRESIDENT: Yes. I do not think 115 is actually saying it

had a specific effect.

MR HARRIS: Precisely and that is the additional point which is there is nothing in there that is essential to any part of even article 2 where the fines are set out. That is not lacking in clarity or giving rise to any ambiguity.

PRESIDENT: What may be relevant is that it only says it is a price coordination arrangement but Ms Bacon will say that does not mean it is a price alignment arrangement.

MR HARRIS: That is true and that is a submission I have made, but also it is too generic and general to be of any assistance.

Sir, unless I can assist further, those are the submissions as regards 102 to 115 and I think there are only two or three left.

Submissions on recital 116

MR BEARD: 116. Mr Harris and I have made good points about this recital not going to an infringement finding. It is setting out the general manner of the reasoning of the Commissioning in relation to the setting of a fine. This is the recital concerned with an indication of the combined market share of the addressees amounting to X for the purpose of setting the penalty.

Now, we have already traversed discussion of recitals which discuss whether or not the infringement

was for the entire period across the whole EEA and how that is dealt with in the operative part. What we say is the Commission is identifying some sort of metric in order to identify a penalty. That is clearly not essential basis for any part of the decision including the fine calculation in the sense that if you used a different market share metric or came out with a different figure, that would not necessarily alter the penalty. So even if you are not with me on any of the other points, it is still not essential basis as far as the penalty is concerned.

PRESIDENT: Is it essential basis for the first sentence of recital 85?

MR BEARD: I am so sorry, you are ahead of me.

PRESIDENT: Which, that is accepted, is an essential basis. To understand it, does one need to look at recital 116?

MR BEARD: We say there is no cross-reference across there.

PRESIDENT: No, it says the market share and if you think what on earth does that mean --

MR BEARD: Yes, indeed, what on earth can that mean.

PRESIDENT: And the answer is given.

MR BEARD: It is within the EEA and we don't know whether or not it is referring to the figures in 116. What is actually done in the fine calculation is you generate some figure of that sort and look at turnover and

1 therefore you can get some numbers out of it. But
2 we don't assume that you read back 116 into 85, no. And
3 in particular, what you can't do is assume that
4 the precise percentage --
5 PRESIDENT: Isn't 116 reflecting recital 24? Aren't they
6 all consistent? It is a theme running through it.
7 Anyone reading the whole decision will say that is what
8 the first sentence of recital 85 is referring to.
9 MR BEARD: I think one has to be extremely careful about
10 reading in facts across it. First of all 24, as I
11 understand it, isn't claimed to be essential basis.
12 Second of all it is referred to as a single year in 24.
13 PRESIDENT: It is all approximate, isn't it?
14 MR BEARD: Well, that is part of the issue here. It is all
15 approximate. When we are talking about whether or not
16 something is essential basis and can't be challenged,
17 when you are talking about these sorts of figures, we
18 are saying, no, you can't treat the market share as
19 being whatever that percentage is.
20 PRESIDENT: Well, if it says, to take an arbitrary figure
21 around 70% and you say actually it is 50%, you can
22 challenge it. Because 50% is clearly not around 70%.
23 So the fact that it says around X%, that does not
24 preclude you from challenging it. You could challenge
25 it if you think it's 2% less. I have no doubt if you

thought it was considerably exaggerated, you would have pointed that out.

MR BEARD: I think we are in danger of lapsing back into the extent to which one can revisit these things in the settlement process and I think, as Mr Jowell explained, it is not a matter of great negotiation. So, you have our points on 116. 119, I think that may be Ms Ford.

MS FORD: In relation to 119 I think we understood there is no dispute in that it only concerns Volvo and Volvo have admitted it.

PRESIDENT: Yes, that is common ground. Thank you very much.

Submissions on recital 120 and 121

MR BEARD: Then we are on to 120 and 121 which are duration for the purposes of penalty and then references to the infringement for the purposes of penalty and then what the basic amount of the fine should be.

MR WARD: It is not pursued.

PRESIDENT: Not pursued, I am told.

MR BEARD: That was easy.

PRESIDENT: It was.

Mr Ward, I think technically you have a right of reply. I do not think you should regard it as necessary to go through recital by recital.

Submissions in reply by MR WARD

MR WARD: Rest assured that was the very last thing on my mind. I was thinking 15 minutes if that would be tolerable?

Let me try to be quicker than that! The defendants spent 55 minutes on the first three recitals but I will be more like two minutes. Ms Bacon said look, these statements about types of information exchange, it is just factual detail. She had actually three different formulations as to why that didn't count: because it was not decisional, not evaluative, not a legal assessment.

Well, all of those formulations are irrelevant in my respectful submission. What matters is these impugned sentences explain why this information exchange was indeed infringing as article 101 tells us that it was.

She is in a difficult position though because she does accept that a factual challenge could be brought, for example to whether this information exchange took place, and the logic of that is that the factual challenge would be a challenge to these recitals, even if formally speaking, formally, the operative part would be challenged just as it was in ABB and just as it was in Coca Cola.

What ABB shows is this doesn't require a lacuna in the operative part, which is certainly how some of the

cases play out, but it is enough to say we are bringing a challenge that would in a sense change the scope of the infringement, even if it does not require blue penciling of any particular words.

But if the defendants' case was right, they would be entitled to dispute most of the building blocks contained in the recitals just as long as they left just enough infringement behind that could somehow support the description in the operative part.

So the result of that would be an infringement of very different scope to that actually established by the Commission. You would start with a lion and you would end up with a kitten. In our respectful submission that is why these recitals are indeed essential basis.

A lot of difficulty arose this morning because of the defendants' desire to atomise these recitals. That is why we have had them all popping up one after another, sometimes within the same recital, because they want to treat these sentences independently but of course they have to be read as a whole.

A few quick bullet points on recital 46 which took the most time. "Commercially sensitive" is not an exotic concept, I am sorry, particularly in this context. It is perfectly plain what it means and it is certainly not what DAF wishes it meant.

Secondly, Mr Harris was very keen to say the defendants don't accept that absolutely all the information exchanged was commercially sensitive. That is not what the recital even says. It says all these elements, by which it means gross price lists, information on gross prices and truck configurators, constituted commercially sensitive information.

Then finally the last sentence, which again seemed to cause a lot of concern, was this facilitated the calculation of gross price for each possible truck configuration. The "this" in that sentence means all the information exchanged in that paragraph.

That is enough on that recital. Another argument we heard put twice against me is that in response to the question of vagueness, I had made the point that the defendants had admitted these formulations. What was said was I was confusing the question of abuse with the question of what is binding under EU law. That is to misunderstand my point.

The reason I alluded to their admission is that it does not sit well in their mouths to now say these recitals are too vague to understand. They understood them well enough to take a 10% discount on the fine.

On recital 48, just one point, Ms Bacon said this was much more informative than knowing which precise

hotel room the act of collusion had taken place in. I would respectfully ask you to read it again. The exchange of --

PRESIDENT: You need not --

MR WARD: Very good. I will leave that.

Then I am going to move on now a long way to recital 51 which is really an exemplar. Much of the next few pages of the decision is of the same nature, it is explaining the collusion and how it took place.

Here, I think it was Ms Ford who said it was really just facts, but I counted seven different infringements articulated in recital 51, and it is also useful because the opening words "from 1997" help pin the start date of this infringement and you could say the same about recitals 54, 57, 59 and 60.

So in our respectful submission, that is very far from an anodyne recitation of the facts. Equally, two of 52 and 53 which Mr Jowell said these are legs of the centipede but the centipede does not need to stand up, that may be right because it has so many legs but indeed these could have been quashed if they had been challenged, if they were actually wrong, although of course they would have had a lot more work to do.

As to 53 in particular, Mr Jowell said, well, I do not know what this has to do with the infringement.

Well, it is about pricing. It is about using the euro introduction to reduce rebates. It is about making sure prices in France would increase. That is pricing.

Then recital 61 which is about geographic scope, it is important to understand what the scope of Ms Bacon's argument is here. On her analysis, the defendants are free to argue that the cartel didn't extend to the entire EEA, for example it just didn't extend to the UK, or not for more than one year. That is a classic example of taking the tiger and turning it into a kitten in my submission.

Then recital 71, single and continuous infringement. Mr Beard says ah, there is no need for a finding that each of these factual elements was an individual infringement. But that is in fact the basis of this decision. What we see is two different bases in essence: single and continuous infringement and multiplicity of individual decisions. And in fact, the operative part, article 1, doesn't actually specify one way or the other. It just talks about collusion. So this helps us understand collusion.

The Commission has done it this way in all probability to avoid the outcome in Coppens where an element of the tripartite test for single and continuous infringement fell away and they do not want the decision

as a whole.

PRESIDENT: Wait a minute. Is it a decision finding a multiplicity of individual infringements as well? There might indeed be limitations issues if they had taken that course because some of them might be too old, which is one of the reasons why it can be so important to find a single and continuous infringement.

MR WARD: Yes.

PRESIDENT: You need to help me if you say this is a decision on finding both.

MR WARD: Well, I do not want to put a gloss on the words of that second sentence. My primary submission is it is a building block in this decision.

PRESIDENT: If one looks at recital 70, it says it can result ... "also from continuous conduct" and so on, even if they could also be in isolation an infringement. The heading is "Single continuous". Then one has the conclusion, it seems to me, of this section in 78 which is clearly -- and that is the only section on infringement. The previous section is about agreement and concerted practice. So I am not sure they really are finding a series of --

MR WARD: I must avoid putting too much weight on it but the inspiration for the submission is in the third line, it says the words "at the same time and on the basis of

the facts described above". But I do not push it further than that. It is a building block in the analysis.

But my very final point was about recital 102. Mr Harris said what on earth does secrecy have to do with anything in the operative part of the decision? It is the premise of article 3 of the decision and accordingly its essential basis.

Unless I can assist further, those are the submissions in reply.

PRESIDENT: No, thank you, Mr Ward.

We thank you all and the large teams who have been involved for each of you for assisting in the preparation of the schedules that were produced overnight no doubt with a lot of work involved, and to all counsel for your very effectively coordinated but not aligned submissions.

We will let you know when the judgment is ready to be handed down and if you could get us the updated schedules or fuller schedules by the end of next week, please?

(4.20 pm)

(The hearing was concluded)

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