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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. : 1292/5/7/18
1293/5/7/18
1294/5/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 4 October

Before:
THE HONOURABLE MR JUSTICE ROTH
(Chairman)
THE HONOURABLE MR JUSTICE FANCOURT
HODGE MALEK QC
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Suez Groupe SAS and Others v Stellantis N.V. (formerly Fiat Chrysler
Automobiles N.V.) and Others

Veolia Environnement S.A. and Others v Stellantis N.V. (formerly Fiat Chrysler
Automobiles N.V.) and Others

Wolseley UK Limited and Others v Stellantis N.V. (formerly Fiat Chrysler
Automobiles N.V.) and Others

APPEARANCES

Suez/ Veolia/ Wolseley	Hausfeld	Tristan Jones (Blackstone Chambers) Tim Johnson (Brick Court Chambers) Tom Foxtton (Brick Court Chambers)
DAF	Travers Smith	Rob Williams QC (Monckton Chambers) Nikolaus Grubeck (Monckton Chambers)
MAN	Slaughter and May	Daniel Jowell QC (Brick Court Chambers) David Bailey (Brick Court Chambers)

Iveco	Herbert Smith Freehills	Tony Singla QC (Brick Court Chambers) Matthew Kennedy (Brick Court Chambers)
Volvo	Freshfields Bruckhaus Deringer	Mark Hoskins QC (Brick Court Chambers) Sarah Abram (Brick Court Chambers) Jacob Rabinowitz (Brick Court Chambers)
Daimler	Quinn Emanuel	Paul Harris QC (Monckton Chambers) Ben Rayment (Monckton Chambers) Michael Armitage (Monckton Chambers)
Scania	Allen and Overy LLP	Brian Kennelly QC (Blackstone Chambers) Jason Pobjoy (Blackstone Chambers) Andrew Trotter (Blackstone Chambers)

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Tel No:

Fax No:

Email:

Monday, 4 October 2021

1
2 (10.30 am)

3 (Proceedings delayed)

4 (10.40 am)

5 Hearing via MS Teams

6 Introductory Remarks

7 THE PRESIDENT: Good morning, everyone.

8 I start with the customary warning which some of you
9 have heard many times, but there may be those
10 participating who have not, namely that these
11 proceedings, although being heard remotely, are as much
12 court proceedings as if they were being heard in person
13 here in Salisbury Square House, where the Tribunal
14 members are sitting. They are being live streamed and
15 of course others are joining on the Microsoft Teams
16 platform.

17 An official recording is being made and an
18 authorised transcript will be produced in the usual way.
19 But it is strictly prohibited for anyone else to make
20 any unauthorised recording, whether audio or video, of
21 the proceedings. If anyone breaches that prohibition
22 it is a contempt of court and punishable as such.

23 Thank you all for your skeleton arguments, and in
24 particular for the co-ordination between defendants in
25 sharing out the issues that you have dealt with. We

1 appreciate that takes some organisation behind the
2 scenes, but it has been invaluable for us and we are
3 grateful for it.

4 There has been one problem with the skeletons,
5 however. You always want to file your skeletons as
6 close to the hearing date as possible and, indeed,
7 I think you got an extension on this occasion.

8 I understand that. We can all remember what it is like
9 when the Tribunal members were themselves having to
10 produce skeletons as barristers. But it means when they
11 come in we start reading them immediately.

12 We noticed that a number of them say they contain
13 confidential information. It is therefore imperative
14 when such skeletons are filed that you highlight, or
15 somebody on your behalf highlights, the bits that are
16 confidential information. That was not done in this
17 case and for my part I simply do not know, I am assuming
18 that it is matters to do with detailed disclosure
19 requests unless someone tells me otherwise. But I have
20 not got highlighted skeletons. I gather they came in in
21 dribs and drabs rather later, and perhaps by tomorrow it
22 will be possible to mark at least mine and my
23 colleagues' up. But in future that has to be done when
24 the skeletons are filed.

25 We will obviously deal with the wider case

1 management issues today and then see where we get to on
2 specific disclosure applications and they will continue
3 tomorrow.

4 On case management generally, I think everyone
5 agrees that there have to be a selection of claims for
6 trial. Whether they are called test claims or front
7 runner claims is just a matter of semantics. We all
8 know what is involved.

9 Clearly the selection is important. But it cannot
10 possibly cover the full range of differing circumstances
11 by size, commercial sector, pricing mechanism etc of all
12 these different claimants.

13 So the approach has to be to select a number that is
14 sufficiently small so as to enable a manageable and
15 sensible trial that is not too complex and not too long,
16 but sufficient to give useful guidance for other cases.
17 When we say not too long we think a trial of a year is
18 just out of question. We would like to think of a trial
19 and plan for a trial that could start in April 2024. So
20 that would give sufficient time for a judgment in the
21 Ryder/Dawson group trial, trial number 2, to be handed
22 down and digested.

23 Of course each case is different, and one cannot
24 have a fully representative set of test claims for the
25 reasons that I have mentioned. So these are not sample

1 claims, they are just selected claims. Then we would
2 hope that the other claims that are not being tried,
3 those involved can take account of whatever differences
4 they say there are between the selected claims that have
5 been tried and the outstanding claims in negotiations,
6 and seek to achieve a settlement. If they cannot there
7 may have to be further trials, but that is the aim.

8 We also think that there ought to be on the
9 pass-through issues a single joint expert for the
10 defendants, when it comes to pass-through. I think that
11 is something we have raised before.

12 Now, we have obviously had an opportunity to
13 consider various submissions made. Our provisional
14 view, obviously, without having heard from you in oral
15 argument, our provisional view is that it is not
16 practicable to have the second wave claimants in this
17 trial subject to one possible point on Germany, which
18 I will come back to. As far as we can see, the only
19 reason it is being put forward is that they were all
20 being represented by the same solicitors and counsel
21 team, but that is not, in our view, a good enough
22 reason. There are a lot of other Trucks claims with
23 other solicitors and counsel pending before the Tribunal
24 and there is no particular reason why these should, as
25 it were, jump ahead of the others.

1 There are tens of thousands of trucks purchased in
2 the UK alone over this period covered by the unlawful
3 arrangements. Once you get to France and Germany the
4 number clearly multiplies much further. You just can
5 imagine if they are all claimed before the Tribunal we
6 could have tens of thousands of claims. They cannot all
7 be heard; we have to take a selection and everyone else
8 has to wait, and that applies in our view to the second
9 wave here.

10 Of course, Mr. Jones, if you want to try and
11 persuade us otherwise we will hear you, but that is
12 a view we have considered having regard to what you have
13 said in your written submissions.

14 What we did want to understand before getting into
15 the question of which claims should be in this trial is
16 just some of the issues that arise in these cases.

17 If we could go to the claimants' skeleton argument
18 at page 5. I am, on the skeletons, working off hard
19 copy, so I do not have the electronic reference.
20 {HS2-A/1/5}, page 5, paragraph 11, you have set out
21 a number of issues that apparently arise in these claims
22 and we just wanted to understand those, because we have
23 not been back to the pleadings nor has anyone taken us
24 to the pleadings.

25 The first one, English limitation, can you just help

1 us Mr. Jones, what is the limitation issue?

2 MR. JONES: Sir, yes. The limitation issue is that some of
3 the defendants have raised an argument that my clients
4 in England cannot go back more than six years. It is as
5 straightforward as that.

6 Of course we say you deliberately concealed this
7 conduct so that therefore needs to be tested in an any
8 test claims trial. It is one of the issues on the
9 agenda, and the way it relates to the selection of test
10 claimants is that one would want to ensure that one has
11 at least a test claimant whose claims go back far enough
12 to engage that issue temporally.

13 Could I perhaps make this overarching point about
14 this list --

15 THE PRESIDENT: Yes.

16 MR. JONES: -- which may make your task today somewhat more
17 straightforward, which is simply to note that when one
18 looks, for example, at Volvo's most expansive proposal,
19 what I call Volvo proposal 4, which may, sir, be
20 a minimal starting point in the Tribunal's mind, apart
21 from the issues which I have raised as the big problems
22 with it, in other words it does not cover enough
23 claimant groups, in broad terms it does tick off this
24 list of issues here.

25 THE PRESIDENT: No, I understand that, but that is not the

1 point I was on. So if you would bear with us please.

2 So that is the English limitation. Germany law on
3 limitation, taking that, breaking that down, what is the
4 German law issue?

5 MR. JONES: There is a provision in German law in broad
6 terms which provides for the suspension of limitation
7 when there is a commission investigation --

8 THE PRESIDENT: Yes.

9 MR. JONES: -- and there is a question about how that
10 applies here, essentially, and what German law has to
11 say about that. So it is a question of fact of
12 German law.

13 THE PRESIDENT: Before you get to that, is it accepted that
14 German law governs what have been called the German
15 claims?

16 MR. JONES: Yes, that is common ground.

17 THE PRESIDENT: That is common ground. So there is no issue
18 on proper law, and that is the same with the French law,
19 is it, and the French claim?

20 MR. JONES: That is the same with the French law.

21 THE PRESIDENT: Right. So there is a limitation issue on
22 German law, and then sticking with German law, in 11.4
23 German law on pass-on, we understand there is an issue
24 of pass-on under German law, particularly having regard
25 to the recent judgment of the Federal Supreme Court, and

1 I have to say we were a little surprised that no one has
2 referred us to that. But that judgment, which I think
3 bears the date of earlier in the year, but the reasons
4 were only released in early September, says some quite
5 clear things about the availability of a pass-on defence
6 under German law and circumstances in which, in the
7 context of the Trucks cases, because it was a Trucks
8 case, pass-on is excluded as a matter of German law.
9 That seems to us an issue of some importance.

10 You will be aware of that, no doubt, Mr. Jones, or
11 those instructing you will be, and Daimler will be aware
12 of it.

13 What is going through our mind is whether that is
14 not, therefore, an appropriate preliminary issue.
15 Because if pass-on is excluded as a matter of law for
16 the German claims, that removes a whole area of
17 disclosure on the German claimants and a whole scope for
18 evidence at trial.

19 MR. JONES: Yes.

20 THE PRESIDENT: I do not know if you are in a position to
21 address us on that.

22 MR. JONES: Yes, absolutely. We have picked out the points
23 which are pleaded issues between the parties, and of
24 course where foreign law has not been pleaded English
25 law principles will be applied, and that applies here.

1 THE PRESIDENT: Yes.

2 MR. JONES: It applies also to various other issues where
3 one could have pleaded foreign law and it has not been
4 done.

5 So the position at the moment is that it is not an
6 issue, as far as I am aware, between the parties there
7 have been --

8 THE PRESIDENT: If I may interrupt you, are you not seeking
9 to raise it as an issue as the claimant?

10 MR. JONES: I would need to take instructions on that, sir.

11 THE PRESIDENT: We would like to know. Your solicitors,
12 Hausfeld, of course have a German branch, if I can put
13 it that way, and I think are involved in claims in
14 Germany, so they will be well aware of this.

15 One would assume, but it is a matter for you, if you
16 do not want to rely upon it, and that is a matter for
17 the claimants, but if you are going rely upon it it does
18 seem to us that it is something that is susceptible for
19 a preliminary issue and an issue that, indeed, could be
20 heard either before the summer of this coming year or
21 certainly next autumn, in a year's time, because there
22 is some factual enquiry, as we understand the judgment
23 of the Federal Supreme Court, but it is very limited.

24 MR. JONES: Sir, if I may say, sir, that sounds very
25 sensible and it may be that a timetable should be given

1 for us to make our election on that. I will need to
2 take instructions and I will get back to you later today
3 or tomorrow morning, if I may, sir.

4 THE PRESIDENT: Yes, if we could, because it will affect
5 what we do about German claims.

6 MR. JONES: Yes.

7 THE PRESIDENT: We can see, as we have only seen a rather
8 rough translation of the German judgment, not an
9 official translation or, as it were, a professional
10 translation. So our understanding of it comes with that
11 caveat. But certainly it is the last section of the
12 judgment where they say that in certain circumstances,
13 and they are dealing with trucks, pass-through as
14 a matter of law is excluded as an argument for
15 defendants. So you may want to just consider that,
16 please.

17 I do not know anything about the French law on
18 pass-on, which is referred to at 11.4 {HS2-A/1/5}, what
19 the issue is on that. You say it is raised but not
20 pleaded. Is there any point you are making on French
21 law?

22 MR. JONES: No, so there is no point that we are making and,
23 as far as I am aware, there is no point that the
24 defendants are making, and when it says it was raised,
25 it simply means it was raised in the correspondence and

1 possibly in the witness statements around the third CMC
2 after we had floated test claimants and the defendants
3 put forward various issues they thought needed covering.
4 But we have said for a while we do not think this is an
5 issue and I think no one has disagreed with that.

6 THE PRESIDENT: If anyone dealing with French claims says it
7 is, they can tell us.

8 Mr. Singla?

9 MR. SINGLA: Sir, I can say that it is just wrong to say
10 that this is not pleaded. We have in our foreign law
11 pleading pleaded French law on pass-on, so I am not
12 really sure I am following the submission.

13 THE PRESIDENT: Sorry, if you do not mind, when you first
14 speak, for the benefit of the transcript could you just
15 say "I represent Iveco". But if each of you could just,
16 when first speaking, say who you are for.

17 Can you just help me, Mr. Singla, what is the French
18 law issue on pass-on?

19 MR. SINGLA: Perhaps the most efficient thing is if I direct
20 to you our foreign law pleading {VSW-A4-1/29/7}.

21 THE PRESIDENT: Yes.

22 MR. SINGLA: I do not know if that document has come up, but
23 effectively --

24 THE PRESIDENT: No. It should do, should not it?

25 MR. SINGLA: {VSW-A4-1/29/7}.

1 THE PRESIDENT: We do not have that document. If it can be
2 brought up electronically or you can just tell us.

3 MR. SINGLA: I am happy to tell you.

4 THE PRESIDENT: We just want to get a sense of what the
5 issue is.

6 MR. SINGLA: No, of course. We say in a single paragraph
7 that we do not admit that the Purchasing Entities and/or
8 the claimants suffered any loss. However, if they can,
9 it is denied that to the extent French law governs the
10 claims, the claimants will, pursuant to the French
11 Civil Code, be able to recover damages to the extent of
12 any pass-on.

13 We say:

14 "It is for the claimants to prove that the alleged
15 losses were not passed on," as matter of French law.

16 Mr. Jones' clients have in fact pleaded back to that
17 in their reply to the foreign law pleading,
18 paragraphs 31 to 34, and I will just give the reference
19 for the transcript, {VSW-A4-1/31/7}. They say that they
20 repeat:

21 "... mutatis mutandis what is set out above in
22 respect of German law ... It is a question of fact ...
23 quantification of damage is a procedural matter governed
24 by the lex fori."

25 Then they say:

1 "It is denied that French law provides that the
2 claimant bears the burden of proving that the
3 overcharges were not passed on."

4 So there is a substantive issue there as between us
5 in relation to French law.

6 THE PRESIDENT: Is that an issue that arises where people
7 have bought trucks from independent dealers? Is that
8 the kind of pass-on you have in mind?

9 MR. SINGLA: The pleading is, insofar as any of the
10 claimants have passed on, then yes, then we take the
11 French law point in relation to all purchases, yes. We
12 do not distinguish in our pleading between the origin of
13 the purchases, as it were, if that is the question.

14 THE PRESIDENT: No, because pass-on arises in two senses
15 here. One, that the defendants have raised a pass-on
16 the defendants have raised a pass-on defence saying:
17 "You, claimant, have not suffered loss" because you have
18 passed it on to your customers, that is where you rely
19 on pass-on. But you say you have pleaded that the
20 claimants are not recovering damages as pass-on.

21 So it has been raised by you saying that the
22 claimants, this is -- because that is what I do not
23 quite follow at the moment and it would be helpful
24 to ...

25 MR. SINGLA: Sir, let me try to summarise the position.

1 This is a downstream pass-on issue. So we say, as you
2 know under English law, we take an issue as regards
3 whether or not the claimants passed on. But in relation
4 to French trucks, effectively we say that that issue of
5 downstream pass-on is governed by French law, and
6 amongst other things there is effectively a reversal of
7 the burden of proof under French law. So we say it is
8 for the claimants to prove that the alleged losses were
9 not passed on. That is the final sentence of our
10 paragraph 10.

11 That is why Mr. Jones' clients have pleaded back
12 saying it is denied that French law provides that the
13 claimant bears the burden of proving that the
14 overcharges were not passed on. So that is the issue of
15 substantive French law, as it were, as to whether there
16 is a reversal of the burden of proof.

17 THE PRESIDENT: Yes. So it is a burden of proof issue, it
18 is not an exclusion (inaudible), pass-on.

19 MR. SINGLA: Yes, and I think before one gets to the
20 substance of French law, Mr. Jones' clients have taken
21 a point as to whether or not this is governed by the lex
22 fori or the lex causae. So at least on the face of his
23 pleading there are those two issues.

24 THE PRESIDENT: There may be a question, then, as you have
25 explained it, as to whether that also should be taken as

1 a preliminary issue, it is a fairly short issue,
2 I suspect, way ahead of a trial that obviously is not
3 for some time so that these matters can be ironed out in
4 advance.

5 MR. SINGLA: Yes, I understand that. As to that, I would
6 obviously need to take instructions, but I understand
7 the question. But I was just at this stage hoping to
8 clarify the position on the pleadings.

9 THE PRESIDENT: Yes, you have. So that is helpful.

10 So the German law is more significant because if
11 it is interpreted one way it is a knockout blow on
12 pass-on. French law, it seems, is a bit more nuanced as
13 you have explained it, but either way there may be scope
14 for these to be heard in much shorter order, and
15 resolving that may then assist with the rest of the
16 case.

17 MR. SINGLA: Yes. If I may address you later on whether or
18 not a preliminary issue would be appropriate, as I say
19 I would need to take instructions on that procedural
20 question. But I just wanted to ensure that the Tribunal
21 was not proceeding on a false basis as to the pleadings.

22 THE PRESIDENT: No, that is very helpful and I think you are
23 not particularly involved in the German claims at all.

24 There are very few Iveco German trucks, I think.

25 MR. SINGLA: I would need to check the precise number but

1 certainly we would want to address you on preliminary
2 issues.

3 THE PRESIDENT: Yes, but as I say, I do not think -- I think
4 essentially the German trucks are especially Daimler and
5 MAN that are the major sellers of the trucks which are
6 subject to the German claims.

7 So can I ask first Mr. Harris for Daimler on this
8 question of pass-through in the light of the recent
9 judgment, is there anything that you want to say about,
10 Mr. Harris, from the perspective of your clients, of
11 having the applicability of pass-through as a matter of
12 German law determined as a preliminary issue?

13 MR. HARRIS: Our current stance, sir -- thank you for the
14 indication -- is that if the claimants wish to put it
15 forward as a preliminary issue then we will give that
16 due consideration. We are not ourselves putting that
17 forward, and if the claimants put it forward then we
18 will take instructions and we can have, if needs be,
19 a resolution of that issue before the Tribunal.

20 THE PRESIDENT: Yes. Whether or not the claimants put it
21 forward, if it is a pleaded issue it may be that the
22 Tribunal puts it forward --

23 MR. HARRIS: I understand that.

24 THE PRESIDENT: -- as part of our case management.

25 Then for MAN, Mr. Jowell.

1 MR. JOWELL: Daniel Jowell for MAN, sir. Sir, as things
2 currently stand it is not a pleaded issue, because as
3 you will have seen what is said by the claimants is that
4 pass-on is a matter of the lex fori, so therefore
5 English law. They say that both in relation to Germany
6 and France. So as things currently stand there is no
7 pleaded issue between the parties on this particular
8 point that you have raised.

9 Now, of course, if the claimants were to amend their
10 pleaded case in order to state that it is a matter of
11 German law and that under German law there is no
12 pass-on, then there would be potentially something to
13 consider as to whether there should or should not be
14 a preliminary issue. But as things stand, as between
15 the parties there is no issue that we see on the
16 pleading to be determined by the Tribunal.

17 THE PRESIDENT: Yes, I understand.

18 So I think the ball is very much, Mr. Jones, in your
19 court on that. But if you can indicate your position in
20 the course of this CMC, because it does have significant
21 implications as to whether we should include, as some
22 are urging, German claims within the trial or not.

23 MR. JONES: We will do that, sir.

24 THE PRESIDENT: So we have -- and I think probably the
25 English limitation issue is not, from what you have

1 said, an appropriate subject to the views of my
2 colleagues to a preliminary issue unless anyone suggests
3 it should.

4 MR. HOSKINS: It is Mark Hoskins for Volvo/Renault.

5 I would like to put down a sort of small marker.
6 Let us assume the claimants do plead this issue, and let
7 us assume there is to be a preliminary issue. My
8 instructions are I would certainly want to make
9 submissions about the nature and meaning of the
10 Supreme Court judgment and, indeed, we believe there is
11 other relevant German case law, indeed more recent case
12 law, which we would want to rely upon. So obviously as
13 I am telling you something you know already, we are in
14 a bit of a difficult position. One cannot assume that
15 because there is a preliminary issue which way it will
16 go, which will of course make it difficult today or
17 tomorrow to decide whether German trucks should be in or
18 not.

19 I am sorry if that is stating the obvious, but
20 I just wanted to make it clear that if there is
21 a preliminary issue we will be putting our back into
22 opposing the position that the claimants might want
23 to put.

24 THE PRESIDENT: No, I understand that. That is why it would
25 be an issue, otherwise it would be agreed.

1 MR. HOSKINS: Absolutely, and I make the point just in terms
2 of if we are trying today to say whether German trucks
3 should be in the stage 3 trial, we are going to have to
4 do that without knowing what the result of the
5 preliminary issue would be. I apologise, it is obvious,
6 I am aware of that.

7 THE PRESIDENT: We see that and we appreciate that, and that
8 is obviously a difficulty that we have got to manage.

9 So the only point we wanted to mention is if there
10 is to be a preliminary issue of that nature, and it may
11 indeed have two strands, it may be what is the proper
12 law governing pass-on, and if it is German, what is the
13 implications, then there might be an argument for the
14 Hertz claim to be included in that preliminary issue.
15 Because the Hertz claim, as we understand it, is purely
16 German and it would be sensible for the Hertz claimants
17 to be bound by that issue.

18 But subject only to that, Mr. Jones, we are against
19 you for reasons that I have explained on including
20 second wave claimants in the trial, and if you want to
21 address us on that further now is your chance.

22 But you are muted, so ... you need to unmute.

23 MR. JONES: Can you hear me now?

24 THE PRESIDENT: Yes, we can.

25 MR. JONES: I do want to address you on second wave, but it

1 sits within the bigger set of issues regarding the
2 selection of claimants and the time that would be
3 required. So I am hesitant to try and dodge the
4 invitation to address it now, and I will, sir, if that
5 is a convenient way of dealing with it, but it is rather
6 tricky to untangle it from the wider questions, in
7 particular the question of trial timetable and how many
8 witnesses would be involved, and so on and so forth.
9 Because of course, sir, I entirely hear your concern,
10 which is not to have too long a test trial, and I cannot
11 really address that without talking about the number of
12 witnesses involved and I cannot really address that
13 without first dealing with the test claimants.

14 So, sir, my own proposal to you was going to be that
15 on all of these case management issues, if I were able
16 to address them in the round, by which I mean on the
17 agenda, items 1-5 which are the key case management
18 issues, so that covers my test claimant application,
19 Volvo, MAN, listing, second waves, because there are so
20 many overlapping issues on those, that really the only
21 sensible way for me to disentangle the different strands
22 and address them in the round, absolutely having regard
23 to the preliminary indications that you have given, that
24 that would be the more efficient way for me to manage
25 those issues.

1 If I were to do that, clearly it would take a long
2 time. It would take, optimistically, until lunchtime
3 today but it might go longer. But, sir, can I just make
4 the point that these case management issues are clearly
5 the important issues which all parties want the
6 Tribunal's decision on.

7 My clients, as you will have seen from the
8 documents, have produced an enormous amount of work
9 directed at test claimant issues. They have spent in
10 the region of £1 million on this application on the test
11 claimant materials. I need to show you that, because it
12 is in the details that one can see why we have chosen
13 the test claimants, why they are the right test
14 claimants to have chosen, and then to go on to talk
15 about trial timing, the witnesses which we think would
16 be required, and then, as I say, sir, that feeds into
17 the second wave question and the question of whether any
18 of those might participate.

19 THE PRESIDENT: I am sorry, Mr. Jones, you are not going to
20 have half a day for that. There are a lot of other
21 parties here and they also want to have their say, and
22 the advantage of having had full skeleton arguments is
23 that we can appreciate that a lot of work has gone into
24 it and I, indeed, get the impression, certainly from the
25 witness evidence we have had, that the other parties

1 have also put significant work in.

2 Our view, having assessed all of that, is that it is
3 far too ambitious to get in all these claimants that you
4 have included, and it will produce a trial that is
5 unmanageable and will be in excess of 26 weeks.

6 So you can have an hour to address us, but not to
7 keep going, taking us through everything, and that is
8 why we are looking -- we can see the benefit of having
9 France included in some way. We are unsure about
10 Germany. It would be nice to have Germany there in some
11 way because the overcharge position may be different in
12 different countries, if that is manageable, and that is
13 why we raised the issue of pass-through in Germany.

14 So it is a question then of what to select. But we
15 can see that you are trying to get a lot of different
16 sectors and claimants of different sizes and different
17 kinds, and we just do not think it is manageable.

18 So we see how the selection has been done. By all
19 means I am not restricting you to talk about second
20 wave. If you want to address us on the VSW proposal and
21 why we should accept it despite our misgivings you can
22 do so in the round, but not for two hours.

23 MR. JONES: Sir, I am grateful for that indication, and one
24 of the issues which I am particularly concerned about is
25 Mr. Jowell's application, which, sir, you may have seen

1 my solicitors wrote to the Tribunal raising a concern
2 about the fact that, because the defendants had very
3 sensibly split up the issues between them, the result of
4 that was that Mr. Jowell's, the MAN/Daimler proposal
5 which has essentially paused things and require my
6 client to provide more information, that that had had
7 a 20-page exposition in their documents, whereas we had
8 narrowed it down to two pages. There is an awful lot to
9 say about that, but I hear what you have said as
10 preliminary remarks and I take from that, sir, that you
11 are looking to list and to choose test claimants now.

12 I will therefore cut back on what I was going to say
13 about Mr. Jowell's proposal by way of opening. But,
14 sir, the only way, if Mr. Jowell progresses that and
15 seeks to persuade you that that timetable needs to be
16 derailed because there is not enough information to
17 choose test claimants, which is the nub of what he is
18 saying, in fairness and because we have not had the same
19 opportunity to set out our arguments in writing as the
20 defendants have, that will take me a long time to
21 respond to, because the only way I can respond to that
22 is to go in detail into the criticisms which are made
23 and into the documents which my clients have produced.

24 We could not do that in our skeleton argument. We
25 have seen what they say, as I say over 20 pages. So,

1 sir, I will tread lightly --

2 THE PRESIDENT: I can reassure you. I am not expecting you
3 by anticipation to respond in these remarks to the
4 MAN/Daimler application for what they call frontrunner
5 disclosure. They will address us, or Mr. Jowell will
6 address us, on that. If we want to, and think
7 necessary, you will have an opportunity to respond.

8 So it is your application for what you say should be
9 the test claimants listed now that you should address,
10 please.

11 MR. JONES: I understand, sir.

12 Submissions by MR. JONES

13 MR. JONES: We received a message from the Tribunal saying
14 it would be helpful to give you a brief overview of any
15 further agreement between the parties, and I will just
16 very briefly say, and just focusing on case management
17 issues, that on the agenda items 1-4, which are the key
18 case management issues, there is not any further
19 agreement to report on those.

20 Item 5, which is listing a trial, directions for
21 trial and so on, of course that tends to follow on from
22 the first set of issues. There are some disagreements
23 over what those directions should be if there is a trial
24 but they are second order issues.

25 THE PRESIDENT: Yes.

1 MR. JONES: Item 6 was my client's mitigation strike out
2 application. You will have seen, sir, that that was
3 withdrawn due to late movement on the defendants' side.

4 Item 7, the defendants' accrued claims and
5 unattributed Trucks application, that has been withdrawn
6 due to late movement on my clients' side. There is some
7 related disclosure requests and requests for evidence,
8 but they are points which were essentially already under
9 the heading already of disclosure, so they are not
10 really case management issues and I do not propose to
11 deal with them in that section.

12 The defendants, the Daimler defendants' composite
13 masterdata application, there is on this a large amount
14 of agreement. There is a bit of a tussle over whether
15 there needs to be an order for us to do what they are
16 asking or not. In most cases where parties have agreed
17 to do what the other parties are asking, they are not
18 pushing for it to be in an order. Again, sir, that is
19 nowhere near the top of the list of issues for this CMC,
20 but it is almost agreed, that particular one.

21 Disclosure I am not going to go through, but just to
22 say that there, at high level, is not any big picture
23 movement. But once one gets into the detail of some of
24 these disclosure applications, there is quite a lot and
25 every hour or two further emails come through telling us

1 that there has been more movement on particular points,
2 and we will have to pick those up as we go through.

3 THE PRESIDENT: Yes, thank you.

4 MR. JONES: One other housekeeping point I have been asked
5 to mention, it may not come up, but my instructing
6 solicitor Mr. Bolster is not with me due to Covid
7 issues. So if I need a break I will take it, but I was
8 asked to make that clear in case I do need to take
9 instructions, sir.

10 THE PRESIDENT: Yes.

11 MR. JONES: On the big picture of case management, could
12 I make four headline points at the outset.

13 The first is to remind you that this is stage 2 of
14 our narrowing-down process, because when we first made
15 our test claimant application, which was before the
16 third CMC, it was at that stage still controversial that
17 we should focus on the three core countries. We are now
18 at the stage of seeing whether, after having locked in
19 those very significant gains, we can trim down the
20 proposal further.

21 We say that our proposal would bring a further
22 saving of between 25 and 50%, but sir, one does need to
23 keep in mind that that is on top of what we have already
24 achieved.

25 The second point as a headline point is that if the

1 claims are trimmed down too far, trial 3 will be a false
2 economy. The reason I say that is that there are
3 obvious advantages in trying these claims together, if
4 they need to be tried of course, not only for the common
5 issues of overcharge and German law and so forth, but
6 also because there will doubtless be opportunities to
7 find common themes even on the individualised issues
8 like pass-on. The fact that my clients are represented
9 through one team is simply an additional point on top of
10 those issues.

11 The import of all of that, sir, is that if there is
12 a trial 3 which does not promote wider settlement, you
13 will have well in mind that if we then need a trial 4,
14 possibly if one takes the most pessimistic approach from
15 Volvo's evidence, a trial 5, a trial 6, that will be
16 far, far more inefficient. So we are as concerned as
17 anybody about the efficient use of Tribunal time, but
18 it is a consideration which does not point simply to
19 cutting; it points to making a properly represented
20 selection at the outset.

21 So the third point I just wanted to touch on before
22 turning to some of the details, is that you will have
23 seen that the big challenge here in selecting what we
24 are calling test claimants is that the loss in these
25 cases may have been very claimant-specific.

1 Overcharge in broad terms is going to be
2 country-wide, although not entirely, I will come back to
3 that point, but possibly not entirely country-wide
4 rather than claimant-specific. But pass-on could in
5 principle be anything -- I emphasise in principle --
6 could be anything from zero % to 100%.

7 As we know from the Supreme Court, what one needs to
8 look at in the first instance is an individual
9 claimant's pricing practices.

10 That is essentially why, as well as, of course,
11 other factors, most notably industry sector, but that is
12 why one needs to be very cautious in the idea that one
13 might get guidance to settle the other claims across
14 countries and industries.

15 My fourth point was simply to emphasise, sir, the
16 very real benefit, possibly above all of the other
17 issues today, of listing this trial. Everyone has done
18 a lot of work to get here today and I entirely endorse
19 your observations that that is not true only of my
20 clients, that is true of all of the defendants. It is
21 also true that every party here could make complaints
22 about other parties having dragged their feet in
23 answering this letter or that letter.

24 But we have made an enormous amount of progress and
25 we are talking about a trial in two years or more. Sir,

1 there is nothing like having a date in the diary to
2 concentrate people's minds.

3 So could I show you the test claimants' spreadsheet?
4 I am going to turn now to give an overview of how we
5 have selected the clients. You I think have been given
6 the electronic trial reference to this, but it is now in
7 the hard copy bundle. I am going to make a few
8 references to it. It is {HS2-E/4.1/1}.

9 THE PRESIDENT: Give me a moment, I am not sure why I am not
10 getting them up. (Pause)

11 MR. JONES: HS2-E is one of the hard copy bundles and I am
12 afraid there is a bit of an issue with this because it
13 does not exist electronically.

14 THE PRESIDENT: Is that not the same as {VSW-D1/597.2/1},
15 Mr. Jones?

16 MR. JONES: Almost. 597.3 is the spreadsheet, sir.

17 THE PRESIDENT: That is what you want us to look at, is it,
18 the spreadsheet?

19 MR. JONES: Yes.

20 THE PRESIDENT: That is the electronic reference, I think,
21 is {VSW-D1/597.3}, which then can be brought up for us,
22 I hope. That is what you want, is it?

23 MR. JONES: Yes, sir.

24 This was the spreadsheet where we first provided the
25 information about each individual claimant, and we

1 explained why we thought our proposal was a sensible
2 one. It was provided initially in May of last year and
3 then updated in September.

4 THE PRESIDENT: Just to help me, because I looked at the one
5 referenced in your skeleton, which is 597.2, is that
6 very different from this or ...

7 MR. JONES: It is a bigger version of this, sir, and because
8 I wanted to show you some of these -- and that Excel
9 spreadsheet is just unmanageable for today's purposes in
10 terms of showing the Tribunal and going through it.

11 THE PRESIDENT: I understand.

12 MR. JONES: So we have condensed it down. But what it shows
13 is all of the purchasing claimants in my client's
14 groups, in other words claimants who bought trucks or
15 leased trucks or, in some instances, merged with or
16 acquired other companies which had bought or leased
17 trucks. That is what I mean by a purchasing claimant.
18 They are all listed here.

19 THE PRESIDENT: Yes.

20 MR. JONES: You will see column A shows the claimant group;
21 B is the business unit, some of them are divided into
22 business units; C is all of the claimants; we have the
23 jurisdiction; we have the claimant's industry, which is
24 relevant for pass-on; and one point while I am on this,
25 if you cast your eye down that row, that column, and

1 it is also clear from other documents, what comes out is
2 the claimants tend to be concentrated in particular
3 industries. So each claimant group tends to be in one
4 or sometimes in a few industries and they tend to be
5 particular to the claimant groups.

6 THE PRESIDENT: Yes.

7 MR. JONES: Column F is downstream companies. So this is
8 the point about truck-using claimants versus purchasing
9 claimants, which MAN have raised.

10 On occasion the claimant, which was the purchasing
11 claimant, did not, as it were, use the truck itself,
12 another company, group company, used it. If that was
13 the case you will see it in this column where it says
14 "downstream companies".

15 If you cast your eye down that, you will see it says
16 "no" in almost all boxes. The first "yes" is when you
17 get to row 17, which is Metro Germany. Just to show you
18 how this works, if you have a look at row 17, which is
19 on page 3 of this, you will see internal industry in
20 column E says "internal logistics", then downstream
21 companies, yes, and they are identified. Then in G, it
22 tells you the industries of those downstream companies.

23 There are only a very small number of examples of
24 this. The only other significant one is Suez Germany
25 and Metro --

1 THE PRESIDENT: One thing I was trying to understand, if you
2 look at row 17, Metro Logistics Germany, and it says
3 "Downstream Companies, Metro Deutschland", which is
4 actually the next row.

5 MR. JONES: Yes.

6 THE PRESIDENT: Does that mean that, you then go to
7 column I, the number of trucks claimed by that
8 particular claimant, that 173 trucks claimed by Metro
9 Deutschland are excluded within the 503 trucks claimed
10 by Metro Logistics? Is that how it has arisen?

11 MR. JONES: No, it does not mean that, sir. There is
12 a slight wrinkle in this, which is that for Metro
13 Germany its downstream internal client, C27, that
14 particular one, it is not true for their other
15 downstream client, but for that particular client they
16 also bought some trucks, so they are also a purchasing
17 claimant.

18 THE PRESIDENT: That is the 173.

19 MR. JONES: That is the 173.

20 THE PRESIDENT: Then the C50, which -- I cannot quite see
21 from this see who they are.

22 MR. JONES: C50 is not on there because they did not
23 purchase their own trucks, they simply used C26's
24 trucks.

25 THE PRESIDENT: Right, okay. That is clear. Yes.

1 MR. JONES: But, as I say, the only other instance where
2 this arises is Suez Germany, which is further down the
3 table and we do not need to look at that now. But just
4 for your note, sir, that is where those points arise.

5 I am grateful for the indication that you have
6 looked at this table before. You will have seen that
7 the other really important columns here, H shows you the
8 total number of trucks claimed in that jurisdiction; I
9 is the number claimed by that particular claimant; and J
10 is the percentage of trucks that that claimant would
11 catch in that jurisdiction.

12 THE PRESIDENT: Yes.

13 MR. JONES: That is one point, when Mr. Jowell addresses
14 you, is to look at how many are actually covered by the
15 claimants that we have selected, because in a very large
16 number of cases, here you will see it is 63%, in many
17 other cases it is 80% or more, because in some of these
18 cases you find that there is one very large claimant and
19 then a sort of tail end of much smaller ones.

20 THE PRESIDENT: Yes. So we can read this table, can we not,
21 together with your very helpful overview appended to
22 your skeleton?

23 MR. JONES: Absolutely, sir. That is the other document,
24 which I will take you to in a moment, but which brings
25 a lot of this material together.

1 So, sir, you have seen, we have discussed some of
2 the 20 issues that were set out along with this table,
3 and I have mentioned that that followed a process of the
4 defendants raising issues and us thinking about them and
5 thinking whether they were points which needed to be
6 picked up, and where the issues required data we gave
7 them data.

8 On this hard copy sheet that we are looking at now,
9 as I have said, this is an extract. The full Excel
10 spreadsheet actually has another 37 columns in it.

11 THE PRESIDENT: Yes.

12 MR. JONES: They cover an enormous range of topics: did they
13 buy second-hand, did they have umbrella purchases, what
14 was the method of procurement, what was the quality of
15 the data, what is the quality of the data for those
16 claimants, which defendants did they buy from. So we
17 provided an enormous amount of data broken down by
18 claimants.

19 So what we then said, standing back, was that across
20 all of these variables and across all of these issues,
21 there are two headline variables which capture all of
22 the issues very well, and one is country, the other of
23 course is claimant group. I will just say a few words
24 about each of those.

25 Country: the main reason why it is important to look

1 at each country is because the overcharge may well have
2 varied between countries.

3 THE PRESIDENT: I think we have got that point.

4 MR. JONES: So I will come back to Hertz Germany when we
5 look at the second wave.

6 So you will have also the point that trying Germany
7 would cover the applicable law issue, but I will come
8 back to that again in the context of the preliminary
9 issue which has been suggested.

10 So the practical point is if Germany is not
11 included, it is extremely difficult to see how the test
12 trial would settle the German claims.

13 THE PRESIDENT: As I say, we have got that point.

14 MR. JONES: The second headline variable is claimant group.
15 It may be obvious, but actually of course we have broken
16 this down into each individual claimant, and that is
17 what we were asked to do by the defendants.

18 When one stands back, we say, looking at each
19 claimant group and looking at one claimant, the largest
20 claimant entity for each claimant group, does pick up
21 these issues as they apply in broad terms to the smaller
22 claimant groups, to the smaller claimants in each group.

23 Clearly there are some difference between claimants
24 in each group, clearly there are some differences, but
25 in broad terms the largest claimant tends to pick up

1 issues which cut across the whole group. One of those
2 issues is value of commerce. The particular question
3 which might arise there is how good is the data. What
4 do we know about how this claimant group procured
5 trucks.

6 One is overcharge where it appears that some of the
7 defendants might wish to say that there is a difference,
8 or potentially a difference between claimant groups on
9 the overcharge. I said I will come back to that.

10 Again, I will come back to that later, but if there is
11 a difference, obviously looking at one claimant within
12 each group would pick that up. One is industry
13 coverage, which again is particularly important to
14 pass-on. The final is of course the pricing policies
15 and the downstream pricing policies. Those tended to
16 vary between claimant groups.

17 Now, it is true to say that on occasion there were
18 differences between claimants in claimant groups on
19 pricing policies. But at a headline level, and this is
20 really what comes out of the pricing mitigation
21 statements, there were policies which were common to the
22 group and to the companies within that group. That is
23 why our starting point is -- it was not simply finger in
24 the air, the starting point was gathering an enormous
25 amount of information, looking at the issues and saying

1 that actually picking one claimant, the largest one,
2 from each group according to those variables means that
3 you get excellent coverage.

4 THE PRESIDENT: Pricing policy is also relevant for pass-on,
5 is it not?

6 MR. JONES: Pricing policy has to be the start of the
7 analysis really for pass-on.

8 THE PRESIDENT: Both of those matters go to pass-on.

9 MR. JONES: If I can go next to the appendix to my skeleton
10 argument just to talk through that. The reference is
11 {HS2-A/1/30}. You will have seen that we have
12 essentially sought to map here which test claimants we
13 would have and the coverage that you would get.

14 In the UK the first three we have said would need to
15 be tried in full. It does not make sense to select test
16 claimants from within those and I do not think anyone
17 has disagreed with that.

18 Of course Volvo do say, and I am sure the other
19 defendants would say, that you should not try any of
20 those, but they do not disagree with the point that it
21 would not be sensible to choose test claimants from
22 within them.

23 Veolia is the test business unit idea which I will
24 come back to in a moment. Brakes is the first test
25 claimant proper, and just to show how this works it is

1 in food distribution, it had 946 trucks. What the
2 numbers in brackets mean is that we propose that one of
3 those purchasing claimants out of a total of three
4 purchasing claimants is taken forwards as the test
5 claimant.

6 You will see by contrast in the row underneath, NWF
7 also had companies active in other sectors, fuel
8 distribution and farm feeds, and we are not proposing
9 any test claimants from those.

10 The yellow boxes simply highlight where there is an
11 industry sector where we have suggested a test claimant.
12 It adds up to --

13 THE PRESIDENT: Before you go on, can you clarify, with
14 Brakes, is the 946 trucks, that is the number of trucks
15 in the 1 or in the 3?

16 MR. JONES: It is in the 3, sir.

17 THE PRESIDENT: So it would not involve what is proposed,
18 considering the purchase of 946 trucks, it would be that
19 proportion of the 946 that was bought by the one
20 claimant you are selecting; is that right?

21 MR. JONES: That is right, sir, and this is a point I may
22 have to come back to in response to Mr. Jowell, we will
23 see how he puts these different issues, but one could
24 ask the question, and it may be a sensible question to
25 ask, how big is that one and one could go back to the

1 test claimant spreadsheet. This is exercise which
2 I threatened to do and I am not doing.

3 THE PRESIDENT: Presumably you would say it would be C12 out
4 of -- 767 out of the 946?

5 MR. JONES: It has 81%.

6 THE PRESIDENT: Yes. Just to understand, I am just trying
7 to understand it, you are saying that Brakes in fact all
8 its -- it is only in food distribution, it is not --
9 because all the other boxes in the Brakes row are black,
10 that means that is the only area of activity.

11 MR. JONES: That is the only area.

12 THE PRESIDENT: Whereas NWF was in three areas and it is
13 only the one that is in yellow that is being proposed.

14 MR. JONES: That is correct, sir. One point just to
15 emphasise out of that is that you can see looking at
16 this table that if you do not include Brakes, NWF,
17 CM Downton and Dairy Crest, it is not only that you are
18 not including that claimant to look at its pricing
19 policies, but you are also not looking at that
20 claimant's industry sector.

21 THE PRESIDENT: I think we have understood that.

22 MR. JONES: It adds up to 15 yellow boxes, if I can
23 summarise it that way.

24 Can I just emphasise, Metro, the reason there is two
25 yellow boxes is that the one test claimant we have

1 identified is in both of those industry sectors. Sir,
2 it may also help for me just to remind you that these
3 industry sectors are really not terms of art. They were
4 picked up from our description in the test claimants'
5 spreadsheet. I think Volvo's expert has helpfully used
6 them in his table and he put in a caveat saying, well,
7 essentially some of these are overlapping and one might
8 draw different economic boundaries. We entirely agree
9 with that. So these are high level descriptions of some
10 of these industries.

11 THE PRESIDENT: So Metro in France, those 306 trucks are the
12 same trucks; that is why the number is identical. That
13 what is you are saying, is it?

14 MR. JONES: Yes, that is right, sir. They were used in both
15 of those sectors, and actually you can see what has been
16 called two sectors there, food distribution and
17 wholesale, they are very similar. Food distribution is
18 taking food to restaurants or caterers or small shops,
19 and wholesale is taking food and other products to
20 wholesale outlets. They are really very similar in
21 terms of the sectors in what would have been called
22 different sectors in that particular example.

23 So I said I would come back to Veolia. This is the
24 unattributed trucks issue where we have proposed
25 a business unit approach.

1 THE PRESIDENT: Yes.

2 MR. JONES: Sir, on this I do not propose to spend a long
3 time because you have seen the shape of the arguments in
4 the skeleton arguments and things have not moved on
5 since then. Clearly there is an issue between the
6 parties about whether my clients can claim at all in
7 respect of these unattributed trucks, and we have said
8 if that is going to be tried as an issue the only way
9 for it to be tried is to include some in the claim and
10 the only way to do that really is to select a business
11 unit, and we have gone with the networks infrastructure
12 unit because, frankly, the waste management unit is so
13 big in France that one would end up essentially almost
14 trying the whole claim.

15 So the only point I want to make in addition to
16 those points which I had already made in my skeleton is
17 a point of nuance, and in particular, sir, having in
18 mind what you have said about the inclusion of second
19 waves or others in trial 3.

20 If we are in the realm of trying to narrow down my
21 proposal and trying to cut further bits from it, then,
22 sir, we do agree it would be better and a better use of
23 Tribunal time to make sure that you include as many
24 countries as possible and as many claimant groups as
25 possible and, if necessary, take the, as it were,

1 lighter touch Volvo proposal towards Veolia.

2 What I mean by the lighter touch Volvo proposal is
3 that in their test claimant order they have said do not
4 try a business unit, try the largest Veolia claimants in
5 the same way as you would for the others, and they have
6 suggested a timetable for us to identify and agree on
7 the largest Veolia test claimant.

8 In one sense one could do that already by looking at
9 the test claimant spreadsheets, but it probably would
10 make sense if you went down that route to give the
11 parties a bit of time just to set against the other
12 factors whether that one would really be the right one.

13 THE PRESIDENT: Yes.

14 MR. JONES: On the Volvo proposal, you have seen our
15 criticisms of that. I am focusing on Germany, but you
16 will also have seen, I think, that the proposals which
17 have been put forwards by Volvo do involve focusing on
18 a very, very small number of claimant groups. For all
19 of the reasons which I have already touched on, we say
20 that that really would not progress matters to
21 a satisfactory extent.

22 We have said that of their proposals, proposal 4,
23 which is the one with the most coverage, might promote
24 settlement, and I underline might for all the reasons
25 that I have already touched on, but it is a very pared

1 back proposal. We would urge you to, for the reasons
2 that I have gone through, be more ambitious and try to
3 progress more of these claims, possibly all of them, and
4 I have in mind particularly on the second wave Hertz,
5 and I will come to that in a moment, sir.

6 I am going to skip through the details of why we
7 have chosen, why we have reached the view that each of
8 the claimants, each of the proposed test claimants, is
9 representative of the group, because, sir, those are
10 points which are responsive to what Mr. Jowell will be
11 addressing you on later.

12 Can I pick up on the question of associated losses.
13 This is another point which you will have seen in the
14 skeletons which, again, I do not propose to spend long
15 on unless it would help you, sir. But the point in
16 broad terms is that in some cases to assess the claimant
17 group's losses, associated with a particular truck, one
18 needs to look not only at the original purchasing
19 claimant, but possibly also at other claimants in the
20 same group.

21 That point is clearest --

22 THE PRESIDENT: Can I just interrupt you. You say another
23 claimant in the same group. I mean, is not the point
24 simply that the company that bought the truck was the
25 actual purchaser and therefore the claimant may not have

1 been the company that used it, it may have been another
2 entity in the group?

3 MR. JONES: Yes.

4 THE PRESIDENT: Therefore, any pass-through will be the
5 other entity, whether that other entity is a claimant or
6 not.

7 MR. JONES: Well, sir, except that they all are claimants.
8 But in principle, yes, but that is why we have a lot of
9 claimants, because any company which it could have been
10 passed on to, as far as we are aware at least, is a
11 claimant in this case and that is --

12 THE PRESIDENT: Also --

13 MR. JONES: No, sir. Sorry, sir, just to be absolutely
14 clear, it is not that they also bought trucks, it is
15 that we were alive to this point when we brought the
16 claims, so in anticipation that it might be said, well,
17 you are the purchasing claimant but actually the truck
18 was used by another claimant in the group and you
19 charged that other claimant money for use of the truck
20 and you have therefore passed on the overcharge to that
21 other claimant, some of it or all of it, that other
22 claimant is in the claim not only if it bought trucks,
23 but in any event is a claimant in the claim, to ensure
24 that any internal pass-on will be dealt with.

25 So the point arises, as I say, most obviously in

1 relation to the situation that we are just describing,
2 which is a Suez Germany and Metro Germany issue, where
3 we have identified the claimants.

4 But it is right to say that some of the claimant
5 groups have taken what could fairly be called a very
6 cautious approach more generally concerned about
7 potential arguments that when you look at internal group
8 financing arrangements for some reason the loss has been
9 passed on, those sorts of arguments. So there are a lot
10 of claimants in the claim in order to cover off any
11 arguments that might be run along those lines.

12 That is why we have proposed the way to deal with
13 this is to identify test claimants, they are purchasing
14 claimants, but then to say that the test claim trial
15 will not only try their damages, their losses, but will
16 also pick up the losses associated with those trucks
17 with the purchasing claimant's trucks.

18 Now, this is another point on which Volvo have made
19 a suggestion which, whilst it is not our favourite
20 suggestion, we agree is a workable alternative. So can
21 I just show you that, sir. It is in Volvo's skeleton
22 argument. It is paragraph 27, so that is {HS2-A/7/11},
23 at paragraph 27.

24 They recognise that any test claimant proposal is
25 going to face this associated loss problem. It is not,

1 as it were, simply a problem of my proposal. But you
2 will see that what they say is why not identify the test
3 claimants then give us some time to say who we think is
4 the associated --

5 THE PRESIDENT: We thought that was very sensible.

6 MR. JONES: We can see the sense of that as well. The only
7 point I would make about it -- a couple of points. One
8 is we already know where this issue arises most
9 obviously, and as I say it is Metro and Suez Germany,
10 and it is clear that it would not make sense to have
11 a trial only of the purchasing claimants' losses in
12 those companies in those groups in that country, because
13 you would not get the key question, which is downstream
14 pass-on. You would not get to it. So it is obvious
15 already that they need to be included. I would not want
16 to agree to Volvo's suggestion and for us then to have
17 to come back and have an argument about that point of
18 principle, because it is obvious that they need to be
19 included.

20 THE PRESIDENT: It depends how you deal with the
21 pass-through, the pass-through argument would have to be
22 heard. Whether they have to be joined as claimants or
23 whether you say you ignore intragroup transfers, because
24 the pricing for that could be artificial, and just say
25 that any pass-through, through use of the truck by an

1 associated company, is to be treated as set against
2 the loss.

3 MR. JONES: Yes, I see.

4 THE PRESIDENT: You do not want to get into an investigation
5 of how internally it was priced within a group.

6 MR. JONES: That is the point.

7 THE PRESIDENT: So there are various ways of doing it. That
8 has got to be covered.

9 MR. JONES: Sir, that is the point, and that is a practical
10 solution but you have the point and there are several
11 ways that one could do this.

12 Second wave, you will have seen the spread of second
13 wave claimants in my skeleton argument at page 13, which
14 is {HS2-A/1/13}.

15 The first point that I want to make is that if one
16 looks at UK, France and Germany, you will see that these
17 five groups were each only active in one of those
18 countries, and we have described their industries in
19 paragraph 32 and we think they are also each only active
20 in one industry.

21 The relevance of that is that when I showed you the
22 VSW table earlier, I said there were 15 yellow boxes.
23 So in broad terms you would be looking at 15 industries
24 across these three countries.

25 The point I make here is that this would add five

1 yellow boxes, one for each claimant. I make that point
2 simply to highlight that whilst of course adding these
3 groups will add time to the trial, it will not add as
4 much time as you might think if one were to simply say:
5 we have got eight groups already and we are adding
6 another five. These are much more streamlined in terms
7 of their geographic and industry, but in particular
8 their geographic coverage than the original eight.

9 THE PRESIDENT: Mr. Jones, we have other Trucks claims
10 before the Tribunal covering other industries. Why
11 should they not be added in as well on your approach?

12 MR. JONES: It comes back to the question ... sorry, sir.

13 So why should they not be added, there are
14 efficiencies and they are real efficiencies, sir.
15 However long I take this morning, and I have an eye on
16 the clock and I hope I do not go over the hour which
17 I have indicated for me and I will do my best not to,
18 but, sir, to put it somewhat glibly, but I hope it
19 captures the point, however long I take I would be very
20 much shorter than if there were 13 of me. Those sorts
21 of efficiencies we see as being a feature of the
22 Hausfeld claims, if I can put it that way, where they
23 have the same legal team, the same pleadings, they all
24 have the same pleadings, the same economists, the same
25 counsel team, and there will, we say, plainly be

1 opportunities here for savings which really would not be
2 comparable across other claims.

3 Sir, we saw that when we had the joint CMCs with the
4 other claimants, where different issues were cropping up
5 and people were arguing different points in different
6 claims. So the point really is that there are
7 particular opportunities here to achieve those savings.
8 That is the main point.

9 THE PRESIDENT: Yes.

10 MR. JONES: So you will have seen in terms of how quickly
11 these can progress, we have tried to progress them. The
12 defendants have not been helpful.

13 THE PRESIDENT: I do not think, subject to what others may
14 say, it is so much an issue of how quickly they can
15 progress and whether they can catch up. Given that this
16 is a trial in 2024, on any view, I suspect they could
17 catch up. It is really about what they will do to the
18 length and complexity of the trial.

19 MR. JONES: I will turn to that next. I will turn to that
20 next. Save for one point, if I may, which is simply to
21 confirm, and I think you have this already, but simply
22 to confirm that you may be wondering the extent to which
23 you could, as it were, cherry-pick additional claimant
24 groups in particular countries and add into the claim,
25 and I simply wanted to confirm that we think that the

1 Tribunal is absolutely able to do that.

2 Even if the floor is as minimalistic as Volvo
3 proposal 4, anything lower than that would not work we
4 do not think, but if one takes and adds in other
5 claimants in other countries, there is no particular, as
6 it were, pitfalls to be aware of there, sir. Hertz in
7 Germany is one which would obviously make sense even
8 though it is in the second wave, and so I just wanted to
9 make that point clear when the Tribunal is considering
10 about how to build up, as it were, the package of test
11 claims.

12 Trial timing, then, and directions. We see that
13 trial length is obviously an important consideration.
14 Sir, on any view, a six-month or nine-month trial would
15 be an extremely long trial. We are looking here
16 ultimately at overcharge in three countries and pricing
17 policies in possibly up to 13 groups, but targeted
18 through test claimants.

19 Of course I will come to the details in a moment,
20 but we do make the headline point that there must be
21 extensive opportunities to manage the claims and the
22 hearings robustly, and essentially to make the parties
23 and make the parties' legal representatives focus in on
24 the most important issues in the claims.

25 Can I show you Mr. Frey's seventh witness statement,

1 because that is really where Mr. Hoskins' trial
2 estimates come from, and those are the estimates which
3 push us towards two-, three-, four-year trials, and I
4 just want to go through those. It is in HS2B.

5 THE PRESIDENT: Before we do that, have you done an estimate
6 of how you say your proposal can be tried in -- I think
7 you say 24 weeks. Have you done a breakdown of that
8 24 weeks so we can understand it?

9 MR. JONES: Yes, I have. It is in {VSW-D1/846/1}, sir.

10 I am having slight IT problems again. I think we
11 need to go down through that letter to try to find the
12 page -- I think it is towards the end. Page 4, I am
13 being told, page 3.

14 You will see there, sir, the proposed timetable is
15 actually paragraph 11 which may be on the next page,
16 I think. Then paragraph 12 is where the timings are
17 set out.

18 THE PRESIDENT: Paragraph 12.

19 MR. JONES: Yes, it is actually page {VSW-D1/846/4}.

20 THE PRESIDENT: Yes, we need to scroll down to the next
21 page, please {VSW-D1/846/5}. You say 7 to 10 weeks for
22 your factual witnesses. The defendants, all the
23 defendants, you say 1 to 3 weeks; is that right?

24 MR. JONES: Sir, it is not right, because we were asking
25 them in this letter for their confirmation, and we were

1 simply trying to have a discussion about it. I note
2 that Mr. Hoskins then says in his skeleton that this is
3 an extraordinary estimate, but we were asking them for
4 input.

5 We see what Mr. Frey says about that, and obviously
6 this is a significant underestimate. I am going to come
7 back to that when I look at Mr. Frey's witness
8 statement --

9 THE PRESIDENT: So what do you think is a realistic estimate
10 for the defendants?

11 MR. JONES: For defendants we say six weeks.

12 THE PRESIDENT: Six weeks. This is for, because this is all
13 the defendants, is it not?

14 MR. JONES: Yes.

15 THE PRESIDENT: Then you say economic evidence, 4 to
16 8 weeks. Foreign law, we might be able to take that for
17 ... yes.

18 Yes, thank you.

19 MR. JONES: Sir, just while we are looking at that and
20 before I go to Mr. Frey's statement, you will have seen
21 in my skeleton that I made the point there, we obviously
22 then received Mr. Frey's witness statement after writing
23 this letter and I made the point that all of these
24 estimates are necessarily at this stage provisional,
25 high level, and, sir, on, for example, expert evidence

1 I am not going to try and persuade you now that that
2 could be done in four weeks. Clearly, having looked at
3 what has been said in the round, it would be much more
4 prudent to list a trial which is somewhere between my
5 estimates and the Volvo estimates. In round numbers we
6 think that factual evidence might sensibly in total take
7 three months and expert evidence might in total take
8 three months.

9 Sir, can I go to Mr. Frey. It is {HS2-B/IC13/1}.

10 MR. JONES: Sir, could I ask for a one-minute break to try
11 and fix my IT problems?

12 THE PRESIDENT: Yes, in fact we usually have a break for the
13 benefit of the transcribers, so we will take a break
14 until ten past 12 and then you can have ten minutes at
15 that point and then we will see where we go.

16 MR. JONES: Thank you, sir.

17 THE PRESIDENT: But no more than ten minutes.

18 (12.02 pm)

19 (Short break)

20 (12.14 pm)

21 THE PRESIDENT: Yes, Mr. Jones.

22 MR. JONES: I am very grateful for that. I was taking you
23 to Mr. Frey's seventh witness statement at
24 {HS2-B/IC13/1}. It says "contains confidential
25 information". I do not think, and Mr. Hoskins I am sure

1 will tell me if this is wrong, that information about
2 how many witnesses and so on are going to be called and
3 how long the trial might take is going to be
4 confidential. That is the material I am going to take
5 you to, sir.

6 It starts on page {HS2-B/IC13/13} at paragraph 30 it
7 starts at paragraph 30 saying for the Volvo/Renault
8 defendants. Later on he explains he does not know how
9 many witnesses the other defendants might want; they
10 have not told him or us either.

11 Before we go into the witnesses they do want, one
12 notable absence is any of the people involved in the
13 cartel. So it is not being said that anyone who was
14 involved is going to tell us about how the cartel worked
15 and why they were doing it even though it was not having
16 an impact on prices.

17 If you look at 30(a) first, he says:

18 "I anticipate that any trial would require evidence
19 from at least two to three witnesses from each brand's
20 headquarters. Based on our work to date, it is unlikely
21 that any one witness for each of Volvo and Renault
22 [because there are the two brands for Volvo] would be
23 able to speak to all of the topics for which evidence
24 might be necessary at headquarter level ..."

25 Pausing there, sir, I accept that. They may be able

1 to do it with fewer witnesses, but of course
2 realistically they might need more. The key issues that
3 they will be talking about, as we understand it, is
4 pricing and how they priced trucks, and that, one
5 assumes, will feed into an argument about how the cartel
6 did not impact on those prices. But in round numbers we
7 see that.

8 Then at (b):

9 "For each additional jurisdiction, I estimate that
10 Volvo/Renault Defendants would need at a minimum one
11 witness from each of the local marketing companies to
12 give evidence on price setting in the market and the
13 relationship with their respective central companies."

14 That, again, sir, we can see in broad terms it goes
15 along with the point that they have made at (a). One
16 can imagine there may be overlap between these people
17 and I think Mr. Frey accepts that. But so far, what is
18 being described is pricing. You can see that it could
19 bump up to four witnesses, whether we would actually
20 need to cross-examine all of them and, if so, for how
21 long is a different question. But one can see that they
22 might have important witnesses, if one wants to put it
23 that way, up to that number.

24 (c) Financing arrangements. Well, on that one, sir,
25 at the moment we can see they might need a witness on

1 it, but it is difficult to imagine that there would be
2 much cross-examination on that. There are bound to be
3 a wide number of issues where there are witness
4 statements to cover off particular points but where
5 there is ultimately no or very little cross-examination,
6 and that we would put into that particular box.

7 But then (d) {HS2-B/IC13/14}:

8 "I anticipate that the Volvo/Renault defendants
9 would seek to produce evidence from the individuals
10 responsible for the customer relationship with each
11 claimant group from each of the Volvo and Renault brands
12 on the relevant commercial relationships ..."

13 The customer relationship on each of the brands for
14 the customer relationships. Now, this is where
15 Mr. Frey's witnesses really get bumped up dramatically,
16 because you up to this point if one were to ask how many
17 witnesses the defendants would need, in round numbers we
18 would be looking at something like 25 to 30 witnesses
19 who might really be cross-examined for more than an hour
20 or so.

21 So we are in the region of 25 to 30 witnesses, and
22 I should say when I say that, going back to (a) to (c),
23 one needs to keep in mind that not all of the defendants
24 are going to want witnesses in every country; some of
25 them make a big point about how they were not big in

1 some of the countries, and they will not all take
2 Mr. Frey's approach.

3 So we are in the realm of 20 to 30, but then we get
4 (d) which really multiplies the witnesses out, and there
5 are some important points to make about that, sir.

6 Firstly some of these relationships across defendant
7 groups and claimant groups in particular countries
8 involved no or hardly any trucks. So Daimler, for
9 example, Veolia and Suez are not seeking any damages
10 from Daimler.

11 Germany, one of the points which in the disclosure
12 context several of the defendants make is that they did
13 not sell many trucks to my clients in Germany. Scania,
14 DAF and Volvo make that point.

15 That is the first point. The second point on this
16 is, I have said a couple of times that I will come back
17 to this question of why might overcharge be claimant
18 group-specific, and sir, you will recall from the
19 economic statements which were before you at earlier
20 hearings that in broad terms all of the parties have
21 agreed that overcharge is going to be done on
22 a country-by-country basis, and they are getting for
23 their econometric analysis market-wide data, not just
24 data from my clients, but market wide, and they all want
25 to look at that.

1 You can see in that context that looking at how
2 a defendant priced its products, which what is (a) and
3 (b) are about, is going to be relevant. But is it going
4 to be relevant to say what was your pricing relationship
5 with these particular claimants if you are doing
6 a market-wide analysis?

7 Now, the answer to that is possibly, but it is only
8 possibly because some of the defendants did indicate
9 that essentially there might be some degree of variation
10 on a company-by-company basis, and you can imagine that
11 the reason they might want to argue that, they have got
12 their market-wide analysis, but then they say, well,
13 actually this particular claimant group bargained
14 particularly hard, or whatever it was, and we are going
15 to put in some evidence, or they are particularly
16 important to us for whatever reason, we are going to put
17 in some evidence showing what was unique about our
18 relationship with this group.

19 We are not, obviously, objecting to that sort of
20 evidence, but if that is the sort of argument that is
21 going to be run it would not make sense to run it across
22 the piece, it can only really only be done on a targeted
23 basis.

24 Thirdly on this particular point, sir, another one
25 of the high level points which the defendants stress is

1 that lots of these trucks were not bought from them,
2 they were bought through dealers.

3 Now, I accept that that does not necessarily mean
4 that there was no one in their offices keeping an eye on
5 the general relationship. There might have been, but it
6 does mean that for an awful lot of these truck purchases
7 they certainly were not involved in the negotiations.
8 They are not going to have much to say about how my
9 clients were particularly strong negotiators, which is
10 the sort of argument which one imagines they are going
11 to want to say.

12 So realistically, whilst we do not doubt that they
13 will be thinking about this, we cannot imagine that
14 there is going to be a witness on each of the client
15 relationships in each country.

16 That is important, because if one then turns
17 forwards to how these come together -- it is on page
18 {HS2-B/IC13/16}, paragraph 39, this is where Mr. Frey is
19 addressing the VSW proposal and the likely length of
20 that.

21 You will see in (a) he gets to this estimate of 100
22 defendant witnesses -- not dealing with the cartel, 100
23 defendant witnesses -- for the VSW proposal only. That
24 does strike us, sir, in terms of how many of these
25 witnesses might actually be cross-examined for any

1 real length of time as completely unrealistic. We have
2 seen what he says, but we think a much more realistic
3 figure would be something in the region of 30 defendant
4 witnesses who are going to be brought in to be
5 cross-examined on how their pricing worked.

6 Now, going back to 39(a), he then says:

7 "In addition, I anticipate that the VSW claimants
8 will call at least one witness per claimant group ..."

9 That would be at least eight claimant witnesses.

10 I have already indicated that we do think that is
11 a significant underestimate of the claimant witnesses,
12 frankly. So there is a bit of pull in both directions
13 here and I will come back to that in a moment.

14 Just at the end of this paragraph (a), Mr. Frey then
15 says how long these 108 witnesses will take, but his
16 maths goes a bit wrong, if I may say, because he says on
17 the assumption that each witness will take between half
18 a day and two days, we agree with that assumption, on
19 that assumption this could potentially amount to 20 to
20 40 weeks. But actually, the lower end of that range
21 that he has presented you is not the lower end of his
22 estimate. The lower end would be ten weeks; he would
23 have said 10 to 40 weeks if he was covering off the full
24 range, and I make that point just because actually even
25 on Mr. Frey's approach, 108 witnesses, the mid-point, if

1 you like, the one day per witness, is 20 weeks.

2 Sir, you have seen our own estimate for our factual
3 evidence. Sir, you saw that I had said seven to ten
4 weeks, we had said seven to 10 weeks for claimant
5 evidence. Maybe that is too long. In a sense it is the
6 defendants who will have a better sense of how long they
7 want to spend cross-examining my witnesses. I accept of
8 course the key issue is going to be downstream pass-on,
9 would be what they would want to be cross-examining on,
10 one assumes, as well as potentially the way they
11 purchased. But I do think Mr. Frey's estimate of one
12 witness per claimant group is, frankly, not realistic.
13 So I accept that the claimant time is going to be larger
14 than he had allocated.

15 But when one then comes to the defendant time, as
16 I have said we think 30 who might be examined for a day
17 each which takes you to is six weeks, but in round
18 numbers I also indicated earlier, sir, that bringing
19 this together I have suggested something in the region
20 of three months for factual evidence, and that would
21 allow for more claimant cross-examination than Mr. Frey
22 has allowed for but less defendant cross-examination
23 than Mr. Frey has allowed for.

24 So that is the scope of the dispute on the factual
25 side.

1 The expert evidence you will see is then addressed
2 at paragraph 39(b), so that is on page {HS2-B/IC13/17}.

3 You will see what Mr. Frey there envisages is two to
4 three weeks for the claimant experts to give evidence on
5 overcharge across three jurisdictions, a further week
6 per claimant group, claimant experts, on pass-on, etc,
7 per claimant, then two weeks per defendant on
8 overcharge. So 12 weeks, three months, three months of
9 cross-examining experts, defendant experts, on what in
10 broad terms are going to be the same issues but in
11 different defendants and different countries.

12 So when I say in broad terms they are going to be
13 the same issues, of course there are going to be
14 differences between them.

15 THE PRESIDENT: Cutting it short, because we are a bit short
16 of time, we understand you say that it is not realistic
17 to say that your proposal would involve a two-year or
18 even a one-year trial, it would be less than that, and
19 we are not necessarily assuming it would take in excess
20 of a year. But our concern, as I said, is that we do
21 not think any trial should be more than 26 weeks, and we
22 are concerned that your proposal will take more than
23 26 weeks. That is what the issue is, as far as we are
24 concerned. It is not looking at a two-year estimate.
25 We are looking at what can sensibly be done in 26 weeks

1 if, as we accept is desirable, we include Germany as
2 well as France and the UK.

3 MR. JONES: Yes. Sir, I am grateful for that.

4 What we say is that these expert issues do not need,
5 would not need six months, they would need in round
6 terms three months, because there would be so many
7 cross-cutting issues, the defendants are bound to be
8 liaising, and in fact they should be liaising also with
9 the claimants' experts, to identify the key issues.

10 There will be differences of approaches, doubtless,
11 in particular cases, but there will also be
12 cross-cutting themes, high level decisions which have to
13 be made, and those are the things which we will be
14 focusing on. So in three months we do say across all of
15 my claims, including the second waves, one could deal
16 with those expert issues. Then what one is left with,
17 I have suggested three months on witnesses, three months
18 on experts, one is left, I accept, sir, going a bit over
19 the 26-week point, because there is a need for
20 submissions, and sir, you will have seen that Mr. Frey's
21 estimate on submissions is 12 weeks.

22 Sir, you will have a better idea than I do about
23 whether that would assist the Tribunal, but from our
24 perspective that seems like an extraordinary amount of
25 time to be speaking to the Tribunal rather than hearing

1 from witnesses.

2 So, back to my point on second waves, it would add
3 five boxes out of 15, but you would not have to redo
4 overcharge. We do say that it can be done within
5 a manageable period.

6 Sir, I hear what has been said about 26 weeks, but
7 if for a little bit longer one could get the fullest
8 coverage to ensure that these claims can make use of the
9 efficiencies which I have highlighted, and that the
10 trial does serve to promote that wider settlement, then,
11 sir, I would urge you to consider, as I say, listing it
12 for slightly longer than that.

13 Sir, those are my submissions.

14 THE PRESIDENT: Thank you very much. We will take just
15 a moment before and we would then turn to, I think,
16 Volvo and then to, I think it is MAN who is leading on
17 the frontrunner disclosure proposal, if I have got that
18 right.

19 We will be back in a few minutes.

20 (12.31 pm)

21 (Short break)

22 (12.37 pm)

23 Decision on length of trial

24 THE PRESIDENT: We have between us considered the very clear
25 and helpful submissions from Mr. Jones along with the

1 material placed before us in writing. We do agree that
2 the trial should be fixed now so that everyone can work
3 towards a particular date, and we think it should be
4 fixed for the start of the Easter term in 2024. That is
5 9 April.

6 But as we indicated earlier, we think that the
7 maximum length of trial to include, therefore, openings,
8 time for writing written closings, and oral closings,
9 should be six months, 26 weeks, and that the complexity
10 of a trial is not simply length, it is also the number
11 of factual variations that have to be considered, the
12 number of witnesses, and the length of closings that the
13 Tribunal has to consider, and that that must then
14 dictate how the individual cases or claims to go forward
15 are selected.

16 We think that what we do now is going to be an
17 objective, it may be some things may have to be cut out
18 later if they become too complex. But we are not
19 persuaded that it is appropriate to take in any of the
20 second wave claims. There are efficiencies, as
21 Mr. Jones pointed out, in that they have the same legal
22 team and the same expert, but at the same time there are
23 undoubted additional complexities through throwing up
24 additional factual investigation and witnesses for
25 different companies or corporate groups. That is

1 subject, as I indicated earlier, to the potential
2 involvement of Hertz on a preliminary issue regarding
3 German law. But that would be their involvement.
4 Therefore, we do not need to hear from anyone about the
5 second wave.

6 As regards what should be in the trial, we can see
7 that they should be Veolia and Suez in some form, and we
8 can see some force in having business units. We also
9 think it is desirable to aim to include Germany because
10 the overcharge analysis may be different for different
11 countries and there are Germany claims both to be tried,
12 not being tried now, but will be looking at the judgment
13 for guidance, and therefore to extend to Germany.

14 We will obviously hear from both counsel for
15 Volvo/Renault and counsel suggesting there should be
16 further disclosure before any final selection is made,
17 but our present thinking is that it is ambitious to
18 include some of the individual UK claimants, that is to
19 say Downton, Dairy Crest, Wolseley or NWF, but that if
20 we do include France and Germany there would be some
21 force in including Metro, because Metro is present in
22 both France and Germany. Metro is present in some
23 different sectors, and from what we have seen the
24 dataset of Metro seems fairly complete.

25 So that is very much a provisional view at the

1 moment. It is not, therefore, precisely aligned with
2 any of the Volvo/Renault alternatives, but it looks at
3 where we are thinking and we would have thought that
4 a trial like that can be accommodated within 26 weeks
5 and that the analysis by Mr. Frey which we have just
6 been taken to is rather overgenerous to put it mildly in
7 terms of time needed on the particular cases.

8 So that is the way we are looking at the moment.

9 With that, we turn to -- I think it is, is it for
10 Volvo/Renault, Mr. Jowell, because you have got
11 alternative proposals?

12 MR. HOSKINS: It is Mr. Hoskins.

13 THE PRESIDENT: I am so sorry.

14 MR. HOSKINS: I am delighted to be mistaken for Mr. Jowell,
15 it is a compliment.

16 THE PRESIDENT: I am sure he will be delighted to be
17 mistaken for you as well.

18 MR. JOWELL: It is entirely mutual.

19 Submissions by MR. HOSKINS

20 MR. HOSKINS: Sir, my only, and I hope it comes through from
21 our submissions, all we have tried to do really is to be
22 as helpful as possible to the Tribunal. I will try and
23 carry on in that vein, taking account of the
24 observations, the preliminary observations that you have
25 just made.

1 Our primary aim is not to sort of grind some
2 tactical axe, it is to make this workable, because we
3 are the people who are going to be at the sharp end.
4 Not me, but all these people that sit behind me and all
5 the other teams are going to have to make this work, and
6 it is going to be important to get this -- we cannot get
7 it right but we can do our best to make it as manageable
8 as possible and that is very much where we come from for
9 the CMC. There is a balance to be struck and we are not
10 going to get perfection.

11 I think it is very important, sir, and that is what
12 we have striven to do, we have to have some sort of time
13 estimate for the trial for a number of reasons: one,
14 because you need to set it down to start from that week
15 in April and you need to set aside time in everyone's
16 diaries, but equally without a time estimate it is
17 impossible, really, to work out what should be in and
18 out of the trial. Obviously you have to marry up the
19 desire to cover as much as possible with what can be
20 covered, and that is why, if it is helpful, I will try
21 and do a bit of a granular presentation of what time
22 things might take and you will obviously apply your own
23 experience to that, all three of you.

24 But that is what we have done, and I can do that
25 quite quickly because obviously you have had our

1 skeleton arguments etc, so you will speed me up, no
2 doubt, if I am taking too long and you will quiz me if
3 there is something that you think is particularly useful
4 I am not developing.

5 It is, sir, as you adverted to, and as we said in
6 our skeleton, important to see what a trial estimate
7 must include because one did not see that in the
8 Hausfeld estimate. For example, pre-reading. Now,
9 clearly there is going to be a relationship between
10 pre-reading and opening submissions, because it may well
11 be that the Tribunal prefers to have a longer period of
12 time for pre-reading and then to have "relatively short"
13 openings submissions or vice versa. But in a case of
14 this scale, even in the estimates we have put, they vary
15 between a week and two weeks of pre-reading, and
16 actually as I read that, I thought if I was the Tribunal
17 I might be thinking that is actually quite light for
18 a six-month trial, but you will no doubt have your own
19 views that.

20 The openings submissions, I think you adverted at
21 start that the defendant groups have tried to work
22 together to avoid repetition. Obviously we will carry
23 on doing that, but the opening submissions will involve
24 five or six defendant groups depending on which path you
25 go down, and even relatively short opening submissions

1 will have to allow everyone to stand up and at least
2 make their submissions in relation to matters which are
3 specific to them.

4 Obviously the bulk of any time estimate will be
5 factual and expert evidence from all parties. You have
6 heard some submissions this morning on that, and I will
7 say something else on it.

8 But the evidence, factual and expert, will have to
9 cover the main topics, which are value of commerce,
10 overcharge, pass-on/mitigation, tax and interest. Of
11 course one has to bear in mind that pass-on mitigation
12 tax and interest will be individual to claimants, or to
13 claimant groups. So that is -- you have to multiply
14 every time you put a claimant in for dealing with those
15 issues.

16 The thing that everyone always forgets in time
17 estimates is the time for the parties to prepare their
18 closing submissions, but more importantly, time for the
19 Tribunal to read them before the oral closing
20 submissions are made.

21 Again, in a case of this scale I imagine that the
22 Tribunal will want a proper time to actually take
23 account of the parties' closing submissions. There is
24 no point in not allowing that time. Clearly, any oral
25 closing submissions are going to be far more effective

1 if proper time has been allowed for the Tribunal to read
2 what has been produced by the various parties.

3 In terms of time estimates, one quite good
4 touchstone, obviously, is Ryder and Dawsongroup, because
5 the Tribunal has already set that down for 24 to
6 26 weeks, which is what we are aiming at here. That is
7 the amount of time that we want to take up. So let us
8 do a comparison of what is actually in the Ryder and
9 Dawsongroup trial.

10 That is two claimant groups, it is one industry
11 sector, it is one jurisdiction and it is five defendant
12 groups.

13 So every time you add a claimant group, every time
14 you add an industry sector, every time you add
15 a jurisdiction, and if you have the extra defendant
16 group, that time estimate, which is already 24 to
17 26 weeks, is going to go up and the ability to achieve
18 something in that time is going to come under strain.

19 Of course some of these factors, it is sort of
20 almost a logarithmic increase, that is the trouble,
21 every time you add a jurisdiction, every time you add
22 a business sector, it is not just one factual witness,
23 it is a number of factual witnesses. So every time you
24 build something else in, the accretion actually
25 increases quite dramatically.

1 Now, if the Ryder/Dawson group estimate is reasonably
2 accurate, and we all hope it is, there is a relative
3 constraint, with all due respect to the Tribunal, on
4 what we can achieve in the same time in a case which is
5 of much greater complexity. Obviously nobody can deny
6 that.

7 THE PRESIDENT: Mr. Hoskins, if I may interrupt you, I am
8 not sure it is a straight read across, because the whole
9 point about starting this trial only in April 2024 is
10 that by then potentially there will be not one but two
11 judgments on UK overcharge, and one detailed judgment on
12 at least, maybe two, on pass-on in various
13 circumstances. So there will be quite a bit of guidance
14 already from the Tribunal, which of course the parties
15 in this trial that we are concerned with may say is all
16 wrong and the Tribunal should think again. But it will,
17 one would hope, and we have been urged by you all to set
18 the date of this trial such that you can take account of
19 the judgment in Ryder/Dawson group, so that should assist
20 and we would hope significantly.

21 MR. HOSKINS: Completely fair, absolutely, sir. Nothing
22 I say is hard-edged.

23 THE PRESIDENT: No, but I am just saying that if that is
24 26 weeks, we must go plus, plus, plus, I do not think
25 quite follows.

1 MR. HOSKINS: I accept that, and that is a fair point. What
2 it does not necessarily mean, because, for example,
3 Ryder/Dawsongroup is just the UK, the points in relation
4 to France still exist.

5 THE PRESIDENT: We see that.

6 MR. HOSKINS: The points exist in relation to Germany.

7 As I say, I am not trying to put a hard-edged point
8 to you, but I simply use that as a touchstone we have.
9 It is a far smaller scope of trial. Even with the
10 benefit of two judgments, given they are UK, given the
11 sectors they cover, there is still going to be a need
12 for substantial extra factual evidence and expert
13 evidence with the best will in the world.

14 So it is swings and roundabouts. I am simply trying
15 to give you all the various factors, and I am sorry you
16 are probably well aware of them already, that will have
17 to go in the pot when you make the very difficult
18 judgment of Solomon, which no doubt you will have to do
19 when you wield your sword at the end of this.

20 In terms of the likely number of factual and expert
21 witnesses, I mean you made the comments about Mr. Frey,
22 but I hope that is a useful starting point. That is
23 again the spirit in which we put the evidence in, to
24 give some sense of what would be needed in terms of
25 expert evidence.

1 If we could go back to that, please, so that
2 {HS2-B/IC13/13}, because there was a certain amount of
3 common ground at least between ourselves and the
4 claimants. So I am looking at paragraph 30. At least
5 two to three witnesses from each brand's headquarters
6 Mr. Jones said he thought that was probably fairly
7 accurate. So that is the sort of level that we are
8 looking at at headquarter evidence.

9 For each additional jurisdiction a minimum one
10 witness from each of the local marketing companies.
11 Again Mr. Jones was happy to say that he could see that
12 that made sense. At least one witness for each
13 jurisdiction to give evidence on financing arrangements.
14 Again Mr. Jones said he could see why we might well want
15 to call that sort of witness. He queried how long he
16 would want to spend cross-examining them, but in
17 principle yes to that type of witness.

18 Then (d):

19 "Evidence from the individuals responsible for the
20 customer relationship with each claimant group."

21 And this is where you got a bit of pushback. But
22 you will see from paragraph 31, it is maybe implicit
23 rather than explicit, but generally speaking there were
24 different account managers for different primary
25 customers. There might have been some accounts where

1 the same account manager dealt with more than one
2 customer, but generally speaking individual account
3 managers for different customers. That would obviously
4 be relevant when you are looking at level of discounts,
5 bargaining et cetera, and that is going to be relevant
6 to both overall overcharge and any arguments about
7 individual loss.

8 It would be potentially relevant to overall
9 overcharge because the econometric model may well want
10 to take account of such factors even in calculating an
11 average for the industry.

12 So the evidence that goes into that model will
13 almost certainly want to take account of that.

14 It is well established that any econometric model
15 must reflect as closely as possible the reality on the
16 ground. Obviously one then picks what are the important
17 variables within that, but one has to have a clear
18 picture of the industry as the starting point for
19 creating an econometric model.

20 Then clearly that sort of evidence may well be
21 relevant or will be relevant to arguments about
22 individual loss of individual claimants in terms of
23 discounts, bargaining position, et cetera.

24 So in our submission the sort of evidence that has
25 been given about the number of witnesses we would urge

1 upon you as being carefully considered and accurate.

2 In terms of the expert evidence, one picks this up
3 at paragraph 33 {HS2-B/IC13/14}. Also we have had
4 evidence on that from Mr. Biro, who is our economist
5 advising us, and perhaps it is useful to see what he
6 says about the details of the expert evidence because
7 obviously Mr. Frey draws on that. That is
8 {HS2-B/IC6/3}. That should be the fourth statement of
9 Mr. Biro.

10 At paragraphs 8 to 15 he explains that overcharge
11 analyses would need to be conducted separately for each
12 of the UK, France and Germany.

13 One sees the sort of best explanation of that and
14 what would have to be taken account of at paragraph 12,
15 which is on page {HS2-B/IC6/4} of this statement. So
16 you will see:

17 "Such an exercise would require extensive factual
18 evidence and disclosure to be provided by VT/RT relating
19 to its sales in each of the UK, France and Germany."

20 Here he is explaining not just that you need
21 separate analysis at the expert level for overcharge in
22 each of these countries, but also that you need the
23 factual evidence to underpin and allow that analysis to
24 take place, and he gives the sort of evidence that would
25 be required both through disclosure and factual

1 evidence.

2 You see the heading:

3 "(a) Factual evidence and documentary disclosure.

4 "... need to take into account economic drivers
5 expected to affect truck prices ...

6 "(i) country-specific factual evidence would
7 encompass topics such as ..."

8 He gives examples. Then the same in relation to
9 documentary disclosure. I will just leave you to
10 quickly glance over that. (Pause)

11 Then when you are ready if you go on to (b) and if
12 you would quickly look at the headings there you will
13 get a sense of the data -- we will do a similar exercise
14 except for data disclosure.

15 THE PRESIDENT: But you are not suggesting that between now
16 and, say, April 2024 trial date there is not time for
17 that disclosure?

18 MR. HOSKINS: No, it is not -- this is not that the trial
19 cannot happen. We are acting on the basis that a trial
20 will happen in April 2024. I am simply making
21 submissions to you about what can go in that trial in
22 order for it to take place for the 26 week period.

23 THE PRESIDENT: Yes.

24 MR. HOSKINS: There is a similar analysis if one goes to
25 page 8 {HS2-B/IC6/8} of the statement for downstream

1 pass-on.

2 Perhaps if you would simply read paragraph 16, or
3 refresh your memory of paragraph 16, which is just a
4 sort of summary again of the sorts of issues and
5 evidence that would be required. Remember this would be
6 claimant specific. So each time you add a claimant or
7 a claimant group you are having to do this exercise.

8 (Pause)

9 It is difficult to translate this into figures,
10 I accept that, but I think it is important to understand
11 what underpins and allows you to come up with your own
12 view of what the figures are.

13 Obviously Mr. Frey has put forward his estimates to
14 try and assist, and you will form a view on that, but
15 that is what underpins, you know, there is a lot going
16 on below the water here in terms of disclosure and
17 factual evidence that will need to be presented at trial
18 in order to support the expert evidence.

19 THE PRESIDENT: We see that. But equally, not particularly
20 for Germany, but France as well, not all defendants are
21 active in all three countries.

22 MR. HOSKINS: Absolutely, yes. Again I think I will take
23 pretty much any points like that against me. If they
24 are not against me I am with you on them, sir. I am
25 trying to build this with you rather than push a point

1 of view.

2 Can I just take you through, I know you will have
3 seen it, but just walk through our primary proposal
4 because again I think it is only by coming up with these
5 sorts of examples one can sort of start to test what
6 might be possible, or if you make a change what that
7 change might involve. I appreciate, as you said, that
8 none of our four proposals exactly match what your
9 preliminary view is, but I hope if we just walk through
10 some of them it will give you a sense of what we have
11 tried to do in terms of putting together these
12 estimates.

13 Under our primary proposal ...

14 THE PRESIDENT: If I can interrupt you, we find these in
15 Mr. Frey's very helpful table at {HS2-B/IC13/59}.

16 MR. HOSKINS: That is right. That is right. We have set
17 them all out there.

18 The primary proposal would be a trial involving test
19 claimants from Suez and Veolia in the UK and France, but
20 would not include Germany. That is the downside of this
21 one.

22 It would determine all issues in relation to those
23 test claimants and we propose that the test claimants
24 are those who acquired the highest number of trucks
25 within Suez France, Suez UK, Veolia France and Veolia

1 UK. They will all operate in a waste management
2 industry, so this is a one sector trial.

3 The proposal does not include any of the other
4 so-called VSW claimants, so Wolseley, Downton,
5 et cetera, Dairy Crest.

6 But just to put that in context a bit, the Veolia
7 and Suez claims comprise more than 80% of the total
8 number of trucks in the VSW proceedings. So you are
9 still, at least in terms at the group level, you are
10 looking at by far the bulk of the trucks.

11 The problem, I think you adverted to it in comments
12 earlier, sir, in relation to the Wolseley claims, is if
13 you bring them in you are adding six further claimant
14 groups in at least seven further business sectors with
15 all that that entails for the time estimate.

16 THE PRESIDENT: If you bring them all in.

17 MR. HOSKINS: Yes, absolutely. You could, you know, try and
18 cut and choose, absolutely, I accept that.

19 Just, again, for a bit of context, approximately 78%
20 of the trucks which were in VSW's test claims proposal,
21 so the one that I think everyone now is going to have to
22 accept is overblown, for the Wolseley claims are alleged
23 to have been procured in the UK, so ie bulk of the
24 Wolseley claims are UK in any event.

25 So Hausfeld had already accepted in a sense that the

1 Wolseley claims in their test proposal was going to be
2 78% UK trucks, and we make the point, well, if that is
3 right you are going to get a strong precedential value
4 from the Veolia and Suez findings on the UK, which they
5 can read across and we can across to Wolseley when it
6 comes to talking about settlement, if that is indeed
7 what happens after judgment.

8 This proposal does not include Daimler as
9 a defendant, so that is another of the swings and
10 roundabouts.

11 In relation to Daimler, Daimler has settled with
12 both Suez and Veolia. It is important to bear that in
13 mind whenever we are looking at this and asking
14 a question: do we want a trial that has to have Daimler
15 in it? They have settled with the largest claimants in
16 this group that we are looking at, and Daimler on our
17 calculation accounts for around 6% of the total trucks
18 claimed in the VSW proceedings.

19 So it is always a pleasure to see Mr. Harris and it
20 would be a devastating loss not to see him at this
21 trial, but it is important that the tail does not wag
22 the dog when we are looking at what is effective and
23 efficient in the trial. I absolutely understand the
24 importance of Daimler, but one has to put it in context.

25 If we go to seventh Frey, paragraph 41, which is at

1 {HS2-B/IC13/18}, you will see that we have volunteered
2 a breakdown for what this trial would look like. Just
3 in summary, it only allows one week for reading in,
4 which I anticipate you are going to say is too short,
5 I have to say. It just looks too light to me.

6 It includes a total of five weeks and three days for
7 both opening and closing submissions, and that includes
8 time for drafting and reading the written closing
9 submissions, and also it is important to remember, of
10 course, it will have to include time for replies from
11 the claimants.

12 Again, it is not a huge amount of time that has been
13 allowed for opening and closing and drafting and
14 reading, but that is the estimate that we have come up
15 with. It is an estimate of 8 to 12 weeks for factual
16 evidence. It is ten weeks for expert evidence and that
17 gives a total trial estimate of 24 and a half to 28 and
18 a half weeks.

19 I have just seen the time and I have been rabbiting
20 on and taken us beyond the traditional lunch break.

21 That is a good place for me to break, if you would like
22 me to, and apologies to everyone for rabbiting on.

23 THE PRESIDENT: Yes, so we will come back at 5 past 2.

24 MR. HOSKINS: Thank you.

25 (1.07 pm)

1 (The short adjournment)

2 (2.06 pm)

3 THE PRESIDENT: Yes, Mr. Hoskins.

4 MR. HOSKINS: Thank you, sir.

5 Sir, I had just got to the end of our primary
6 proposal. You will remember that was for UK and France
7 but not Germany. The trial estimate was between 24 and
8 a half and 28 and a half weeks. I should say that does
9 not include associated losses which I will say something
10 quickly about, but these estimates do not include that,
11 because we do not know at the moment exactly what is
12 involved in that.

13 Our submission is that that is manageable and it
14 also would cover sufficient issues to make it useful.
15 In our submission as soon as one gets into looking to
16 add Germany, one is moving out of manageability and that
17 is why that is our primary proposal. We say UK and
18 France manageable, anything with Germany unmanageable,
19 by which I mean well over 26 weeks.

20 I can take the alternatives quite quickly because
21 I do not want to get bogged down in details, and I am
22 sure you do not either. But our first alternative I do
23 not think probably is going to get much traction given
24 the preliminary views pressed by the Tribunal, but it
25 going to be helpful when I come to the end of the

1 alternatives because I think I can probably indicate the
2 sort of trial involving Germany you might have and the
3 amount of time it might take.

4 On our first alternative you would be adding Brakes
5 UK and Brakes France to our primary proposal.

6 So what you would add to our primary proposal is two
7 new claimants, Brakes UK and Brakes France, you would be
8 adding a new sector, food distribution, you would be
9 adding a new defendant, Daimler.

10 If we can go, please, to Frey 7, paragraph 42(a),
11 that is {HS2-B/IC13/20}, you will see that the time
12 estimate given there, it is broken down in a bit more
13 detail, but the estimate in Mr. Frey's evidence is about
14 30 weeks for that trial.

15 So adding in Brakes takes you from 24 and a half/28
16 and a half weeks to 30 weeks. So it is adding roughly,
17 finger in the air, about four weeks.

18 THE PRESIDENT: You say each defendant. Is Brakes claiming
19 against all the defendants?

20 MR. HOSKINS: I think it is. That is certainly what I have
21 noted. So unless someone corrects me that was my
22 understanding.

23 So that is about four weeks to add in Brakes, and
24 I will come to it because the alternative -- I am going
25 to flag another alternative at the end -- takes out

1 Brakes and I am giving it a value of four weeks. You
2 will see the importance of it when I come to it.

3 The second alternative is a way of getting German
4 trucks into trial 3, but the way our second alternative
5 does that is that we add a German claimant from the
6 Suez Group to our primary proposal but we take out
7 Veolia from our primary proposal.

8 In that circumstance, you would therefore have
9 a trial in respect of test claimants from Suez alone in
10 the UK, France and Germany. Suez, we say, is
11 a preferable test claimant because of the difficulties
12 that Veolia has with their unattributed trucks, which
13 Mr. Jones adverted to, about 49% of the trucks in
14 respect of which they claim suffer from this
15 unattributed trucks problem.

16 So if you are going to pick a claimant, a test
17 claimant, across the three jurisdictions, clearly Suez
18 is preferable, we say, to Veolia.

19 Again, Daimler would not be a defendant in that
20 trial for the reasons that I have already described. It
21 settled out with Suez.

22 If we can go in seventh Frey, down to
23 paragraph 42(b), which is on page {HS2-B/IC13/21}, you
24 will see -- sorry, can we move the page down a little
25 bit, thank you. So you will see the time estimate for

1 that trial is 32 to 36 weeks.

2 THE PRESIDENT: They are all on the table, are they not, at
3 the bottom of the table?

4 MR. HOSKINS: Absolutely, yes. I am positioning it also
5 because there is more reasoning in Seventh Frey that you
6 might want to refresh your memory on, so I am simply
7 doing it through that. But absolutely, the figures are
8 obviously the same.

9 Then our third alternative was to accommodate, if
10 you wanted to include German trucks and Daimler as
11 a defendant, you could do that by adding test claimants
12 from the Metro Group in France and Germany to the first
13 alternative. Now, under that proposal, as we have put
14 it in the evidence and in the table, that trial would
15 include test claimants from Suez, Veolia, Brakes and
16 Metro, because Brakes is the way that you get
17 Daimler in.

18 That trial would cover the UK, French and German
19 markets.

20 THE PRESIDENT: When you say Brakes is the way you get
21 Daimler in, the Metro claim is against who?

22 MR. HOSKINS: Sorry, Metro also includes Daimler. I am
23 sorry.

24 THE PRESIDENT: Yes. So you do not need --

25 MR. HOSKINS: Sorry, that is my mistake.

1 THE PRESIDENT: That is why we had suggested that we do not
2 have Brakes, you just have Metro.

3 MR. HOSKINS: Sir, this is not our preference, this is an
4 option. So you take our third alternative but you take
5 Brakes out.

6 THE PRESIDENT: Yes.

7 MR. HOSKINS: The problem with that is if you go to
8 paragraph 42(c) of Mr. Frey's seventh statement, so at
9 page {HS2-B/IC13/22}, do you see at the bottom of the
10 page our estimate for this trial is 42 to 48 weeks, now
11 that is including Brakes. So if you take out Brakes, I
12 appreciate this is incredibly crude, we had assigned
13 four weeks to Brakes, you end up with an estimate on
14 this very crude basis of 38 to 44 weeks.

15 So it is still well in excess of the 26 target we
16 are going for, but that gives you a sense of what
17 a trial with Germany would be like. That is why our
18 primary submission is that if you want 26 weeks you
19 cannot have Germany, but if you want Germany this is the
20 sort of trial you would be looking at.

21 THE PRESIDENT: Yes.

22 MR. HOSKINS: That does not deal with associated losses. As
23 I have said, these estimates do not include associated
24 losses, and I think there was a degree of harmony at
25 least between ourselves and Mr. Jones, and I think also,

1 sir, yourself, this morning. We have made a suggestion
2 as to how to deal with associated losses in stages.

3 If we can go to page {HS2-B/IC13/24} of this witness
4 statement, please, paragraphs 44, over the page, please
5 {HS2-B/IC13/25}, you will see that we have set out
6 a proposal at 45 to 46 which Mr. Jones said he could see
7 the sense in, and I think the Tribunal agreed this
8 morning.

9 THE PRESIDENT: But we do not see it in terms of bringing in
10 additional parties. It is simply that one is not going
11 to look at intragroup transactions and intragroup
12 pricing, which is often artificial, but that you are
13 entitled as a defendant to say, well, maybe the
14 claimant -- there can be no pass-on by the claimant,
15 because the claimant actually did not use the truck, but
16 we are entitled to have regard to the pass-on by that
17 entity which did use the truck. So they do not have to
18 be another claimant.

19 MR. HOSKINS: The only point I make in associated loss -- I
20 make two. One is we have a proposal for actually
21 digging a bit deeper into what it means and what is
22 involved, and I think we are all agreed, at least
23 between myself and Mr. Jones, that that would be a good
24 idea and this is a framework for doing that. Then the
25 second point I make is that whatever it ends up being it

1 will add a bit to the estimate.

2 Those are the two simple points I make at this
3 stage. That is really all we can do without it being
4 crystallised in a more meaningful way.

5 THE PRESIDENT: Yes, I am not sure it necessarily adds to
6 the estimate. It will add a little bit of evidence that
7 will need to be given but not necessarily
8 cross-examined.

9 MR. HOSKINS: Sir, the other point I make is that we just do
10 not know precisely what it is going to bring in. So
11 that is the marker I put down, that depending on where
12 we end up on associated losses it may add to the time
13 estimate, it may add de minimis, it may add materially,
14 but the estimates all take account of it. It is just
15 another factor that we need to take account of and I put
16 it no higher than that.

17 MR. JUSTICE FANCOURT: I suppose the other area where
18 additional claimants, or the involvement of other
19 individual claimants or would-be claimants might arise
20 is the unattributed lorries, because there, if I have
21 understood the claimants' proposal correctly, what they
22 are saying is that we have joined in all the parties who
23 may have been the original purchaser of the truck, so
24 that it is not necessary for the Tribunal to spend time
25 identifying who was in fact the actual purchaser.

1 I appreciate the defendants may have a different
2 approach to that issue, but that is another area. I do
3 not know if you were going to come on to that at any
4 stage or whether Mr. Jowell was going to address it.

5 MR. HOSKINS: The only thing I have to say on unattributed
6 trucks is that there is a difference between ourselves
7 and the claimants as to what that means for choosing the
8 test claimants.

9 Again, I think we have probably reached a landing on
10 that, because before today the claimants' proposal was
11 to have business groups for Veolia to deal with that
12 unattributed trucks problem, whereas we in our
13 proposals, whenever Veolia appeared in our particular
14 proposal, sorry, it was to liaise to discuss with the
15 claimants to find the suitable purchasing entity within
16 the Veolia Group, or a particular purchasing entity.
17 Again, I understood Mr. Jones this morning to be saying
18 that was a good idea, he was not too averse to that as
19 a proposal.

20 So in terms of what will the stage 3 trial look like
21 or the trial 3, rather, look like with unattributed
22 trucks in it, I think that is the main thing for us that
23 impacts upon it. It is whether it is one purchasing
24 claimant sought to be agreed with the claimants or
25 whether it is a business entity. But beyond that, I did

1 not have any other submissions to make, sir, unless you
2 have other questions.

3 MR. JUSTICE FANCOURT: I see. Thank you.

4 MR. HOSKINS: Sir, it is all very rough and ready but
5 hopefully it is rough and ready in a helpful way.

6 Unless you have any further questions, those are the
7 submission that I wanted to make on this particular
8 topic.

9 THE PRESIDENT: Yes, just a moment. (Pause)

10 No, we have no questions.

11 I think, Mr. Jowell for MAN, you urge a different
12 approach.

13 Submissions by MR. JOWELL

14 MR. JOWELL: Not fundamentally. May it please the Tribunal,
15 we consider it to be common ground that there are
16 broadly two objectives that the Tribunal should seek to
17 achieve when considering the selection of frontrunner or
18 test claimants. The first is that the number and nature
19 of the test claimants should be such as to permit
20 a trial that is manageable in its length and scope.

21 There is also, however, a second objective, that
22 Mr. Jones adverted to, which is that it is desirable
23 that the frontrunner claimants should be selected if at
24 all possible to be reasonably representative of the
25 overall class of claimants.

1 That is because the utility of having representative
2 claimants in this way really relies on them being
3 persuasive precedents so that they can facilitate
4 settlement, and they will only be persuasive insofar as
5 they are reasonably representative of others.

6 We say that the defects of the approach advocated by
7 the VSW claimants is that it is unlikely to achieve
8 either of those objectives.

9 Their approach, once you properly analyse it, will
10 result in test claimants that are too numerous to permit
11 a manageable trial, and in addition, we also say that
12 one cannot have any confidence that their test claimants
13 would even be representative.

14 Now, we appreciate of course that there is a tension
15 between the two objectives of manageability and
16 representativity and the Tribunal has now determined, or
17 at least provisionally, that the trial be six months in
18 length, and we certainly do not seek to dissuade the
19 Tribunal from that conclusion, which seems to us to be
20 an entirely reasonable allocation of the Tribunal's
21 valuable time and resources.

22 We also recognise that having reached that
23 determination, there is inevitably going to be less room
24 for the trial to be representative. We certainly
25 endorse the Tribunal's instinct that there is not scope

1 within that timescale to have a trial of the 42 test
2 claimants within eight claimant groups that the VSW
3 claimants propose.

4 But more generally, we recognise that within that
5 time constraint of six months the ability for one to
6 have a trial of a fine-grained representivity is
7 inevitably more limited. Of course that also, we
8 recognise, will affect the necessity for all of the
9 further information we seek since it might be said
10 against us that there is no point in identifying
11 a starting point of, say, 50 representative claimants if
12 all one can end up with is four or five.

13 So we recognise that we must tailor our cloth to the
14 limitations of a six-month trial and the realities of
15 that.

16 But if I could just briefly take you through our
17 approach, then our critique of the VSW approach, and
18 then finally back, as it were, to the information that
19 we do seek and which we do think is at least relevant,
20 remains relevant, for at least those claimants that are
21 within the frame of potentially being test claimants,
22 and in particular what I am going to focus on is this
23 question of associated losses, because we actually
24 consider it to be rather more of an issue perhaps than
25 has been recognised as yet.

1 So starting with our approach, our approach has
2 essentially been to go back to basics and to try to
3 select a sub-set of the claimants that will be
4 representative of other claimants.

5 As I think is common ground the key issue in
6 relation to which it is important to be representative
7 is pass-on. We say that once one recognises that
8 pass-on is the source of the efficiencies here, it
9 follows that what one should be seeking to do is to
10 identify groups of claimants that are likely to have
11 broadly similar rates of pass-on and one needs to
12 identify their key characteristics to do so.

13 What we have proposed, guided by our experts, is to
14 follow essentially the EU Commission Guidelines on
15 pass-on in identifying what are generally regarded as
16 the key factors that affect pass-on, or are liable to
17 affect it, and those are essentially fourfold.

18 First, the types of services that are supplied by
19 the claimants. Just pausing there, that is similar to
20 but it is not quite the same as the industry in which
21 they operate, because of course different services can
22 be supplied in the same industry.

23 The second factor is the nature of the competitive
24 conditions, and of course an important aspect of that
25 here is going to be whether the services concerned are

1 supplied in the same country or region.

2 The third factor is the key characteristic of the
3 customers: do you have a few large customers or many
4 small customers? Are the customers in the public or
5 private sector? And finally there is the price-setting
6 process, for example is this a regulated industry, does
7 the claimant use cost plus method? And so on.

8 So the first task on our approach is to group the
9 claimants along those straightforward dimensions and
10 then, once that is done, one needs to ask which of the
11 claimants in each of those groups should be selected.
12 This, we say, should be done on the basis of which
13 claimant has used the highest number of trucks in each
14 group of similar claimants.

15 That is an important point, because it is the use of
16 the truck that is going to be relevant from the point of
17 pass-on, and that will not necessarily be the same as
18 the claimant that initially purchased the truck.

19 THE PRESIDENT: Sorry to interrupt you. Just to make sure
20 I understood it, the claimant for-- pass-on is something
21 that reduces the damages.

22 MR. JOWELL: Yes, indeed.

23 THE PRESIDENT: The damages can only be claimed by
24 a claimant who purchased the truck. To take a simple
25 example, if within a group claimant X does the

1 purchasing but all the use is by company Y which does
2 not purchase a single truck, you cannot select company Y
3 because he has not got a claim.

4 MR. JOWELL: It comes down to the same point as this
5 associated losses point, which is that in many cases the
6 claimant that purchases the truck will simply be
7 a centralised corporate entity within the claimant group
8 that is there to purchase trucks. What it will then do
9 is to recharge the truck, it may on sell the truck
10 internally or it may lease it internally, but there will
11 be some other form of transfer. That initial claimant
12 purchaser in those circumstances will typically have
13 suffered no loss because they will have passed on the
14 entirety of their loss into group.

15 THE PRESIDENT: You are saying that we have then got to
16 start examining the way in which they have priced it on,
17 whether they have done it in one go or annually through
18 an annual charge, and work out whether they have
19 suffered a loss or not?

20 MR. JOWELL: If there is an allegation by the claimant that,
21 if you like, that initial claimant, some of the loss has
22 stopped with that initial claimant, then yes. But in
23 many cases --

24 THE PRESIDENT: That cannot be right, can it? One has to
25 look at it as a group, and you look at the claimant that

1 purchased it as the claimant because they have paid the
2 overcharge, and then if it has been recouped by
3 a pass-on by another company in the group that is where
4 the pass-on occurs, otherwise you get involved in
5 scrutinising the internal accounts which can be done in
6 all sorts of ways.

7 MR. JOWELL: I accept that it may not matter. That is an
8 important point, and if there is a total pass-on then it
9 will not matter. When I say total pass-on, I mean
10 intergroup complete pass on, then it will not matter and
11 you will not need to look at that issue.

12 But it is only if the claimant company is saying,
13 well, part of the loss fell on the initial purchaser
14 because it did not entirely pass on, that you will need
15 to look at that.

16 In most cases where there has been an internal
17 transfer then the real loss is suffered by the later
18 claimant that uses the truck, and that is why it is
19 important to focus on the user of the truck, because it
20 will be the user of the truck that has onwardly
21 purchased internally, as it were, the truck that will
22 both have suffered the loss and also, importantly from
23 our point of view as defendants, it will be that
24 purchaser, that onward purchaser that will also have
25 passed on the loss, because they will be the external --

1 they will effectively be focused externally and they
2 will be onward supplying the trucks or other products
3 which will then be the source of the pass-on.

4 I think this is common ground, because there is a
5 reason why there are 500 claimants in these proceedings,
6 and they have not all purchased trucks from these
7 defendants. In fact, I think most of them have not.
8 Most of them are said to have precisely suffered loss in
9 this manner.

10 THE PRESIDENT: According to Mr. Jones, I think they are
11 included just in case you sought to argue that the
12 purchaser had suffered no loss.

13 MR. JOWELL: It is relevant, they have to be included
14 because they are the ones, they are the corporate
15 entities that have actually suffered the loss and they
16 are rightly included. But they also need then -- but
17 critically, and I think this is common ground, is that
18 one needs to then consider whether those claimants have
19 passed on, because they are the only ones who will have
20 done relevant, as it were, external passing on, rather
21 than a simple internal transfer.

22 So it is critical to have then disclosure by them,
23 evidence by them and scrutiny of the extent to which
24 they have passed on, and I think we are actually
25 entirely in agreement, sir, in the sense that the

1 internal transfer is likely to be, hopefully at least,
2 largely entirely irrelevant. But what does matter then
3 is that you get at the users of the trucks, because
4 those are the ones who are actually going to have both
5 suffered any loss and also the ones who will have passed
6 on. It is their passing on that one has to look at;
7 it is their passing on that is relevant.

8 That is why we have always maintained this focus on
9 the users of the trucks, because particularly when you
10 are looking at representivity from a point of view of
11 pass-on, you have to look at the right claimants, the
12 ones that have actually passed on the relevant loss.

13 We say finally, just coming back to our selection
14 criteria, we have always accepted that once you have
15 grouped according to the way we propose, you would then
16 have to whittle that down to a more manageable number,
17 and there are various objective ways by which you could
18 do that. For example, you could do it on the basis of
19 selecting those few frontrunners from the groups that
20 have used the most trucks in total.

21 But as I will come to, as far as we are concerned we
22 are not there yet because we do not have that
23 information.

24 That is our key complaint, that we have not been
25 able to carry out this approach, which should not really

1 be a controversial approach, it is very sound, sound in
2 theory, but it does require a certain amount of key
3 information from each claimant. Unfortunately we have
4 not obtained that information, and I will come back to
5 that.

6 But what I would like to do before I come back to
7 that is to say a few words about how VSW have approached
8 things and why we think they have got it rather wrong.

9 Now, you will have heard from Mr. Jones that the way
10 that he has approached things is rather different.
11 Essentially the core of their approach is to say they
12 assume that they will select at least one frontrunner
13 from each one of the claimant groups that they represent
14 in each of the core countries. Then for at least most
15 of the claimants, or for four of them, they plan to
16 identify which claimant within each claimant group has
17 purchased the most trucks and then select that one.

18 That approach combined with then taking the whole
19 division for Veolia and taking all of the claimants for
20 three of the smaller claimant groups, brings them up to
21 42 proposed test claimants, and it is actually 42 and
22 counting, because in our submission when one takes into
23 account the associated losses, that 42 is likely in
24 practice to be rather more than that.

25 Now, we say there are two cardinal errors that the

1 VSW claimants have made in adopting this approach. The
2 first is that they assume that it is necessary and
3 desirable to have at least one claimant from each
4 claimant group.

5 Now one can see from a client management point of
6 view they may wish to take that approach. Their
7 solicitors will not wish to leave any claimant group
8 behind. But it is not right, in our submission, from
9 the perspective of case management. It may well be that
10 there are claimants within one claimant group that are
11 sufficiently similar to those in another claimant group
12 that they can adequately proxy for them. If so, then
13 it is not necessary or efficient to have each and every
14 one of the claimant groups represented. I think the
15 Tribunal is provisionally in agreement on that point.

16 But to give an example, CM Downton, for example,
17 operates a haulage business but so too does NWF and so
18 too does Boughey. It may be that NWF or Boughey can
19 suitably represent the haulage sector, and if that is
20 right then you do not need CM Downton also as
21 a frontrunner. So that is the first error we say they
22 make, which is this assumption that you have to have one
23 from each claimant group.

24 The second error is that they are looking only at
25 the number of trucks that the claimants have purchased,

1 and as I have said, that ignores this important
2 question, the really important question of which is the
3 claimant that has used the truck. It may be that, as we
4 have already discussed, it may be not only that it will
5 be recharged within the claimant group, but it may also
6 be that it will be leased to other claimants in the
7 group.

8 So if those other claimants are the ones that
9 ultimately pay for the truck and use the truck and
10 pass-on the cost of the truck, then it is their claims
11 that are the ones that count.

12 This is a point that actually VSW have recognised,
13 at least in their factual evidence. I do not want to
14 take it up, because it is Inner Ring confidential, but
15 for your note you will see --

16 THE PRESIDENT: But I think there is common ground that the
17 business about pass-on through an associated company
18 should be taken into account. It is just what is the
19 most sensible way of doing it, and I do not think VSW
20 resist that, and that is something we could look at
21 further when we have decided how many claimant groups we
22 are going to do in the first place.

23 MR. JOWELL: Indeed, and we see that. But, and I think my
24 learned friend seemed to suggest in his submissions at
25 one point that was only confined to two of the proposed

1 claimants, Metro Deutschland and Suez Fleet Management.
2 Now, I think it is also the case that those are two of
3 test claimants that the Tribunal has floated as
4 possibilities, as real possibilities, and it is rather
5 important to look at that issue then rather more
6 carefully.

7 Also I did note that Mr. Jones was quite careful not
8 to say that the associated losses point was confined to
9 cases where the truck had been sold internally in the
10 group, within the group. He also mentioned financing
11 losses, and I imagine that must relate to circumstances
12 where there has been perhaps an internal hire purchase
13 arrangement or a lease within the group.

14 So I think that this may be a rather more prevalent
15 issue than it may seem at first sight, and the problem
16 is that until you know how many of these other claimants
17 there may be within the group that you are looking at
18 that have claims, you do not really know what you are
19 dealing with.

20 Now, my learned friend has suggested in his order
21 that the Tribunal should make an order -- he suggests at
22 paragraph 3.9, that the Tribunal should order that it
23 will try also the claims of other claimants insofar as
24 they relate to truck purchases or leases attributable to
25 the purchasing claimants.

1 So his suggestion is that these other claimant
2 claims within each of these groups, those that have
3 either purchased trucks or been leased trucks
4 internally, those will all, also, be tried.

5 Whether one actually joins those claimants or not,
6 and I noted, Mr. President, that you indicated that you
7 would not be inclined to necessarily join them, but
8 nevertheless insofar as one is trying the claims of
9 those other claimants, further, those other claimants
10 within the same group that have onwardly purchased the
11 truck, one is going to need to have them in the frame in
12 some way because insofar as one is going to look at
13 their pass-on, which one would have to do, we are going
14 to have to get disclosure from them, they are presumably
15 going to have to provide witness evidence about the way
16 in which they pass on their costs, and they are also
17 going to be surely bound, and we will have to ensure
18 that they are bound. So whether one calls them
19 claimants, additional claimants or not, they are
20 certainly going to be de facto additional claimants in
21 these claims.

22 So we say that what we have here really is a rather
23 vague proposal to potentially join an unknown number of
24 additional claimants' claims to the existing claims. We
25 do not know at present how many separate pass-on

1 enquiries this is going to actually require. Because if
2 you take, for example, Suez Germany, which is one of
3 these proposed test claimants, and one that the Tribunal
4 was floating might be selected, if one takes that, for
5 example, now within Suez Germany you have one entity,
6 Suez Fleet Management, that purchased all of the trucks.
7 But then you have multiple entities within the Suez
8 Germany division, and I cannot get into how many there
9 are precisely without going into Inner Ring confidential
10 information, but I do not think I am letting on any
11 great secret by saying that there are a number, many of
12 them, that have then been potentially recharged these
13 trucks internally, and those will then go on to supply
14 services potentially in different sub-sectors of the
15 German market.

16 So until we know --

17 THE PRESIDENT: I have been trying to understand that by
18 reference to the table.

19 MR. JOWELL: Yes, I am afraid I do not --

20 THE PRESIDENT: Because I am looking at the overview table,
21 which is the one attached to Mr. Jones' and his
22 colleague's skeleton.

23 MR. JOWELL: Yes.

24 THE PRESIDENT: The three authors of the skeleton. Suez
25 Germany, I think what is suggested is that it should be

1 the internal logs, logistics, perhaps, to which, and
2 there is one entity in Germany that is in that field.

3 MR. JOWELL: Yes, but the difficulty is --

4 THE PRESIDENT: That is the only one.

5 MR. JOWELL: Yes, and that is the purchasing entity. So
6 that is the company that buys all the trucks for the
7 whole, for this bit of Suez Germany. But then it, and
8 this is I think --

9 THE PRESIDENT: There are no other claimants in Suez Germany
10 that deal in that sector.

11 MR. JOWELL: Not yet, and what my learned friend does is he
12 says, well, we have this one as almost, if you like, as
13 a sort of Trojan horse, because this is the purchasing
14 claimant but then we also want you to try all the claims
15 of all the other claimants with associated losses.

16 THE PRESIDENT: But there are not any other claimants.

17 MR. JOWELL: Not yet, no, but he says there will be.

18 THE PRESIDENT: He is going to --

19 MR. JOWELL: Because within that division, those will be the
20 claimants with what he calls associated losses, which
21 are other claimants within the same division --

22 THE PRESIDENT: But they are not yet parties to the
23 proceedings.

24 MR. JOWELL: They are not yet parties to the proceedings,
25 but he wants you to order, in his paragraph 3.9, that

1 they will automatically become parties to the
2 proceedings, or their claims will be. Our point is that
3 we don't know then at the moment what that is going to
4 involve. We do not know how many of them, of these
5 other claimants, have bought trucks and we do not know
6 in what sectors they operate, and therefore we do not
7 know what is going to be involved in calculating the
8 pass-on of these many other potential claimants, whether
9 one calls them claimants or claim. Maybe I am a bit
10 old-fashioned, but I think one cannot really have
11 a claim without a claimant attached.

12 So it seems to us that there is a need to have the
13 information, the core information that we seek, at least
14 in relation to any of the proposed test claimants,
15 because we need to know who actually used these trucks
16 in respect of which they are claiming.

17 Before one brings in the purchasing entity you need
18 to know who are the claimants underneath that purchasing
19 entity that have suffered the real loss that they are
20 seeking and what is actually involved then in actually
21 ascertaining whether all of those real claimants have
22 actually suffered loss or whether they passed it on. We
23 do not know whether that is going to be one enquiry or
24 many, many enquiries. It all depends on what sectors
25 they operate in and how different they are and, indeed,

1 how many trucks they purchased internally.

2 So what we do say is that even if it is no longer
3 necessary, given the more limited scope of the trial,
4 for us to obtain the information we seek across the
5 board, we do say that it would certainly be wise and
6 prudent before joining any of these test claimants for
7 certain to find out what is behind all of these
8 associated losses. That means first and foremost
9 providing the identity, the data that is identified in
10 our category 3, which is which individual claimants used
11 trucks and how many such trucks they used in their
12 business. That does not need to be provided across the
13 board, but it should be provided in respect of any
14 claimants who are, if you like, downstream of any
15 proposed or contemplated test claimants.

16 In fact, that is going to be required in any event
17 on VSW's approach in order to make sense of its own
18 paragraph 3.9, because if it wants to claim these
19 associated losses it is going to have to tell us at some
20 point who are the claimants, identify the claimants who
21 have suffered these associated losses.

22 So it is going to have to happen, but we say it
23 should happen before you go nap on the test claimants
24 for certain, anyway, and not after because you may
25 suddenly find that what you thought you were selecting

1 was one test claimant is in fact really 25.

2 Related to that, we say it is also going to be
3 relevant to know not only who used the trucks but also
4 to identify the services provided by each of those
5 individual claimants. This is our category 8.1. To
6 that end we have asked for a breakdown of revenue for
7 each claimant from the different types of services they
8 provided.

9 So now we say, well, at least in respect of any
10 claimant that may be claiming associated losses under
11 the umbrella of a test claimant, they should provide
12 that information.

13 We also say that they should provide information as
14 to the geographic location of where they provide those
15 services.

16 THE PRESIDENT: By geographic location, how granular do you
17 mean?

18 MR. JOWELL: Take the Suez. Forgive me, I mean, either the
19 country or the region insofar as their competitive
20 conditions are likely to be different within a country
21 in different regions, I would have thought that Germany
22 is a likely case of that. So that when you are looking
23 at all of these different claimants that may lie
24 underneath Metro Deutschland or underneath Suez
25 Deutschland, one needs to know where they are supplying

1 their services as well as what services they are
2 supplying.

3 It is not right to say: "oh well, you know their
4 place of incorporation therefore you know where they are
5 operating", because of course some of these companies,
6 and this is in the witness evidence, are incorporated in
7 France, for example, but then they supply their services
8 abroad. So you need to then be looking at pass-on on
9 overseas markets.

10 THE PRESIDENT: Yes.

11 MR. JOWELL: So what we are -- and then finally, we would
12 say one also needs to look at the price setting
13 processes for each claimant in respect of which you may
14 be seeking these associated losses, and that is our
15 category 7.

16 Again, this has not actually been provided
17 adequately in most cases in these statements that they
18 have provided, because it has not been done on
19 a claimant-by-claimant basis. It has been done on
20 a unit level. So once one has a picture, then, of who
21 are these claimants with the associated losses, how many
22 trucks are they buying, where are they selling to, what
23 services are they providing and how are they pricing,
24 one can then be in a position to say, well, we are going
25 pick this one and this one but not those other ten,

1 whatever it may be, and you can include them or not
2 include them in a proportionate way.

3 We say that that is essential, otherwise what you
4 are in danger of ordering here is either a claimant with
5 no utility, because they may just be a purchasing
6 entity, which is then internally selling all the trucks
7 on and not suffering any loss and none of us will be any
8 the wiser, or you are leaving yourself open to ordering
9 that these test claimants should be of an uncertain
10 ambit with an uncertain number of claimants potentially
11 operating and passing on in multiple different regions
12 with different pricing policies and so on, and the
13 26 weeks is going to become unachievable.

14 So those are our submissions. I am happy, of
15 course, to deal with any criticisms of that approach,
16 but I think the key criticism that is made against us is
17 that, well, we are seeking perfection here. That simply
18 is not the case. We appreciate that all we are entitled
19 to is proportionate information provided by way of
20 reasonable searches. If they say: "we cannot provide
21 it, it is impossible, the management accounts are
22 destroyed", then we accept that. But at the moment they
23 have not provided this key information across the board
24 and they have not also provided it in relation to the
25 more circumscribed group where it really is more

1 important that we know, even if one is going to narrow
2 the trial down in the way that the Tribunal, very
3 sensibly in our submission, proposes.

4 So those are our submissions, sir, unless I can be
5 of further assistance.

6 THE PRESIDENT: Just on one point, if it would be possible
7 for us to indicate, if that is what we felt, that we
8 think the groups from which the selection should be made
9 should be Veolia, Brakes and Metro, or whatever, and we
10 should leave everybody else out, consistent with your
11 submissions, but you would then say there should then be
12 further scrutiny of which particular claimants within
13 those groups should be the right ones and the
14 proportionate ones to go forward for trial.

15 MR. JOWELL: Yes, indeed, and for that purpose --

16 THE PRESIDENT: Then you do not need to get, for Wolseley or
17 for NWF or whatever, all this information.

18 MR. JOWELL: Indeed, indeed, and effectively what we want
19 is, really want, is a grid which says for each claimant
20 how many trucks do you use, what is the service, what is
21 the characteristics, what is the pricing process, and
22 so on.

23 THE PRESIDENT: Yes, and of course for Germany, we will be
24 hearing from Mr. Jones what is happening about
25 pass-through, but in the light of the recent judgment

1 from the Supreme Court, and it may be affected by that.

2 MR. JOWELL: Yes, indeed.

3 THE PRESIDENT: Thank you.

4 I think those submissions, as we understood the
5 skeletons, are made also on behalf of Daimler and
6 supported by DAF, but Mr. Harris, you have your physical
7 hand up.

8 Submissions by MR. HARRIS

9 MR. HARRIS: Sir, if I may, very briefly I am pleased to say
10 we do adopt those submissions by Mr. Jowell, and as
11 regards your final comments, yes, this is right, if it
12 were to be narrowed down to groups 1, 2 and 3, then this
13 additional information need only come from groups 1, 2
14 and 3.

15 I simply add this point, which is that for a trial
16 in April 2024 for groups, say, 1, 2 and 3, this is
17 a perfectly manageable proposition as well as being
18 sensible for the reasons that Mr. Jowell has given.

19 That is all I have to say on the joint application.
20 But if I may just address you in a matter of two or
21 three minutes on the question of German trucks and
22 Daimler's involvement, if I need to.

23 It will not come as a surprise to you that we submit
24 that we are in happy agreement with the claimants and
25 with the provisional view of the Tribunal that this

1 Tribunal, so groups 1, 2 and 3 or 4, should include
2 German trucks. That was a debate that was had at the
3 last CMC at quite some length and it was provisionally
4 decided then that Germany was one of the core countries.

5 Of course, why was it a core country and why should
6 it remain a core country, notwithstanding the
7 submissions made principally by Mr. Hoskins, is that
8 there are (a) so many trucks in Germany so it is not
9 sensible to leave out that core country if one wants to
10 make progress, and of course we are all in the market
11 for making progress, none more so than the Tribunal. If
12 a core country is left out of the analysis then that
13 progress will not be made.

14 Similarly, if there is to be a trial of a core
15 country where Daimler is a key participant but Daimler
16 is not involved, then again we will not be making
17 sensible progress across the litigation as a whole.
18 With respect, it is not realistic to suggest that there
19 will be sensible settlement discussions involving
20 Daimler if there is a trial that has not involved any
21 Daimler trucks and has not involved Daimler's home
22 market.

23 So that conjures up the possibility, therefore, that
24 were Mr. Hoskins' proposal to be adopted there would
25 simply have to be another trial about Germany and

1 another trial about the same jurisdiction but this time
2 involving Daimler trucks, and with great respect we say
3 that is not efficient.

4 Of course those disadvantages would be overcome by
5 what has been mooted by the Tribunal, namely the
6 involvement of, say, Metro with the German trucks of
7 Metro, or potentially, subject to time limits of course,
8 Hertz. It could potentially be Hertz with all of its
9 German trucks or it could be Metro and Hertz, I accept
10 subject to time limits.

11 So those are the things that I principally have to
12 say, and I end with just these two further comments,
13 that of course whilst Mr. Hoskins put forward various
14 numbers of weeks, with great respect we say that does
15 not take into account efficiently the streamlining point
16 that you yourself made, sir, that will come about from
17 the first trial in BT/Royal Mail and then the second
18 trial in Ryder/Dawsongroup. Though that does not cover
19 all other jurisdictions and it will be different issues,
20 and what have you, nevertheless there will be a great
21 deal of learning from those trials that will help to
22 streamline trial 3.

23 So we do not, with great respect, agree with the
24 time estimates that Mr. Hoskins put forward. We do
25 think that with the involvement of Daimler and with the

1 involvement of a claimant with sensible numbers of
2 German trucks, say Metro or say Hertz, that can still be
3 done in a six-month period and, indeed, could and should
4 be case managed so as to ensure that that happens.

5 That leaves me only with one final remark, which is
6 we would invite the Tribunal to at least give further
7 consideration to whether, if there are to be claimant
8 groups, only a few, say 1, 2 and 3, that although that
9 should include German trucks and Daimler for the reasons
10 that I have just given, there is some merit in having
11 a UK-based claimant in a trial that will be dealing with
12 UK trucks and overcharge in the UK.

13 There is a danger that if it is to be, for instance,
14 Veolia and Suez and, say, Metro or Hertz being the 1, 2
15 and 3, then it would be unfortunate and might merit
16 further consideration whether, given that you will be
17 dealing with the UK overcharge, it should have another
18 claimant who is UK based and possibly doing a different
19 line of business, so that one gets a fuller flavour of
20 the UK overcharge, given again, that that is intended to
21 apply as far as possible to other claims in the Trucks
22 litigation.

23 That is all I have to say if that is of any
24 assistance.

25 THE PRESIDENT: Thank you, that is very helpful.

1 Yes, Mr. Singla.

2 Submissions by MR. SINGLA

3 MR. SINGLA: Sir, could I address you very briefly in
4 respect of Iveco's position, and I will be brief.

5 Our primary concern throughout this process has been
6 to ensure that the trial 3 is of a manageable scope, and
7 we do not agree that Mr. Jones' clients have put forward
8 a proposal that could be dealt with in anywhere near the
9 timeframe that the Tribunal has indicated. So we
10 gratefully adopt Mr. Hoskins' submissions as to why the
11 trial 3 should be limited to UK and France. It simply
12 would not be manageable to include Germany in that
13 trial, we submit.

14 One point which Mr. Hoskins did not address you on
15 which I would just like to add in this context is that
16 insofar as the Tribunal is thinking that it may be more
17 palatable to add Germany into trial 3 because there may
18 be some preliminary issue hearing in respect of Germany
19 before we get to trial 3, we would respectively submit
20 that should not be a relevant consideration at this
21 stage. The reason we say that is because first of all
22 we do not accept that the German law position is as you,
23 sir, indicated earlier; we do not accept that there is
24 one judgment which is definitive or conclusive. There
25 are in fact a number of different German judgments and

1 one would need to go away and really take stock of the
2 German position, which is not, we submit, settled.

3 But more importantly perhaps for practical purposes
4 there is no current German law pleading from Mr. Jones
5 and his clients, and in those circumstances we say the
6 very question of whether there can or should be
7 a preliminary issue on that question should be postponed
8 and cannot properly be determined by the Tribunal at
9 this hearing.

10 So we would respectfully suggest that the proper
11 course is for the Tribunal to consider in isolation, as
12 it were, the question of whether Germany should be
13 included within trial 3, viewed purely from the
14 perspective of whether it would be manageable to add
15 Germany. We submit when you ask yourself that question
16 on the assumption that there will not be a preliminary
17 issue hearing, then we submit that the trial has to be
18 UK and France only.

19 That is all I wanted to add to the debate.

20 THE PRESIDENT: Yes.

21 Mr. Jones, you will have a chance to reply, but
22 Mr. Jones, before doing that have you taken instructions
23 on your client's position on Germany and German law?

24 MR. JONES: No, I cannot update you on that. We have been
25 trying to liaise with those who would be able to give

1 instructions on this but it was not possible over the
2 adjournment. So I will not be able to come back to you
3 on that until first thing tomorrow.

4 THE PRESIDENT: Right. Well, we will take a few minutes to
5 consider what we do before we invite you to reply.

6 Mr. Williams, do you want to say anything?

7 MR. WILLIAMS: If I may, sir, I would like to make a few
8 observations.

9 THE PRESIDENT: Yes.

10 MR. WILLIAMS: I think there are a number of points where we
11 can add to the debate in particular based on our
12 participation in trial 1.

13 Submissions by MR. WILLIAMS

14 MR. WILLIAMS: Sir, on the question of the scope of the
15 trial we also adopt what Mr. Hoskins has said. Of
16 course we understand that the claimants want a trial of
17 their claim, or as much of their claim as possible as
18 soon as possible, but the critical consideration from
19 our perspective is that the trial is not overloaded. We
20 echo what has been said about manageability.

21 THE PRESIDENT: Can I just ask you, you are in trial 1.

22 MR. WILLIAMS: Yes, sir.

23 THE PRESIDENT: You are in trial 2.

24 MR. WILLIAMS: Yes, sir.

25 THE PRESIDENT: Both concerned with UK overcharge.

1 MR. WILLIAMS: Yes, sir.

2 THE PRESIDENT: You are calling economic expert evidence in
3 trial 1 and trial 2?

4 MR. WILLIAMS: Yes, sir.

5 THE PRESIDENT: The same expert.

6 MR. WILLIAMS: Yes, sir.

7 THE PRESIDENT: Presumably it is the same expert in trial 3?

8 MR. WILLIAMS: Yes, sir, that is the plan, yes, sir.

9 THE PRESIDENT: Yes, thank you.

10 MR. WILLIAMS: I will not repeat what has been said about
11 manageability, but just to add this point: we are
12 concerned that if the trial is overloaded it will
13 prejudice the ability of the defendants, including DAF,
14 to defend what are claims for very substantial sums. Of
15 course they face a large number of claims and they
16 should be entitled to put up a full defence of those
17 claims.

18 We agree with the points that have been made that
19 really the tipping point is whether one seeks to include
20 Germany in the trial. If the Tribunal is minded to do
21 that then we agree with the tentative proposal to add
22 Metro for the reasons that have already been covered,
23 and I will not repeat that.

24 But we do make the point that that is a material
25 expansion of the trial in itself. It will expand the

1 trial from five defendants to six defendants. It will
2 become a three-jurisdiction trial, rather than
3 a two-jurisdiction trial, and this is relative to
4 Volvo/Renault's primary proposal.

5 One issue that I think has slightly come out of
6 focus is the question of what sectors are being
7 addressed, because as I understand it, the Volvo/Renault
8 primary proposal is to deal with one sector, which is
9 the waste sector, and not all of the sectors that Veolia
10 and Suez are involved in. We just invite the Tribunal
11 to maintain the focus on that issue, because of course
12 trial 2 is a single sector trial, dealing with vehicle
13 rental, truck rental. If one adds in Metro, that will
14 be a distinct sector, and of course if one were to
15 introduce more than one Veolia or Suez sector, that
16 would be three sectors, which would in itself be a very
17 material expansion in the scope of the trial.

18 So that is why, as we understand it, Volvo/Renault
19 suggest that the focus should be on waste with
20 considerations of manageability in mind.

21 The Tribunal has heard a number of general
22 observations about the number of witnesses and the type
23 of witness evidence that the Tribunal can expect to hear
24 from at trial. Up to a point we understand that those
25 observations are necessarily general at this stage, but

1 we do take issue with Mr. Jones' submission that the
2 Tribunal can be confident that even on their widest
3 proposal it is not likely that more than 25 defendant
4 witnesses would need to be cross-examined at trial.
5 That is, in our submission, finger in the air stuff and
6 it is exactly the sort of submission that is likely to
7 lead to an overloading of the trial.

8 If it helps just to give you a thumbnail of the
9 position in the Royal Mail proceedings where DAF's
10 witness evidence has been served, there are four factual
11 witnesses for DAF in that case, and I will not go into
12 detail about the coverage but just to give you
13 a flavour, one witness deals broadly speaking with cost
14 matrices and cost data, one deals with pricing approval
15 at the parent company level, one deals generally with UK
16 pricing but also specifically with pricing negotiations
17 with the two claimants, that is to say Royal Mail and
18 BT, and the customer relationship more generally, and
19 one deals with the production of trucks, complying with
20 new emission standards.

21 So the evidence does address the specific customer
22 relationship. We do not agree with Mr. Jones that
23 evidence of that nature is only going to be relevant for
24 the very largest claimants. There is more than one
25 category of customer, as the Tribunal is aware. There

1 are direct customers, and Royal Mail and BT are direct
2 customers. There are also fleet customers where the
3 truck is technically sold through the dealer but there
4 is a relationship between the truck manufacturer and the
5 customer. Even where the sale takes place through
6 a dealer there will be effectively be back-to-back
7 negotiations between, on the one hand, the manufacturer
8 and dealer and, on the other hand, the dealer and the
9 customer in relation to that specific truck.

10 So we do not accept the idea that for all but the
11 largest customers all one needs is to understand the
12 output of the regression, which is essentially what
13 Mr. Jones said.

14 As I said, in BT and Royal Mail there is one witness
15 who is able to cover the customer relationship for both
16 of those, both of those claimants. Obviously as one
17 introduces more claimants there is a chance,
18 a probability even, that one is going to have to
19 introduce additional witnesses to deal with different
20 customer relationships, and of course that evidence is
21 going to need to be replicated across different
22 jurisdictions. So if one introduces more than one
23 jurisdiction or even three jurisdictions, there will be
24 different customer relationships potentially in
25 different jurisdictions.

1 So we do endorse what Mr. Hoskins said and what
2 Mr. Frey said in his evidence about the broad evidential
3 picture. I am not saying there will be 100 witnesses at
4 trial or anything as specific as that, but that is the
5 broad picture and that leads to a very large number of
6 witnesses, certainly when one takes into account the
7 prospect of six defendants.

8 So that is the factual side of the equation which we
9 think, broadly speaking, VSW have seriously
10 underestimated on the defendants' side.

11 Turning briefly to expert evidence, Mr. Hoskins has
12 already made the point that if one is dealing with three
13 different jurisdictions for six defendants that is
14 18 different regressions. Of course we can see that if
15 one expert is conducting the regression for more than
16 one jurisdiction points of principle may arise, but
17 other issues will be particular to the jurisdiction and
18 the particular regression. So we do say that is a very
19 potential expansion in the scope of the economic
20 evidence.

21 The other point we make is that everyone has in
22 focus the regression and that side of the analysis and
23 the pass-on analysis, but the experience on trial 1 is
24 that the other expert issues are not to be
25 underestimated. As Mr. Jones' paragraph 11 identifies

1 there are a large number of them.

2 On DAF's case there is the theory of harm and the
3 plausibility evidence which goes to the prospect of
4 effects in the light of this infringement. There is
5 used trucks, there is volume effects, there is interest,
6 there is tax, there is compliments. So in my submission
7 one should not think there is the regression and then
8 there is pass-on, and broadly speaking that is the scope
9 of it. There are many more expert issues when one
10 starts to think about what is needed to reach a damages
11 number at trial, and the scope of that is not to be
12 underestimated.

13 So that is broadly speaking, sir, what I wanted to
14 say about the trial estimates. That is why we support
15 Volvo/Renault's position that if one is looking at
16 a 26-ish week trial, their primary proposal is really
17 the outer limit of what can realistically be
18 accommodated.

19 Just to finish with one other point, we have
20 expressed reservations, as I have said, about whether
21 the German market should be prioritised in a 26-week
22 trial 3. If there is to be a trial including German
23 trucks we want to play a full part in that trial. We
24 are not suggesting that that trial on the German
25 overcharge should be done in half measures. The result

1 of an overcharge assessment for Germany will depend
2 first and foremost on an individual regression, as
3 I have already indicated, and in our submission that
4 sort of analysis cannot be done by halves, it should be
5 properly if it is going to be done at all, and that
6 applies equally, and the points I have made about the
7 need to look at claimant specific evidence also arise in
8 that context.

9 As we understand it, a large part of VSW's reasons
10 for pressing for the inclusion of German trucks in this
11 trial relates in part to the number of trucks in the
12 second wave where there are more German trucks and more
13 DAF German trucks. If the trial is to generate any kind
14 of reliable guidance for future claims then obviously
15 the trial needs to involve a full treatment of the
16 issues. That is obviously the idea of a frontrunner
17 trial.

18 I make that point, sir, because I think one of the
19 points you have made is that some of the defendants have
20 a smaller presence in some jurisdictions. That may be
21 true as far as specific claimants are concerned, but it
22 does not in my submission affect the scale of the task
23 of trying the extent of the overcharge in that
24 jurisdiction for them if they are going to participate.

25 As far as associated losses are concerned, we agree

1 with both Mr. Hoskins and Mr. Jowell that that needs to
2 be resolved at least for the sub-set of claimant groups
3 that are going to participate in trial 3, and I think
4 the Tribunal has heard a number of ways in which that
5 can be taken forward.

6 Sir, that is what I wanted to say.

7 THE PRESIDENT: Thank you. Thank you.

8 We will now take I think ten minutes to consider and
9 we will return at about 3.25.

10 (3.13 pm)

11 (Short break)

12 (3.38 pm)

13 Decision on inclusion of claimants

14 THE PRESIDENT: Sorry to keep you rather longer, but we did
15 want to think quite carefully about what we have heard.

16 Mr. Jones, you have a right to respond but we should
17 tell you that on the basis of the submissions from
18 everyone, we have not been persuaded to omit Germany.
19 We think Germany should be included for reasons you and
20 Mr. Harris gave, irrespective of whether there may be
21 a preliminary issue or not.

22 We think some of the trial estimates that have been
23 put forward are exaggerated, but equally we think the
24 trial estimate of the VSW proposal as we originally
25 indicated is also unrealistic.

1 So we are thinking in terms of a trial that would
2 start on the beginning of the Easter term 2024, on
3 9 April, which would run through Easter and Trinity,
4 stopping on 31 July but starting again on 16 September,
5 and therefore would conclude by the end of the
6 Michaelmas term, which is 20 December 2024. That would
7 allow 28 weeks, including two weeks off for preparation
8 of and reading of written closings.

9 Within a trial of that size we think we can work at
10 the moment towards an objective that can be revisited in
11 the light of developments, and revisited in terms of
12 scaling back, not adding. So at the moment the
13 objective would be that there will be Germany included,
14 that there will be Suez and Veolia, certain claimants
15 from those entities and Metro, and possibly one of the
16 self-standing UK claimants. We leave that as an option,
17 and it seemed to us that potentially the best candidate
18 is CM Downton on the basis of the availability of data
19 as set out in the table under paragraph 107 of
20 Mr. Bolster's ninth witness statement, namely the extent
21 of information that is missing for some of the others.

22 But to reach a firm decision of which claimant or
23 claimants from those groups should be included, we did
24 think from what we have heard that Mr. Jowell did make
25 some valid points that we do need to know who is the

1 purchasing claimant and who are the using claimants.

2 There was a suggestion that you are seeking to
3 amend, to add other claimants. I do not know if that is
4 right, but one just wants to know, in deciding who the
5 test claimants should be, who are the purchasers and who
6 are the end-users, and also that it would be helpful to
7 know the size and nature of the customers and that,
8 therefore, subject to what you have to say, within those
9 parameters it might be sensible to see what further
10 information could usefully be provided and reach a final
11 decision at a further CMC in February as some have
12 suggested, so that we would have made quite a bit of
13 progress but we would not actually be fixing the
14 ultimate identity of the claimants today.

15 So that is our thinking at the moment, but it is
16 subject to what you have to say.

17 Reply submissions by MR. JONES

18 MR. JONES: I am very grateful, sir, and I think I can
19 probably say on behalf of all of us that that would give
20 us something to look forward to, namely Christmas 2024.

21 So, sir, we will proceed on that basis and I will
22 address the issues which you have highlighted as I go
23 through responding to what my learned friends have said.

24 Can I just pick up on one of them right away, which
25 is the proposal so that one might add another claimant

1 group in this country. There is a contextual point
2 which is we noted, sir, that one of the differences
3 between the proposal which you floated earlier and Volvo
4 proposal 4 was that your proposal would include Suez and
5 Veolia in Germany as well as in France. Whereas I think
6 Volvo proposal 4 only had them in France.

7 If I may say, that struck us as very sensible, if
8 Germany is being done, that Suez and Veolia should be in
9 all countries. But the other difference was that Brakes
10 had not been included in your proposal, sir, and I was
11 going to raise that. It links to the point that you
12 have just raised, sir, about CM Downton. Because if
13 none of those smaller companies in this jurisdiction are
14 included, then we are very doubtful that we would get
15 helpful guidance, because Veolia and Suez are both, one
16 sees their trucks driving around, they are waste
17 disposal trucks and they are both in that business and
18 they both have big industrial and municipal clients. It
19 is a very particular business, and as we understand it
20 the claimants which are going through in other claims
21 are also quite particular. Of course one of them is
22 just against DAF and we understand that one is leasing
23 companies, essentially. Whereas if one looks at my
24 clients in this country, yes, they are in different
25 sectors and they have been described as being in

1 different sectors, but you can see that there is a sort
2 of high level similarity of driving things around and
3 delivering them either on behalf of yourself or others.
4 But it is not waste and it is very different to waste
5 and very different to leasing trucks.

6 So I was going make a bid to add Brakes back in,
7 which was the one which we had always focused on as the
8 minimum in Volvo proposal 4. Sir, I hear what you have
9 suggested about CM Downton. I may need to take
10 instructions on that because the pros and cons of each
11 of them do not immediately spring to mind; we had Brakes
12 as Volvo's suggestion which seems sensible, so I will
13 take instructions on that.

14 I will come on to Mr. Jowell's points.

15 THE PRESIDENT: We could -- can I interrupt you just on that
16 point. We know of course far less about the detail of
17 the different claimants and the information and so on,
18 and I think I can speak for all three of us, none of us
19 pretend to be as on top of all the accumulated evidence
20 as I suspect you all are. So if there are good reasons
21 for saying that actually Brakes is preferable to
22 CM Downton, you can consider that and put it forward.
23 But the main point that we consider is that it should be
24 only one of the UK entities and no more than one.

25 MR. JONES: Sir, I understand and I am hearing very loud

1 whispers behind me that yes, we definitely do think that
2 Brakes is better but I am not going to be able to
3 unravel that right now.

4 There is another related point, and I do not know
5 whether this points in favour of Brakes rather than
6 CM Downton, but it certainly points in favour of
7 including one of these groups, which is that otherwise
8 you also do not get Daimler as a defendant in the UK
9 because it is not a defendant to Veolia and Suez.

10 But, sir, I will take that away, if I may.
11 I apologise that some of these points may need to be
12 picked up again tomorrow or, sir, as you say, maybe in
13 due course at another CMC. But we will certainly focus
14 our attention on the Brakes versus CM Downton question.

15 MR. HOSKINS: Sir, I am sorry to interrupt but surely this
16 has to be a February question.

17 THE PRESIDENT: No, that must be right. We will not have
18 time to come back to that tomorrow because you will have
19 to supply information to the other parties as to what
20 are the considerations in terms of quality of
21 information, nature of customers and then are there any
22 associated trucks issues.

23 I do not think there are for CM Downton, there may
24 be for Brakes, I do not know.

25 MR. JONES: So those issues to some extent get wrapped up

1 with Mr. Jowell's points, which I will come on to.

2 Just on Mr. Hoskins' point though, it was his
3 clients who suggested including Brakes rather than
4 CM Downton, so I am somewhat surprised that he is now
5 saying he is not sure. We had focused on Brakes because
6 that was the one he narrowed down to.

7 MR. HOSKINS: If you are going to take a point against me,
8 it was Brakes to bring in France and Germany. It was
9 not Brakes as a standalone UK claimant. It is deeply
10 unsatisfactory for the claimants to keep trying to claw
11 things in on the hoof without doing the prep.

12 THE PRESIDENT: Mr. Hoskins, Mr. Jones, I have said we are
13 not going to do it tomorrow, we will do it in February.
14 You need not start blaming each other, let us just get
15 on. So I am ready to keep that open as to which it
16 should be, but I am not sure that even if we had Brakes
17 UK we necessarily then should also have Brakes Germany
18 and Brakes in France. Brakes are not in Germany, are
19 they, but Brakes in France.

20 MR. JONES: No. So in the light of your indication, I will
21 deal very briefly with comments in reply to Mr. Hoskins'
22 points.

23 Mr. Hoskins went through Mr. Frey's evidence --

24 THE PRESIDENT: No, I do not think you need to -- I have
25 said we were not persuaded by that, we are including

1 Germany and we are doing it in, as we indicate,
2 28 weeks.

3 I think the real question is the points that
4 Mr. Jowell made about the additional information on the
5 constituent claimants within the larger groups to help
6 identify who the claimants should be, whose cases become
7 the test cases. He suggested that you should, in the
8 next month or so, he did not put a time on it, but
9 obviously so it can be considered for February's CMC,
10 supply within that narrower group of potential claimants
11 details for the purchaser of the trucks, which claimants
12 were the users of the trucks, which sectors they are in
13 and the nature of their customers. Is it one big
14 customer, many smaller customers, is it public sector or
15 private sector and so on, which will then assist in
16 deciding whether it should be indeed, as you have
17 suggested, the largest purchasing entity in Veolia UK or
18 should it be another one or should it be two together,
19 and so on.

20 MR. JONES: Sir, can I look at that then. If I go to the
21 appendix to my skeleton argument just to get an overview
22 of this point, and the first point, the first cardinal
23 error which Mr. Jowell highlighted was he said we had
24 made an assumption that one needs one claimant per
25 claimant group, and he then suggested that one might

1 narrow down and find a claimant in one claimant group,
2 let us say CM Downton, which is representative of
3 claimants in another, let us say Brakes.

4 Now, sir, looking at this table what will
5 immediately strike you about that suggestion is the
6 point which I have made several times, which is that
7 they are in different industry sectors, and we have
8 provided extensive pricing and mitigation statements
9 which show that the way in which they priced was
10 different.

11 Now, it is not to say that I disagree with the very
12 high level point of principle that you could select one
13 which would be helpful for the others. Indeed, I have
14 just been addressing you on that very point, sir. But
15 on the question of if you are doing that and if you are
16 selecting one of them, is it going to help you to have
17 any more information than you already have, sir, we
18 really struggle to see why it would.

19 Going back to CM Downton, you will see that there is
20 actually only one purchasing claimant for CM Downton.
21 So there is not another claimant for us to give this
22 information about. There is not a difference between
23 purchasing and using for any of them apart from Metro
24 and Suez Germany. I made that point and I will come on
25 to that.

1 THE PRESIDENT: I think it is not a point about CM Downton.
2 I do not think that is what Mr. Jowell was referring to,
3 and he will correct me if I am wrong. I thought it was
4 a point about Suez, Metro and possibly Veolia, where you
5 raised the point about associated trucks. You have
6 highlighted that.

7 MR. JONES: Yes.

8 THE PRESIDENT: He has suggested that in fact some of the
9 people that may have used the trucks are different
10 companies in the groups that actually are not currently
11 claimants at all.

12 MR. JONES: Sir, if I may, sir, your summary of Mr. Jowell's
13 submissions was, I am sorry to say, incomplete, because
14 Mr. Jowell did say that he had two cardinal criticisms
15 and his first one was a point about how you could choose
16 from between CM Downton or NWF or Dairy Crest.

17 So the first point he was making was he wants more
18 information to be able to choose which of those would be
19 a good representative claimant. So the first point I do
20 make is that that simply does not make sense, because we
21 already know that those claimants have high level
22 similarities and high level differences.

23 We know that because it is clear on the table, we
24 know it because they are different claimant groups with
25 different pricing practices, and the idea that one might

1 want even more information about how they priced, for
2 example, because that might help to us choose one --

3 MR. JOWELL: Forgive me for interrupting, but perhaps I can
4 make things simpler.

5 We are not seeking further information from
6 CM Downton. We do accept that it is only in respect of
7 those claimants where there is a user purchaser
8 dichotomy or difference that we are seeking the further
9 information.

10 In light of the Tribunal -- we were previously, but
11 in the light of the Tribunal's indication that it is
12 going to narrow down the number of test claimants.

13 I hope that can shorten things a little.

14 MR. JONES: I am very grateful. In which case I will only
15 focus on the cardinal error number 2, which was this
16 point about truck using and truck purchasing.

17 This point is closer to the point which
18 Mr. Grantham, their expert, makes in his letter, in his
19 witness statement, because the gist of what he says is
20 you might need possibly a different one, but more likely
21 more than one claimant from within each row. If we are
22 focusing on Germany, we are talking then about Metro and
23 Suez in Germany because it comes down to this difference
24 between purchasing and using claimant.

25 Can I start with Suez Germany, then. You will see

1 on this sheet internal logistics to waste has 527
2 trucks. That purchasing claimant has 527 trucks. So if
3 one was going to choose a purchasing claimant rather
4 than a truck using claimant, it would be obvious that
5 this is the one that you would choose.

6 How does this map across to truck using claimants?
7 If we can take up, please, the spreadsheet, the test
8 claimants spreadsheet, so {HS2-E/41}, I am on row 228.

9 THE PRESIDENT: Sorry, this, the spreadsheet which you
10 showed us before.

11 MR. JONES: If you are looking at it electronically, it is
12 {VSW-D1/597.3/41}.

13 THE PRESIDENT: Yes, thank you.

14 This is Suez Fleet Management.

15 MR. JONES: Yes, C226, jurisdiction Germany, industry
16 internal logistics to waste, downstream companies, yes
17 or no, it says TBC. What is TBC there is the number of
18 downstream companies, because when I showed you Metro
19 earlier we populated that with the identities of the
20 downstream companies. The number is actually five,
21 I think. But if you go to the next column you will see
22 industry of downstream companies. So that shows you
23 that we were saying, well, as Mr. Jowell has known, we
24 have been saying all along this is one where there is
25 a difference between purchasing and using, and the

1 answer is "waste".

2 So one of Mr. Jowell's point was we need to know
3 what industry the truck using companies, in other words
4 the downstream companies, are in and whether they are in
5 different industries. But we know that, they are all in
6 waste.

7 THE PRESIDENT: Just a moment. If we look then further down
8 on the next page as we have it, or scrolling down, we
9 then have three other German companies within the
10 Suez Group, all of which are in waste management and
11 they have a different number of trucks being claimed by
12 them, a much smaller number.

13 What I am not clear is are those companies that used
14 some of the 527, or were the 527 being claimed by Suez
15 Fleet Management also being used by other companies
16 within Suez Germany?

17 MR. JONES: Sir, I will show you in the pricing statement
18 but the quick answer before I go there is that those
19 other three are other Suez companies which also bought
20 trucks, and you will see they bought tiny numbers of
21 trucks compared to the one which we have selected. So
22 they are not, as it were, the downstream companies, they
23 are separate companies which purchased trucks. But I do
24 not understand anyone to be suggesting that they should
25 be test claimants, because they are so small.

1 So we are looking at by far the largest company
2 which purchased trucks. Sir, the question which you put
3 to me a moment ago is: are those downstream companies
4 which used trucks which were bought by C226, are they
5 all in the claim -- and that is the point which
6 I addressed you on earlier on, which is to say yes, they
7 absolutely are. Because the point here is that when you
8 have a truck purchasing claimant, if it then -- the way
9 it works, as it did here, I will show you in the
10 statement in a moment, if what happens is that it buys
11 the trucks and essentially leases them out internally to
12 other group companies, then it might be the case that
13 some or all of the overcharge was passed on to those
14 internal group companies.

15 So we have made sure that they are all in the claim,
16 because if it was passed on --

17 THE PRESIDENT: Yes.

18 MR. JONES: The objective is to get to the place, sir, that
19 you outlined when you were discussing this with
20 Mr. Jowell, which is that we do not particularly want to
21 be tangled up on these internal transfer points, we want
22 to focus on the overcharge and pass-on. But they are
23 there because strictly speaking if they were not,
24 Mr. Jowell or others might be saying you have got the
25 wrong claimant, they passed it on internally.

1 THE PRESIDENT: I think all that is being said is that if
2 Suez Fleet Management, number 227 or 8, is going to be
3 one of the selected claimants for trial, it may be that
4 also those other claimants who are, you tell me, already
5 in the claim should also be test claimants with them so
6 that disclosure can be obtained from those other
7 associated claimants to get the disclosure of pass-on.

8 So it is not, I think, a major issue of principle,
9 I would have thought. It is an issue of how one manages
10 it just to make sure that by selecting Suez Fleet
11 Management you do get all the relevant companies
12 together that are dealing with the trucks bought by Suez
13 Fleet Management. That is how I understand Mr. Jowell's
14 submission, and whether they are formally claimants in
15 the selected claim or whether they undertake to give
16 disclosure for the purpose of the selected claim is
17 perhaps a matter of detail.

18 MR. JONES: So, sir, that, if I may say, is what me and
19 Mr. Hoskins have broadly agreed on and it does not
20 require what Mr. Jowell has suggested.

21 The reason I say that is that that, sir, what you
22 have just outlined, is the purpose of my associated
23 losses approach. That is why our order says you
24 would not only include the original purchasing claimant,
25 but you would include all of these downstream internal

1 companies which are -- there are a few for Veolia and
2 I think two for Metro on this point, you would include
3 their losses insofar as they relate to the trucks bought
4 by the initial purchasing claimant. That is my
5 mechanism for dealing with it.

6 But the whole point of that is to ensure that the
7 claims are tried, that they give disclosure, that the
8 whole thing is dealt with. Mr. Hoskins had a different
9 idea, but which I showed you, and it amounts to the same
10 thing which is essentially saying to me can you just
11 identify a bit more clearly who these claimants are.
12 The two Metro ones have been identified. I just told
13 you there are five for Suez, but I think it is right to
14 say we maybe have not said who they are because they are
15 not on these spreadsheets because they did not purchase
16 anything. But all Mr. Hoskins said, which I said was
17 a sensible approach, was tell us who they are and we
18 will then at the next stage make sure that they are in
19 as well.

20 But to do that, you see, you do not need any more
21 information about them, they are all in the waste
22 sector, they are all in Germany, the pricing statement
23 describes the arrangement which I have just summarised
24 to you and the only reason, if one looks at
25 Mr. Grantham's statement, why one would want granular

1 detail is if one were going to say, and this what
2 Mr. Grantham says, do not choose purchasing claimants at
3 all as test claimants, just choose -- this is what he
4 says -- choose truck using claimants and then he would
5 say I do not know whether we need all of these five or
6 six Suez truck using claimants, maybe we just need a few
7 of them.

8 But my answer to that is it is just not a sensible
9 way of selecting test claimants to say do not worry
10 about who bought it, we will use a few of the trucks of
11 whoever bought it, but let us delve internally and look
12 at who used it. It makes much more sense to say we will
13 have the purchasing claimant with all of its trucks
14 included and then those downstream ones, absolutely they
15 need to be in, they all need to be in, that is my point,
16 they all need to be in. Mr. Hoskins maybe has not
17 precisely agreed with that way of putting it, but he has
18 put forward another procedure for essentially reaching
19 the same goal, and there is not in that context any
20 reason to need to give more detailed information on
21 those particular claimants, unless, sir, you were
22 persuaded that you should not have the purchasing
23 claimant and you should just have a couple of these
24 internal downstream ones. That would be the only reason
25 for doing it.

1 That is the headline, and can I, before I come back
2 to some of the detail on Suez, on that question of
3 principle, should you just choose a truck using claimant
4 instead of a purchasing claimant, on Suez you might just
5 about be able to make it work. There is, from our point
6 of view, no advantage, but you might be able to make it
7 work because what happened in Suez was one company
8 bought the truck and then, as I have basically said,
9 leased it to other companies internally.

10 But for Metro it was actually a slightly different
11 method, because one company was buying the trucks and
12 providing logistics services to other companies in the
13 group, so they want deliveries to this shop on this day
14 and they want certain things delivered here and there.
15 So if you ask us the question which Mr. Jowell asks us,
16 which is when did those claimants use which trucks, this
17 is why I think there was a comment in my skeleton
18 argument saying what do you mean when did they use them,
19 which days, which afternoons, which bit of the truck?
20 This is a group which is involved in various forms of
21 distributing food and other products, it is selling its
22 services internally, it just does not work to say which
23 trucks did each of those use and when.

24 So it is much more sensible to come back to the
25 purchasing claimant and to make sure that you pick up

1 the downstream claimants.

2 I do accept if it turned out that our downstream
3 internal claimants were in several industries, then
4 Mr. Jowell might have a good point, or in different
5 countries, these are two of the big variables he raises.
6 If they are in different industries or --

7 MR. JOWELL: Forgive me, but I just want to correct one
8 thing because you have said it twice, which is that I
9 suggested that what matters was the industry, and
10 I specifically said that is not what matters. What
11 matters are the services.

12 So if somebody is providing incineration services to
13 a municipal company, that is going to be completely
14 different from somebody that is providing, say,
15 collection services for a private company. It is no
16 good saying it is waste. It is not informative. One
17 has to know what are the services, who are the
18 customers, because they can have completely different
19 rates of pass-on. Forgive me, but it is important that
20 that is corrected.

21 THE PRESIDENT: I think that all that is being asked for,
22 before we go firm on who the test claimants are, and
23 clearly that is a decision of some significance for the
24 future of these proceedings which is why we are spending
25 so much time on it, and if we get it wrong whoever the

1 judge is, and it will not be me in 2024, will be cursing
2 the decision that has been taken today and we want to
3 avoid that, is that we might benefit from a little more
4 information to be clear that as best we can we are
5 getting it right.

6 So if you say there are five companies that you
7 would provide a chart, and I do not think it would be
8 controversial and it is served on us and provided to
9 everyone, saying who they are, which area of Germany
10 they are in, they might all be national, one might only
11 be in Bavaria and so on, and what the nature of their
12 customers, and then one can see that one might indeed
13 end up saying: "well, actually if 400 of them are being
14 supplied to this company, perhaps we will only bother
15 with 400 and we will leave the other 127 out, because
16 it is going to take too much time and it is not going to
17 achieve much and we will get as much as we sensibly can
18 by looking at the 400 and the associated large user".
19 I do not know, that may be completely unrealistic.

20 That is all that I think is being asked for and I do
21 not think -- it is not going to derail the trial. We
22 have set the date for that. It is simply going to
23 enable to us reach a decision with a little bit more
24 background information, which may indeed be buried
25 somewhere in the POM statements or whatever, but it is

1 certainly not in the forefront of what is before us.

2 In the case of Suez you have an identified company
3 that bought 527 trucks. In the case of Veolia Germany,
4 things are a bit more complicated because you have got
5 I think nine companies, and it may not be clear which
6 one bought which trucks, but you are suggesting that all
7 nine of them should therefore be included.

8 So that is I think what is being sought. I do not
9 think it is involving a huge exercise, as I understand
10 it, or massive disclosure. It is really more
11 a collection, provision of information in a form that we
12 can get to grips with in a simple way.

13 MR. JONES: Sir, I understand. Could I just make this one
14 observation just on the proportionality?

15 If it is limited, sir, what you have just described,
16 to Suez Germany and, in other words, the five companies
17 downstream of the test claimants that we have identified
18 there, and if it is limited in the same way to Metro
19 Germany and the company and its two downstream ones to
20 address this particular Suez and Metro issue, then, sir,
21 I can see it is a relatively straightforward point for
22 us to come back on.

23 But once one starts adding in others, it does become
24 much bigger, and Veolia in particular. Sir, all I would
25 say about Veolia is there is a prior question which is

1 for you and the Tribunal, which is whether the business
2 units approach is taken. Because if business units are
3 taken to resolve unattributed trucks, that only works by
4 having all the purchasing claimants in the business
5 unit.

6 So it would not be a good use, in my submission, of
7 our time, of anyone's time to start looking in any more
8 detail at Veolia if actually our business units proposal
9 is going to be accepted, and that becomes even more
10 problematic when one starts looking at Veolia France
11 where really the exercise starts to become pretty
12 massive pretty quickly.

13 THE PRESIDENT: In the business units, those are the
14 business units of all the companies that purchased; is
15 that right?

16 MR. JONES: That is right.

17 THE PRESIDENT: Are there, again, other companies that used
18 those trucks?

19 MR. JONES: No, no, that is only an issue for Suez Metro
20 Germany. That is only an issue there, sir.

21 THE PRESIDENT: So for Veolia what if we take, say, Veolia
22 France where there are 17 companies in networks
23 infrastructure, which is the one you have suggested.

24 MR. JONES: Yes.

25 THE PRESIDENT: If one had all 17 they would be the users --

1 MR. JONES: Yes.

2 THE PRESIDENT: -- the purchasers and users of the trucks.

3 MR. JONES: That is right, sir.

4 THE PRESIDENT: Yes.

5 MR. JOWELL: May I just say that it is very helpful to have
6 that confirmation, but I think it would be helpful
7 I think to have that sort of formally set out in the
8 sense that perhaps they should confirm that they are not
9 then seeking associated losses for any companies other
10 than Suez and Metro.

11 THE PRESIDENT: That is what I have understood.

12 MR. JOWELL: Me too, but it would be good to have formal
13 confirmation.

14 THE PRESIDENT: Is that right, Mr. Jones?

15 MR. JONES: Sir, could I just have one moment?

16 THE PRESIDENT: Yes, if you want to. You said that your
17 solicitor is not with you. If you wanted to take
18 a moment offline to --

19 MR. JONES: It was not so much that actually, I can come
20 back to you on that now. It is that if you look at my
21 order, which is in {HS2-B/30/4}.

22 THE PRESIDENT: Have you got the electronic bundle
23 reference?

24 MR. JONES: {HS2-B/30/4}.

25 THE PRESIDENT: Yes, sorry.

1 MR. JONES: You will see there, just picking it up at the
2 top of the page, to put it in context you might want to
3 look at the previous page, but it is where we are
4 identifying in paragraph 3 which VSW claimants we say
5 should be involved. But on 3.5, that is where we
6 mention Brakes, 3.6 NWF, 3.7 Metro, 3.8 Suez, and then
7 3.9. This is the associated loss bit:

8 "The claims of other claimants insofar as they
9 relate to truck purchases or leases attributable to the
10 claimants listed in paragraphs 3.5 to 3.8 above."

11 So it is only those four.

12 Can I just explain why it might be the other two.
13 It is Metro and Suez for the reasons that I have given,
14 which is this crucial point that we are discussing about
15 purchasing versus truck using.

16 THE PRESIDENT: It is only Suez Germany.

17 MR. JONES: It is only Suez Germany, that is not clear from
18 this order, but it is only Suez Germany and Metro
19 Germany.

20 Brakes and NWF, that is the sort of cautious, the
21 more cautious point which I mentioned earlier, which
22 actually may also spill across to Metro and Suez. But
23 that is the sort of financing point, or to put it in
24 broad terms my clients being cautious more generally to
25 make sure that no argument can be raised against them.

1 I entirely see Mr. Hoskins' sensible suggestion, and
2 I have mentioned that already, that we really need to
3 identify who these are, understand that. But the key
4 point in answer to your question is that it does not
5 apply to Veolia, so it is not a Veolia issue. It is
6 these four companies and it is particularly Metro and
7 Suez Germany.

8 MR. HOSKINS: Can I just ask for clarification. Does it not
9 apply to Veolia because of the proposed business unit
10 approach, and if the business unit approach was not
11 adopted and the largest purchasing claimant was instead
12 adopted, would it then apply to Veolia?

13 MR. JONES: I think I know the answer to that, but I do not
14 want to get it wrong. So I had better take instructions
15 before I answer Mr. Hoskins' question. I see the
16 relevance of it, but sir, if it would help the Tribunal
17 for me to answer that I had better liaise with my
18 solicitor who is not in the room right now.

19 THE PRESIDENT: Yes, I think that would be helpful because
20 of course for Veolia they are under 3.4 in this draft
21 order with a whole lot of companies.

22 MR. JONES: Yes, I hesitate to give the answer. I will take
23 instructions. It may only take me one minute.

24 THE PRESIDENT: Yes, well, why do you not do that. We will
25 pause for a minute.

1 MR. JONES: I am grateful. (Pause)

2 THE PRESIDENT: Yes, Mr. Jones.

3 MR. JONES: Sir, I am very grateful for that. That was not
4 us very quickly trying to work out our case, that was us
5 trying to overcome more technological hurdles. So I am
6 sorry that that took me longer than I thought.

7 There is not an associated losses point for Veolia.
8 That list of claimants that you see in the order, they
9 are all purchasing claimants, that is why they are
10 there, and if you took a different business unit then
11 you would have even more purchasing claimants, because
12 as I have explained we have not chosen the biggest one
13 for France because that becomes almost as big --

14 THE PRESIDENT: Is the purchasing company, if we look at,
15 say, 3.4(c), the SADE business unit in France, would
16 claimant 11, C11, that will have purchased trucks and
17 will those trucks be then used by C11?

18 MR. JONES: Yes.

19 THE PRESIDENT: They will not be used by C18?

20 MR. JONES: That is a different angle on the question, and
21 I apologise, sir, again I see the importance of it but
22 that particular angle is not one that I have
23 bottomed out.

24 They are in the same business unit, so I can see
25 perhaps there is scope for that to happen. I have not

1 asked the question, frankly.

2 THE PRESIDENT: If you do not always know who bought them,
3 do you know who used them? There are certain problems
4 if you do not know either which company bought them or
5 which company used them.

6 MR. JONES: I am being told that the answer is where we know
7 who bought them, that is also the company which used
8 them. So we do from behind me have a quick answer to
9 that one. But what we --

10 THE PRESIDENT: Yes, but there are some trucks where you do
11 not know which company bought them?

12 MR. JONES: That is right.

13 THE PRESIDENT: But whichever one it was, that would have
14 been the company that used them?

15 MR. JONES: That is right.

16 THE PRESIDENT: Yes, so you may or may not, but that is
17 a matter for trial, have evidential problems recovering
18 for those trucks.

19 MR. JONES: That is right.

20 THE PRESIDENT: There it is. That is not for today.

21 MR. JONES: Yes, I agree with all of that, sir.

22 THE PRESIDENT: Yes.

23 MR. JONES: So, sir, just coming back to Mr. Jowell's
24 application, as I say if it is focused on the six or so
25 companies that we are talking about in Metro, the

1 downstream companies in Metro and Suez Germany, that is
2 a manageable activity, we cannot see any reason for it
3 to need to go beyond that. But we could do that and,
4 sir, as you have suggested, that could then be folded
5 into the final decision on this in February. We
6 see that.

7 THE PRESIDENT: Yes, and I think that then we can if
8 necessary consider further the business unit approach.
9 But at the moment, for our part we think doing it by the
10 business unit makes sense.

11 Will one somewhere have an explanation of what the
12 different companies within the business unit, what is
13 the difference between them, is it area of operation, is
14 it nature of customer, just to understand how the
15 business unit operated?

16 MR. JONES: Yes, that will be in the Veolia France pricing
17 and mitigation statement. There is a geographic element
18 to it, sir.

19 THE PRESIDENT: Yes. Well, I think maybe it is just copying
20 it out from that statement, or adding if necessary.
21 I think it would be helpful for us to just understand
22 that a bit better, and I think we are very close,
23 subject to the issue about Brakes, reaching a conclusion
24 on test claimants. But I think we should reserve the
25 actual decision to a further CMC which can be much more

1 narrowly focused within the parameters which we have set
2 out, which I think are now clear, namely no second wave,
3 include Germany, potentially include one UK company,
4 maybe Brakes, if that is the one that you suggest, and
5 include the Veolia and Suez in France and Germany as
6 well as the UK, and we can then consider how that looks.

7 MR. JONES: Yes.

8 THE PRESIDENT: When we reassemble to address that, you
9 could within presumably, we could say within four weeks
10 if that is reasonable, you can have longer if you think
11 you really need it, but from what you have been saying
12 you do not, to just provide some additional information
13 (a) on the companies under 3.4 and what they all do and
14 why they are different, and (b) as to the downstream
15 claimants that use the trucks covered by Suez Germany
16 and Metro Germany as the purchasing claimant.

17 MR. JONES: Yes, sir, we -- I apologise. We certainly see
18 the sense in all of that. In terms of the tasks which
19 my team will have and those three points, sir, which you
20 highlighted, is my understanding right as follows that
21 on the question of Brakes versus CM Downton essentially
22 it may not be necessary to put this in an order but
23 essentially the point is that we should have more of
24 a think about it ourselves and then liaise with the
25 defendants, and in particular I think Mr. Hoskins whose

1 clients are particularly on this, to identify reasons to
2 prefer one versus the other.

3 For the description of what the companies do under
4 3.4, sir, I do not know if that would go into an order,
5 but as I understand it it is, as you say, no more than
6 describing as best we can what are the differences
7 between these companies and why are there so many within
8 a business unit. Then --

9 THE PRESIDENT: And the differences by reference to area of
10 operation and nature of customers. For example, one
11 might be just dealing with public sector and local
12 authorities, one might be dedicated to one big customer,
13 but I am just speculating.

14 MR. JONES: I understand. So in fact, that is the same
15 essentially as the information we would be giving for
16 downstream for Metro, the Metro and Suez entities. We
17 would be focusing on those points.

18 THE PRESIDENT: Yes.

19 MR. JONES: Sir, I am very grateful for that.

20 There are some other issues which perhaps follow on,
21 but I do not know whether you want to go to them next.

22 THE PRESIDENT: Just before you do that, but also as regards
23 Brakes and CM Downton it would be helpful to know the
24 nature of their customers, size and region and so on.

25 MR. JONES: Yes, I understand that, sir. Can I just clarify

1 that you did mention earlier that some of this might
2 just involve sort of copying and pasting or pointing
3 people towards what is in our pricing -- I only jump on
4 that now because that particular point is in there for
5 Brakes and CM Downton. So if there are issues that we
6 have already covered, we will put them perhaps in
7 a separate document to make it easier at the next
8 hearing to highlight the points. But it is not
9 necessarily implicit in what, sir, you are asking now
10 that on all of these topics we have not done enough
11 already. We might have done, one just needs in some
12 cases to bring it together and perhaps in some cases to
13 expand.

14 THE PRESIDENT: That is what I was saying. That is a
15 correct summary.

16 Mr. Jowell?

17 MR. JOWELL: Yes, I just wanted to clarify that our
18 understanding before we get into a post-hearing debate
19 about the order, what the information should be that
20 these particular claimants in Suez and Metro that have
21 the associated losses claims should provide.

22 Our understanding is that you, sir, have ordered
23 them to provide the nature of their services and the
24 geographic location in which those services are provided
25 as well as the nature of their customers. We would also

1 in addition, you, sir, have not mentioned it, but we
2 would find it, and believe that the Tribunal would find
3 it, very helpful for the next CMC also where it is
4 available for those particular claimants, and bear in
5 mind that there are only said to be seven or so of them,
6 should also provide the basis on which they have priced,
7 if it is possible.

8 Because we understand from what we have received is
9 that there is differences, potentially radical
10 differences, between the way that these different
11 claimants have priced their services. Of course we only
12 seek that insofar as it is proportionate and reasonably
13 available, but if it is then of course pricing is key to
14 a selection of -- is key, going to be key to the
15 question of pass-on and therefore the potential
16 selection between those claimants.

17 So if it is possible reasonably to provide that for
18 the seven claimants, then we would respectfully also
19 seek that. But we are in your hands, sir.

20 THE PRESIDENT: No, I do not think we will order that. I do
21 not think we need that information at this stage. But
22 it is the other three points that you mentioned, the
23 nature of services, geographic location, nature of
24 customers, size, character.

25 MR. JOWELL: Yes, I am grateful.

1 THE PRESIDENT: I think on that basis, with the indications
2 that we have otherwise given, we should be in a good
3 position in February to make the final selection and to
4 take the matter forward.

5 As we have now to stop for today and we obviously
6 come on to deal with the disclosure applications
7 tomorrow, to say regarding trial length when we said we
8 think this is quite manageable and why we think a read
9 across from trial 2 is just not appropriate, bear in
10 mind that I think all the defendants, perhaps except
11 Scania, are in trial 2, you will all be putting in
12 evidence about the UK overcharge in trial 2. Your
13 respective experts will all be giving evidence in
14 trial 2 and there will be a determination no doubt in
15 the judgment of trial 2 analysing their evidence and
16 giving a view.

17 That does not stop the same expert coming back in
18 trial 3 and saying: "oh, the Tribunal got it all wrong",
19 but it does seem to us that the big issue of UK
20 overcharge will be very substantially advanced by
21 trial 3, and that has very much gone into our thinking
22 when we have looked at why we think the scope of the
23 trial that we have indicated can be done is manageable
24 within the 28 weeks we have set out.

25 We are not starting from scratch in trial 3.

1 With that, I think we should adjourn until -- is
2 10.30 tomorrow going to leave us good time? We will not
3 get through everything. I suspect there will be matters
4 held over to Friday applications, and I know Mr. Malek
5 wants to say something about disclosure just before we
6 adjourn. But the only question is if you would like us
7 to start at 10 o'clock I think we can do that, if you
8 think it is of real benefit.

9 MR. WILLIAMS: Sir, could I clarify, does your indication
10 that we are going to have another CMC in February mean
11 that you are not proposing to give other directions in
12 terms of the timetable to the trial that you have
13 indicated tomorrow, but you are holding those issues
14 over until February? Because I think that is material
15 to what we need time for tomorrow.

16 THE PRESIDENT: We can give other directions for further
17 steps if that would be appropriate. You would like us
18 to do so?

19 MR. WILLIAMS: I think it is more that debating the dates
20 for witness statements, expert reports, all of that,
21 that takes time in itself, and if that is going to be
22 held over until February then that would allow us to
23 focus on other issues tomorrow.

24 MR. SINGLA: Sir, it is Mr. Singla for Iveco. Just on that
25 point from Mr. Williams, we are of the view that it is

1 just not practical to start talking about the detail of
2 timetabling given where the Tribunal has left things.
3 It is perfectly clear that we are going to have a CMC
4 in February, and at that CMC we will have a much better
5 view as to what trial 3 will look like.

6 So we have not come prepared to debate the detail of
7 trial directions.

8 Picking up on your invitation to start at 10.00 am
9 tomorrow, we would be very keen to do that for
10 disclosure purposes, because we are ready to argue about
11 disclosure and there is a lot left to talk about.

12 THE PRESIDENT: I think Mr. Singla is right. It is a bit --
13 I think it is unnecessary to go into detail of trial
14 timetable, or rather directions for trial, which is what
15 you mean, at this stage. It would be quite adequate to
16 do that in February.

17 You all know what has to be done for trial. It is
18 a question of when it can be done and that is clearer
19 once we have identified the claimants.

20 We will start at 10 o'clock tomorrow and move on to
21 disclosure.

22 I will hand over to Mr. Malek.

23 MR. MALEK: Yes, I have looked at the various disclosure
24 applications.

25 So starting off with the VSW disclosure application

1 I think that the first one is dependent dealer channel
2 sales data. We should be able to deal with that
3 tomorrow. I think a lot of the issues have fallen by or
4 been agreed. One of the key issues over the remaining
5 parties is across a market disclosure appropriate in
6 relation to jurisdictions where so few trucks have been
7 sold by individual manufacturers?

8 So at the moment I am not keen to give market-wide
9 disclosure against individual defendants in
10 jurisdictions where they have sold very, very few trucks
11 because it is just not going to be proportionate.

12 I have looked at the costs of it and the costs are
13 potentially enormous. I can see the importance of it,
14 and everyone knows how I ruled on this aspect in another
15 application, and people should bear that in mind when we
16 come back to that tomorrow.

17 The leasing data: as regards France I think what we
18 should probably do is set down a timetable to deal with
19 that issue of France. I can hear that on a Friday. At
20 the moment I have got 14 January 2022 available. We can
21 deal with it then if other people are available.

22 I suggest the parties just agree a timetable for that;
23 one expert and one factual witness each.

24 There will be issues on leasing data, but I do not
25 think it is going to be a huge topic. For example,

1 Daimler's has been resolved, as I understand it, and in
2 some of the others there is no dispute. So I do not
3 think that is going to take too much time.

4 The Germany market-wide disclosure, again there is
5 going to be a question of proportionality. I understand
6 that DAF will provide Germany only if they are in
7 trial 3. They only have 18 trucks. Scania has only got
8 40 trucks in relation to Germany.

9 So proportionality issues are going to be arising on
10 that one as well.

11 Composite dataset: I can see where everyone wants to
12 get, which is one reliable dataset which in effect binds
13 everyone as to its accuracy. It seems to me that VSW do
14 need to answer the questions in relation to their own
15 dataset, get that in order, and then ideally the other
16 parties, if they can, should work from the dataset
17 already provided to fill in the gaps rather than
18 producing their own version starting from scratch, if
19 that is feasible, but we can discuss that tomorrow.

20 As regards the defendants' applications, the Vo2/01
21 category, I think clearly that is relevant and it is
22 important.

23 Insofar as necessary and proportionate
24 disclosure has already been carried out by individual
25 claimants I do not think they should be required to do

1 it again, but there should be a disclosure statement
2 saying what necessary and proportionate searches they
3 have done in the normal way.

4 As regards those who have not, who have only just
5 looked at effectively available documents, my current
6 view is that they should go further and that we should
7 be having reasonable and proportionate disclosure on
8 that generally.

9 There are similar considerations in relation to PO1
10 and PO2. In my own mind PO3, I am not sure where we are
11 going to go on that, but we can discuss PO3 in more
12 detail tomorrow. But PO1 and PO2 by and large the
13 missing data should be provided if it is available and
14 can be reasonably obtained. I know there are arguments
15 on that. PO4 to PO6, we can go through each one of
16 those individually.

17 As regards tax and interest, my provisional view is
18 that we should have an order dealing with that and we
19 can deal with that by way of correspondence. The
20 parties can propose a consent order. If there is any
21 arguments about timings or the precise wording we can
22 deal with that in correspondence in the way we have been
23 dealing with these orders in the past.

24 The application under Rule 61, I am not sure how
25 live that is. If it is still live we will deal with it.

1 I think most of the documents being sought have been
2 mentioned within the meaning of Rule 61. That leaves
3 open a question of our discretion: is it reasonable and
4 proportionate to direct all these documents to be
5 produced.

6 In respect of some of the documents there will be an
7 argument that all that is really necessary is a sample
8 basis. So where there is a process being described I do
9 not expect every document within that process to be
10 disclosed, at least initially. You can give one example
11 of each on a sample basis, and then if other documents
12 are needed from that then we can come back to that.

13 The RFI application as I understand it has been
14 agreed. Also Daimler's application for responses to the
15 disclosure questions I think has been agreed, but I need
16 some clarity tomorrow as to on what basis it has been
17 agreed, because sometimes what people say is, we have
18 agreed to provide an RFI, and then when the RFI comes
19 back they have not answered the questions at all and
20 they have put "Not entitled" or "It is not
21 proportional". So I need to understand from the parties
22 what they have actually agreed is going to be provided.
23 Is it that they will provide the answers, or they will
24 provide answers on a best endeavours basis, and we need
25 to know timing on that.

1 So those are the sort of provisional views.

2 Obviously everything is up for grabs tomorrow, but
3 I thought that might help the parties if they want to
4 carry on talking about the issues and see if they can
5 resolve them without necessarily troubling the Tribunal
6 at least on all of them tomorrow.

7 MR. WILLIAMS: Sir, just on the RFI, it has been agreed not
8 to pursue the RFI but there are a number of related
9 disclosure issues which are covered by other disclosure
10 categories and we do continue to pursue those. So some
11 of those issues still rear their head under the heading
12 disclosure rather than information.

13 MR. MALEK: Okay, that is fine, yes.

14 MR. JONES: Sir, could I just jump in. I intended to jump
15 in earlier but I did not do so boldly enough. But just
16 to comment on the case management point, which is very
17 briefly to say that of course we agree that most of the
18 directions can now be pushed over to February. We do
19 not need to take time on that tomorrow. Except that it
20 is being suggested to me that there are a couple of
21 issues where if we do not make directions tomorrow we
22 will lose the opportunity to make the best use of
23 the February hearing. I do not want to spend long on
24 that tomorrow morning but I will give it some thought
25 tonight.

1 I just wanted to raise that now so if I do pop up
2 first thing and answer not only your Germany preliminary
3 issue point but also a couple of case management issues
4 it is not said that I should have mentioned this today.
5 They will be short if there are any, but I can see there
6 may be a couple of points where it is just sensible to
7 steer us in the right direction before February.

8 THE PRESIDENT: On that, Mr. Jones, if your solicitors could
9 send a note to all the other parties just, if there are
10 such issues, listing them so that people can take
11 instructions in advance.

12 MR. JONES: Yes.

13 THE PRESIDENT: I think that would be helpful and
14 appreciated. Also we do very much hope that you will be
15 able to address us on the point about German law arising
16 from the judgment.

17 MR. JONES: Yes.

18 THE PRESIDENT: I just draw your attention to that. It is
19 paragraphs 91 and following in the judgment of the
20 Federal Supreme Court which, as we see it, does appear
21 to state up-to-date the position of German law and the
22 jurisprudence of that court.

23 MR. JONES: Yes, I am very grateful, sir.

24 THE PRESIDENT: We will adjourn until 10.00 am tomorrow
25 morning.

1 (4.45 pm)

2 (The hearing adjourned until 10.00 am on Tuesday,

3 5 October 2021)

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