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IN THE COMPETITION
APPEAL
TRIBUNAL

Case No: 1284/5/7/18 (T)

1290/5/7/18 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 22 March 2022

Before:
The Honourable Mr Justice Michael Green
Derek Ridyard
Sir Iain McMillan CBE FRSE DL
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Royal Mail Group Limited
BT Group PLC and Others

-v-

DAF Trucks Limited and Others

A P P E A R A N C E S

Tim Ward QC, Ben Lask (Appearing for Royal Mail/BT)
Daniel Beard QC, Daisy Mackersie, James Bourke (Appearing for DAF)

Digital Transcription by: Opus 2

Tel No:

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Tuesday, 22 March 2022

(10.30 am)

THE CHAIRMAN: Good morning, everyone. These proceedings are being live-streamed. I must, therefore, start with the customary warning: these are proceedings in open court as much as if they were being heard before the Tribunal physically in Salisbury Square House.

An official recording is being made, and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court.

As you will also see, one of our members, Mr Ridyard, is attending remotely on the screen.

So we have an agenda, we have a few things to get through and, Mr Ward, are you going to go first?

Submissions by MR WARD

MR WARD: Sir, I would be absolutely delighted to. The first agenda item, if we take them in the order the Tribunal has kindly proposed, is expert evidence and how it should be heard.

THE CHAIRMAN: Yes.

MR WARD: We very much emphasise that we consider this to be a matter for the Tribunal how it wishes to hear the

1 evidence and, needless to say, we will gladly comply
2 with whatever the Tribunal thinks fit. So for that
3 reason we did provide timetables for both concurrent
4 evidence and for cross-examination. But the expert
5 evidence is voluminous and it is, in part, highly
6 technical.

7 THE CHAIRMAN: Yes.

8 MR WARD: Having considered it in the round, we do
9 respectfully say that it would be appropriate to hear
10 a substantial part of it concurrently. So, to that
11 extent, and subject to the Tribunal's view, there is
12 agreement with the defendants.

13 However, as you will have seen from the skeleton
14 arguments, there is disagreement, if you like, in the
15 shopping list of exactly what we say should or should
16 not be heard concurrently.

17 THE CHAIRMAN: Yes.

18 MR WARD: I can summarise that for you, but I anticipate
19 that is probably well understood.

20 THE CHAIRMAN: Yes, it is well understood, and in principle
21 we are content to have some of the evidence done in that
22 fashion. We think it makes sense.

23 I think it is complicated in this case by having the
24 same experts covering different topics, some of which
25 will be hot-tubbed and some will not.

1 MR WARD: Yes.

2 THE CHAIRMAN: So I think the order of events is perhaps
3 quite important.

4 MR WARD: Yes.

5 THE CHAIRMAN: Depending on -- I imagine there is agreement,
6 therefore, is there, that overcharge, that will be done
7 concurrently?

8 MR WARD: Yes. So I think it is right to say there is
9 agreement that the volume of commerce overcharged and
10 used trucks will all be done concurrently.

11 THE CHAIRMAN: Yes.

12 MR WARD: Having considered DAF's proposal, we
13 enthusiastically suggested finance and tax as well, but
14 they said no. But we are proposing that.

15 THE CHAIRMAN: So you are proposing that?

16 MR WARD: Yes.

17 THE CHAIRMAN: But DAF resist that?

18 MR WARD: Yes.

19 THE CHAIRMAN: Right.

20 MR WARD: Then we do respectfully ask for the opportunity to
21 do orthodox cross-examination on plausibility, which I
22 will come to in a moment, complements, and then supply
23 pass-on, which is the question of whether my clients
24 passed on the truck overcharge through their prices to
25 customers.

1 THE CHAIRMAN: I notice from, I think, DAF's proposed
2 timetable that they might agree with you that supply
3 pass-on is --

4 MR WARD: Yes, that is agreed.

5 THE CHAIRMAN: -- not concurrent.

6 MR WARD: Subject, of course to your views. But yes.

7 THE CHAIRMAN: Yes.

8 MR BEARD: Yes, and I will deal with financing and tax in
9 due course.

10 THE CHAIRMAN: So the contentious issues are theory of harm.

11 MR WARD: Yes.

12 THE CHAIRMAN: Or plausibility -- it is the same thing,
13 yes -- and complements.

14 MR WARD: Yes, and then finance and tax.

15 THE CHAIRMAN: Then finance and tax.

16 MR WARD: Yes, that is exactly right.

17 THE CHAIRMAN: Yes.

18 MR WARD: If I may just briefly develop our submissions on
19 plausibility or, as you say, sir, theory of harm, it is
20 exactly the same. We do respectfully ask for the
21 opportunity to cross-examination this in the orthodox
22 way before hot-tubbing takes place on the issue of
23 overcharge and the other issues that are proposed.

24 Now, you will appreciate that Professor Neven for
25 the defendants' evidence is that although his clients

1 took part in a 14-year EEA-wide cartel, involving its
2 key competitors, with the object of restricting price
3 competition, it is nevertheless, according to
4 Professor Neven, implausible that it had any effect on
5 prices.

6 We observe, just parenthetically, that DAF has never
7 given any explanation of why it entered this cartel, but
8 Professor Neven says it is just implausible that it
9 would have had any price effect; and you will see we
10 strongly disagree with that.

11 This matters because it is the rationale used to
12 justify findings that Professor Neven makes, that the
13 overcharge itself was zero, or even negative. Although
14 his negative results, he says, are not statistically
15 significant, and cannot be considered difference to
16 zero.

17 So we will be submitting that DAF's case is quite
18 extreme in this regard, and it is part and parcel of
19 other aspects of its case. So, for example, it says
20 that BT recovered more than 100% of the overcharge
21 through supply pass-on, so it seems to be DAF's case
22 that if there was an overcharge it was actually
23 a benefit to BT.

24 We, of course, fundamentally disagree with all of
25 that. But for the starting point though, is this

1 question of plausibility, which we submit that that is
2 the background against which the econometric analysis he
3 has performed falls to be assessed.

4 In fact, we can see that very clearly from DAF's
5 supplemental skeleton argument which was served, I think
6 yesterday and if I may ask you to turn it up, Mr Beard
7 has helpfully summarised Professor Neven's points as to
8 why this -- which makes clear why the plausibility
9 argument matters.

10 If I could ask you just to look at page 3 of that
11 skeleton, paragraph 12. {A/3.01/3}.

12 THE CHAIRMAN: Page 3 of DAF's~...?

13 MR WARD: They call it, "Supplementary submissions on
14 concurrent expert evidence". It came in yesterday,
15 I think.

16 THE CHAIRMAN: I am not sure I have seen that. Have you
17 seen that? I have got tab 3 of the bundle, which is
18 DAF's skeleton argument.

19 MR WARD: No, it is not that.

20 MR BEARD: There was a document sent yesterday -- (Handed).

21 THE CHAIRMAN: Oh, I have it here.

22 MR BEARD: It was intended to actually assist with this
23 process, but that may not have been~...

24 THE CHAIRMAN: Right. No, I do have it. I am sorry,
25 I overlooked that.

1 MR BEARD: Is it worth just pausing and if the Tribunal has
2 not had a chance to look through it, just giving it
3 a quick skim?

4 THE CHAIRMAN: Yes, I will do that.

5 MR WARD: Can I just draw your attention -- if I may just
6 finish the point?

7 THE CHAIRMAN: Yes.

8 MR WARD: The crucial point is paragraph 12, where Mr Beard
9 has rightly summarised what Professor Neven says about
10 how the plausibility analysis feeds in, and he says
11 there, you will see that the plausibility analysis:

12 "... 'can also inform the interpretation of the
13 estimates' ... and the evidence 'supports the conclusion
14 from the econometric analysis that the infringement is
15 unlikely to have had any effect'."

16 So if I may put that in slightly less refined terms,
17 it goes to justify finding that there was zero
18 overcharge. So Professor Neven says: it is perfectly
19 plausible that this cartel would have had no effect, and
20 here we are, the econometric analysis seems to show
21 that.

22 Now, the argument between the experts, of course, on
23 the econometrics, is quite technical about exactly what
24 is or is not within the econometrics, but both of them
25 have seen fit to do this theory of harm work. We do

1 respectfully submit that the plausibility analysis does
2 not stand up, and we submit that it is appropriate for
3 the Tribunal to hear that evidence against that
4 background.

5 I will pause, but there is another limb to this
6 submission. So if you would prefer to read Mr Beard's
7 submissions first, or I will just finish~...

8 THE CHAIRMAN: I am just reading through on this aspect.

9 (Pause).

10 So you say his argument on plausibility is wholly
11 implausible?

12 MR WARD: We do.

13 THE CHAIRMAN: Right. But as I understand it from your
14 skeleton, you are also questioning his independence?

15 MR WARD: We are, I am afraid, sir, yes, and I will explain
16 that briefly as well, if I may.

17 The issue is Professor Neven's pre-existing
18 relationship with DAF. We have set the detail out in
19 more detail in a letter to Travers Smith which I can
20 show you, because the crucial point in it is a footnote
21 which appeared in Professor Neven's report. But the
22 easiest place probably to see that is in the PTR bundle,
23 and it is tab 25.1.

24 I do not actually think -- last time I checked the
25 expert reports themselves are not in -- I am so sorry,

1 I said 25.1. Yes, it is 25.1. {A/25.1/2}.

2 THE CHAIRMAN: 25.1, yes.

3 MR WARD: But the expert reports themselves are not actually
4 in the bundle, so far as I know, yet.

5 Could I ask you to turn that up and turn to the
6 second page of that letter, and it is paragraph 6, where
7 the crucial footnote is quoted. Do you have that, sir?

8 THE CHAIRMAN: This is Bryan Cave's letter, yes?

9 MR WARD: Yes. Paragraph 6.

10 THE CHAIRMAN: Yes, got it.

11 MR WARD: Here we quote this footnote, and it is footnote 3
12 in Professor Neven's report, and he says:

13 "In addition to my instructions in these
14 proceedings, I have also been instructed on behalf of
15 DAF since 2013 to advise on the Commission's
16 investigation and to provide my expert opinion in
17 respect of other follow-on damages claims in the UK and
18 across Europe arising from the Decision. Nevertheless,
19 the only material that I have relied on in making this
20 report is set out in annex B."

21 At the back of his report is a letter of instruction
22 from Travers Smith, which identifies the material which
23 he should rely upon.

24 Now, that was news to my clients when we saw this
25 footnote. Approval from the Tribunal was sought for

1 Professor Neven's appointment in February 2021, and
2 although Professor Neven filed two witness statements on
3 that occasion, he did not disclose this information.

4 When we challenged this in correspondence with DAF,
5 they explained that at a case management conference in
6 2018, the transcript recorded that the firm,
7 Compass Lexecon, was acting for them in a number of
8 jurisdictions, although they made no reference at that
9 time to Professor Neven by name.

10 But what is very important here is that what
11 Professor Neven has disclosed, belatedly, is that he was
12 himself involved in advising DAF in the very European
13 Commission investigation which led to the settlement by
14 DAF and led to the decision which is at the absolute
15 heart of these proceedings.

16 So why does that actually matter? Well, in our
17 submission it gives rise to a number of linked concerns.
18 The first one is, of course, about access to
19 information, because although he has given his report on
20 the basis of a circumscribed set of information, it is
21 evident that, acting as he has for nine years, he may
22 well have had access to other information and we have no
23 visibility at all of what that may have been. I think
24 it is fair to say that Travers Smith have sought to
25 answer that point in their recent letter, but we do not

1 accept that it really has told us what it is that he has
2 seen.

3 Of course, you will be aware, sir, that experts are
4 required to consider all material facts, including those
5 which might detract from their opinion, and we simply
6 cannot know what else he might have learned through the
7 process of advising DAF over all these years, and in the
8 critical phase of advising as to settlement; what
9 exactly he may know that we do not know. Of course, we
10 have got the Commission file, or at least extracts from
11 it, but we simply do not know.

12 Then the second issue which is related is, of
13 course, simply the closeness of the relationship. He
14 has been working for them for many years on what sounds
15 like a wide range of cases. We do not know how many,
16 and that is something that I may well explore with
17 Professor Neven in cross-examination, but these are all
18 matters which, in my respectful submission, will in due
19 course be for the Tribunal to consider when it considers
20 the weight of Professor Neven's evidence.

21 We do not think it is right, with respect, that the
22 Tribunal should hear a couple of days of hot-tubbing
23 where, no doubt eminent experts will express eminent
24 views, without having had the opportunity to evaluate
25 the cross-examination that we wish to conduct on these

1 issues. They are, in a sense, a framing for those
2 issues, and a context against which we think the
3 Tribunal should hear that evidence.

4 THE CHAIRMAN: Well, I think this sort of comes back to what
5 I was saying in the beginning are the difficulties with
6 having the same experts, some of the issues of which are
7 going to be hot-tubbed and others are not; and if you
8 want to challenge his independence, which you do want to
9 do --

10 MR WARD: We do.

11 THE CHAIRMAN: -- obviously that can only be done through
12 cross-examination, and it is difficult to see that that
13 needs to be dealt with upfront, really.

14 MR WARD: Well, that is our submission, sir. Obviously
15 Mr Beard says: well, you are going to have the
16 opportunity for residual cross-examination, and of
17 course the reality of that residual cross-examination is
18 that the Tribunal will have carried out the questioning
19 it wishes on the issues it is most interested in, and
20 realistically advocates are neither asked nor thanked
21 for then, as it were, ritualistically putting their case
22 through that residual cross-examination.

23 But this particular issue is one that is logically
24 prior and is contextual for what follows, and we do say
25 the same about plausibility. That is(?) just

1 a straightforward expert issue, without doubt, and
2 Mr Beard says in his supplementary skeleton: well, it is
3 all intertwined with the overcharge analysis, and of
4 course they are intertwined. But there is a logically
5 prior question of: is there anything plausible in the
6 idea that this cartel gave rise to an overcharge? Which
7 is effectively used by DAF to set up the point that the
8 finding that there is no overcharging whatsoever,
9 despite 14 years' of hard labour of anti-competitive
10 conduct, is nevertheless quite acceptable and does not
11 show, as Mr Harvey says, that the model is just
12 mis-specified.

13 Mr Harvey says if you have come to zero and results
14 that are not even statistically significantly different
15 from zero, it is just mis-specified. You should not be
16 getting negative results on a cartel that lasted for
17 14 years. You can debate how much overcharge it caused,
18 but negative results? Professor Neven says: well, but
19 it is just not plausible it would have any effect, and
20 when you read his plausibility analysis it is full of
21 abstractions.

22 THE CHAIRMAN: Well, it seems to me from my limited
23 understanding of this area that it is quite a sort of
24 academic question, and it is almost on the cusp between
25 liability and damages.

1 MR WARD: Yes.

2 THE CHAIRMAN: Yet liability is not actually in issue.

3 MR WARD: Indeed. One could be forgiven at times for
4 thinking this case is, as they say in jargon,
5 a standalone claim. But that is not the case, and
6 indeed the contrast between the experts on plausibility,
7 as you will have seen if you have had a chance to
8 pre-read at all the expert reports, Mr Harvey says: let
9 us look at what the decision actually says was going on
10 here, and the decision says: pricing operated in this
11 way, it enabled the manufacturers to be better able to
12 calculate the transaction prices of their rivals. He
13 does not say they knew a particular truck was
14 €37,423.12, but he says: look, that is how it was
15 working. It was a cartel that operated to give useful
16 information, and these manufacturers received this
17 information for 14 years and, guess what? It probably
18 influenced their prices.

19 THE CHAIRMAN: Yes.

20 MR WARD: Professor Neven takes an approach where he looks
21 at this in the abstract and says: well, in the abstract
22 are the conditions ripe for a kind of collusion around
23 a focal point on transaction prices? He purports to
24 analyse the nature of the market and so on and so forth.
25 But our submission will be it just does not really

1 engage in a practical way with the facts.

2 But we do wish to cross-examine on that, and we do
3 think that it is so bound up with what I would call the
4 case strategy of DAF, that it relies upon this
5 independent evidence to show that it is just perfectly
6 plausible the answer may be zero, but it is important to
7 consider the merit of that in advance, and before we get
8 deep down in the technicalities of whether dummy
9 variables for the global financial crisis interact so as
10 to neutralise demand variables in the model, to just
11 give an example of a live issue.

12 THE CHAIRMAN: So you say because of his approach to that
13 question it affects the way he approached the figures
14 and the econometrics?

15 MR WARD: Well, I do not say that, because that might be
16 implying some form of bias on behalf of Professor Neven.
17 I do not say that.

18 THE CHAIRMAN: Right.

19 MR WARD: But I say that the plausibility material is being
20 used in a sense to -- how can I put it, from the
21 lawyers' point of view, soften you up for the conclusion
22 that zero is an unsurprising answer.

23 Largely it is abstract but there is also, I should
24 say, to prevent Mr Beard from having to say it on my
25 behalf, there is an empirical piece from Professor Neven

1 as well as part of his analysis but we do not accept
2 that that really goes anywhere near to showing what they
3 seek to show.

4 THE CHAIRMAN: As you probably know, Mr Ridyard is our
5 expert in this area.

6 MR WARD: We are very aware of that.

7 THE CHAIRMAN: I think it is fair to say he would feel
8 comfortable with asking the questions in this area, as
9 well as overcharge more broadly, and there is no
10 reason -- I think this is right -- why it cannot be
11 dealt with concurrently, subject to your point about
12 challenging his independence.

13 MR WARD: Yes. Of course we are very grateful that
14 Mr Ridyard is here and engaged in this case, and it can
15 only be an asset to all of us for that to be the case,
16 and of course we do not mean in any way to suggest the
17 contrary, that somehow Mr Ridyard will not deal with
18 this in an appropriate way.

19 But there is, if I may put it this way, a somewhat
20 adversarial element in our challenge here which goes
21 beyond just the question of whether or not one should
22 have a dummy variable and, if so, does it interact
23 properly with others, which are truly technical
24 questions, because most of the questions on overcharge
25 are very, very technical. Indeed, you will have seen

1 that there is a great deal of highly technical economics
2 in this case, which is why we have accepted that
3 concurrency is the right approach.

4 THE CHAIRMAN: How would you envisage it working then? That
5 we would have a day, I think is in the timetable --

6 MR WARD: Yes.

7 THE CHAIRMAN: -- of cross-examination of both experts on
8 this area?

9 MR WARD: Yes. If you were to turn up the timetable we
10 submitted, which is under -- the most recent version is
11 under tab 49, and it is the second page of the letter.

12 THE CHAIRMAN: Yes, I have got that loose actually, yes.

13 MR WARD: You will see that our proposal was for a day --
14 that is to say Wednesday the 18th, which is theory of
15 harm, which for the avoidance of doubt would include our
16 independence challenge.

17 THE CHAIRMAN: Okay.

18 MR WARD: We think of them as linked issues, frankly. So
19 that would be cross-examination by both parties.

20 THE CHAIRMAN: This is really an issue raised by
21 Professor Neven, is it not?

22 MR WARD: Plausibility?

23 THE CHAIRMAN: Yes.

24 MR WARD: I do not think that would be fair, in fact.

25 Because Mr Harvey also says the theory of harm -- he

1 does not use the word "plausibility", he calls it
2 a theory of harm -- is relevant because of course one
3 has to interpret the econometric results in order to
4 determine whether one can properly infer causation from
5 the econometric results.

6 So Mr Harvey sees a role for the theory of harm, and
7 what he does is to look at the Commission decision and
8 say: this is how it was working, it is entirely
9 plausible it would work.

10 Now, despite five, or is it now six years of
11 litigation in this case, vast amounts of disclosure,
12 exchanges of evidence, requests for further information
13 and so forth, there is still actually a very significant
14 factual vacuum in the material before you, which is to
15 say that DAF has adduced no evidence whatsoever of what
16 it actually did with the fruits of this cartel. So
17 there is no witness who says: I went to these cartel
18 meetings and this is what we did with the information.
19 Or: when we got the gross list prices from Daimler we
20 took them home and we threw them in the bin, made paper
21 aeroplanes or did something more constructive with them.

22 So that is a big factual vacuum in this case, and
23 what Mr Harvey does is look at what we do have, look at
24 the strands in the evidence that DAF has put forward,
25 the things it has allowed out, and has said: well, look,

1 I can see there are various ways that this could have
2 worked, how these gross list prices and the other
3 aspects of the cartel might actually have influenced
4 prices on the ground, firmly rooting his analysis in the
5 decision. So that was proactively put forward by
6 Mr Harvey.

7 THE CHAIRMAN: Okay.

8 MR WARD: It was not just reactive. But it is right to say
9 that it is not expressing a firm view about what
10 actually happened, but DAF have just chosen not to
11 explain that.

12 THE CHAIRMAN: So you envisage half a day each on
13 cross-examination --

14 MR WARD: Yes.

15 THE CHAIRMAN: -- of Mr Harvey and Professor Neven on that
16 first day, essentially, of the expert evidence.

17 MR WARD: Yes, and of course we would very much welcome,
18 once this is in concurrent session, if Mr Ridyard or
19 yourself had any further questions, then concurrency is
20 an opportunity to engage with that; and it is fair to
21 say that even the plausibility analysis is not
22 completely free of technicalities. There is an argument
23 over a model produced by Professor Joseph Harrington
24 which was extremely influential in some Dutch
25 proceedings where the Dutch court threw out a very

1 similar argument by DAF to the one that is being
2 advanced before this court.

3 THE CHAIRMAN: Yes.

4 MR WARD: But that will be explained in our written
5 openings. That is at the more technical end of the
6 argument.

7 THE CHAIRMAN: So you say if we have got some burning
8 questions on plausibility we can put that to them in the
9 concurrent session on overcharge?

10 MR WARD: Of course. Of course. You will see that the
11 timetable allows for two days of concurrent evidence on
12 overcharge and volume of commerce, and one day of
13 residual cross-examination, which is quite a generous
14 amount of residual cross-examination. But we all
15 recognise the importance of this. The volume of
16 commerce issue is quite narrow -- I will be corrected if
17 I am wrong but there is only one point which is about
18 so-called truck bodies. It may be helpful if I explain
19 that now as it is going to bear also on the question of
20 complements.

21 THE CHAIRMAN: Right.

22 MR WARD: Shall I, if I may, take a step back and explain
23 what that is?

24 THE CHAIRMAN: Volume of commerce? Yes.

25 MR WARD: So obviously what happens in cases of this kind is

1 a great deal of energy is put into trying to work out
2 exactly what the trucks were and how much was paid for
3 them. There was a very long process through which the
4 parties tried to reach this. It is fair to say
5 Mr Justice Roth banged heads together on this one and
6 something called an effective price schedule emerged
7 because there was a lot of debate about whether various
8 additional charges or premia were involved -- I actually
9 cannot remember the detail, mercifully, but various
10 add-ons were or were not part of the truck prices
11 properly construed.

12 That went reasonably smoothly, eventually, and then,
13 relatively late in the day, DAF introduced a further
14 argument, which was that where a truck also involved
15 a body, a truck body, that was not part of the truck as
16 caught by the Commission's decision. So if you
17 visualise a very, very standard type of truck which has
18 a cab and then a rectangular box behind it, a very
19 typical delivery-type truck. Their argument is that
20 that rectangular box, even if sold to the claimants by
21 DAF, did not count within the scope of the cartel.

22 We do not agree, and there is some argument about
23 whether that is right as a matter of law in the sense
24 that our submission is it is just caught by the
25 decision, and if, indeed, it was not part of the

1 decision, one would expect it to say so.

2 But beyond that, the economic argument is partly
3 about: if that is right, how do you extract these bodies
4 from the data? So that is a relatively narrow issue on
5 volume of commerce.

6 There has been a lot of to-ing and fro-ing on the
7 subject of leases, because a large number of these
8 trucks were bought on various kinds of leases, and that
9 gives rise to questions about depreciation of lease
10 payments and so forth. But I say this with hope, as
11 well as optimism, that those issues are collapsing down
12 to very little. I think there has been some pragmatism
13 on that issue, and I hesitate to say there is nothing in
14 it, but I do not think there is very much.

15 On overcharge, the issues that remain, despite the
16 sort of sheer thickness of the expert reports, are also
17 reasonably circumscribed. They are very important, but
18 they are quite circumscribed and, if it is helpful,
19 I will just enumerate them.

20 THE CHAIRMAN: Okay.

21 MR WARD: One is what currency should the model be conducted
22 in because, as you will appreciate, it is a Dutch
23 company. It manufactured in the Netherlands and in the
24 UK. My clients bought trucks in the UK, and the
25 headquarters was in the Netherlands. Everyone agrees

1 there is a mixture of currencies involved: euros and
2 pounds and some of the predecessor currencies to the
3 euro, because this cartel is so old it goes back to the
4 pre-euro era.

5 THE CHAIRMAN: Right.

6 MR WARD: The experts have had to make a decision about what
7 they should do: we have to model in one currency, which
8 one should it be? Mr Harvey says euros and
9 Professor Neven says pounds. So that is an important
10 issue in the case.

11 THE CHAIRMAN: So the exchange rate comes in and affects
12 everything.

13 MR WARD: One of the very technical questions in the case is
14 whether you can effectively model out the exchange rate
15 through controls in the econometric model, and our case
16 is you cannot and therefore one has to make a choice,
17 and that choice is going to involve pros and cons, if
18 I can put it at rather a stylised level. There is
19 a technical issue there about whether or not in fact you
20 can effectively control for the exchange rate.

21 Then there is one I have already mentioned, just in
22 passing, which is the financial crisis, because this
23 cartel straddles the global financial crisis. Mr Harvey
24 says one should allow a dummy variable to reflect the
25 years when the global financial crisis was at large,

1 because it had such dramatic effects on the market that
2 one must take it into account.

3 Professor Neven says: well, I have already taken
4 into account variability in demand, I do not need
5 a global financial crisis dummy as well. Then, for very
6 technical reasons, he says that dummy interferes with
7 the operation of the demand variable. That is a very
8 technical issue.

9 Then the third thing which goes into the dispute
10 over overcharge relates to emissions standards. Now,
11 you will have seen that the infringement:

12 "The finding of infringement~..."

13 I am just going to read the words so I do not put
14 any gloss on them, but you need not turn it up:

15 "... involved collusion on, among other things, the
16 timing and passing on of costs for the introduction of
17 emission technologies required by Euro 3 to Euro 6
18 standards."

19 As you are probably aware, Euro standards for
20 emissions just raise the requirements on a periodic
21 basis for new vehicles, and the decision explains the
22 way in which the parties colluded over that. Both
23 Professor Neven and Mr Harvey agree that you can isolate
24 a price effect for these emissions standards.

25 Professor Neven says: well, that is just because these

1 trucks were more desirable. Mr Harvey says: well, they
2 were not actually desirable, nobody wanted to pay for
3 these emissions standards, and all this is is the effect
4 of collusion.

5 So that is quite an important point. Again, it
6 actually collapses into an argument of quite a refined
7 nature about omitted variable bias.

8 Then the final point I would mention, just under the
9 head of overcharge, is there is a technical difference
10 between the way the two experts have modelled the data,
11 in other words the different periods of the cartel.
12 A very long-running cartel, the DAF data set changes
13 fundamentally in 2003. In the pre-2003 period one is
14 dealing with a data set called AS400 from DAF, which
15 contains the trucks, but not truck individual costings.

16 In the period post-2003 there is a data set called
17 MI which does include individual truck costings.

18 Mr Harvey has done two models to reflect that.

19 Professor Neven has, I think, a main model, which is
20 just MI data set only, and then a combined model of the
21 two, as he is very, very sharply critical of the ability
22 to model effectively in the earlier period because of
23 the lack of this individualised truck cost data.

24 So that is the other overcharge issue that you will
25 be looking at. I may live to regret these words, but

1 I believe the other issues have largely fallen away.
2 There may be other things that need to be explored, but
3 they are definitely the core issues that will come
4 before the Tribunal for consideration on overcharge.

5 So that is, I am afraid, a slightly long-winded way
6 of saying why we have allowed two days for overcharge
7 and volume of commerce, and then one day for residual
8 cross-examination, which is obviously quite generous in
9 light of the two days for the Tribunal.

10 THE CHAIRMAN: Right. Well, we do not mind going faster.

11 MR WARD: I imagine.

12 Shall I explain our position on the other heads 13
of...?

14 THE CHAIRMAN: I think you were explaining value of
15 commerce.

16 MR WARD: Yes.

17 THE CHAIRMAN: Was that the explanation?

18 MR WARD: Yes, I was not intending to say anything more
19 about that.

20 THE CHAIRMAN: Okay.

21 MR WARD: It is common ground that that should be dealt with
22 concurrently.

23 THE CHAIRMAN: But not complements?

24 MR WARD: But not complements, so maybe if I could just say
25 something very briefly about that.

1 THE CHAIRMAN: Yes.

2 MR WARD: I have already explained that DAF have an argument
3 that they want to make, that even trucks that were --
4 that where trucks are supplied and are subject to the
5 cartel, the cartel does not extend to the bodies. So
6 the box on the back is not part of the cartel.

7 Of course, as you will know, trucks come in two
8 types: rigids, as they are called, with the body
9 attached, and then tractor-trailers, where there is
10 a hinged trailer which obviously can be changed.

11 THE CHAIRMAN: Are the bodies manufactured by somebody else?

12 MR WARD: DAF do manufacture some bodies in their factories
13 in the UK but in the case of Royal Mail they largely
14 supplied them to Royal Mail, albeit from third parties.
15 So DAF has negotiated the body and they supplied
16 a complete truck to Royal Mail but did not actually
17 manufacture the bodies themselves.

18 But the argument is that as the price of the trucks
19 rose -- trucks they call "naked trucks" to avoid
20 explicitly accepting the body as any part of the truck,
21 but as the overcharge caused the truck price to rise --
22 or naked truck -- then the price of the bodies, or
23 trailers, would have fallen, and that is a complements
24 effect.

25 This is an area where there is a fundamental

1 difference of approach between the experts. Mr Harvey
2 has carried out a form of empirical analysis. It is
3 tentative in the sense that he describes it as a "trends
4 analysis". Perhaps "tentative" is not the right word,
5 but he accepts it has limitations because it is based on
6 a trends analysis of truck body manufacturer margins.

7 Professor Neven has done something completely
8 different. He has not taken an empirical approach at
9 all. What he has done is carry out a simulation model
10 and, as Mr Ridyard will, of course, be very familiar,
11 a simulation model is something that one often sees in
12 merger cases where a competition authority is trying to
13 predict what the effect of a merger will be on
14 competition in the future. So you take the data that
15 has been obtained through the merger control process and
16 try to perform a model of what will happen if the market
17 goes down from four competitors to three, or three
18 competitors to two.

19 But what we have here is something very different,
20 which is an attempt to model the past using a simulation
21 model. It is based on highly complex mathematics.
22 Certainly that will be an area more for Mr Ridyard than
23 perhaps for lawyers, but what we want to do is challenge
24 this at quite a fundamental level and say the model is
25 just not equipped to answer the question whether in the

1 past the overcharge actually caused the prices of
2 complements to fall.

3 So this is an area where we absolutely say without
4 hesitation that Mr Ridyard's expertise will be very,
5 very important, and the actual modelling of this and the
6 issues in dispute are complicated. But we do have, if
7 you like, a conceptual objection to this, that we do
8 want to put in cross-examination.

9 THE CHAIRMAN: The prices of the bodies, were they
10 separately negotiated from the~...?

11 MR WARD: When Royal Mail bought complete trucks from DAF,
12 DAF supplied the bodies, but DAF's evidence is it
13 separately negotiated with the third-party bodybuilder.
14 So Royal Mail would get an invoice for, say, £45,000,
15 which would be for the entire truck, including the body.

16 THE CHAIRMAN: Yes.

17 MR WARD: But, in a sense, DAF would have outsourced the
18 supply of that body to a bodybuilding company.

19 For other trucks, not the ones purchased by
20 Royal Mail, DAF actually manufactured bodies itself at
21 its Leyland plant from 2007. So there is a mixture in
22 here, and the complements analysis has to look at all of
23 these strands.

24 THE CHAIRMAN: It seems slightly sort of artificial to
25 separate it out from the general consideration of

1 overcharge.

2 MR WARD: We say absolutely so, exactly so, and we say that
3 the decision itself does not make this distinction, and
4 if people like DAF really thought that these bodies were
5 not included, when they were settling it, they would
6 have been pretty careful to say so, so as to precisely
7 not find themselves at the end of the kind of argument
8 we are facing here.

9 THE CHAIRMAN: I am not really sure why, if that is the
10 case -- that is your position -- why it should be
11 subject to cross-examination rather than concurrent
12 evidence like the rest of overcharge.

13 MR WARD: It is only that we do think there is a sort of
14 conceptual problem with the kind of modelling that
15 Professor Neven has done.

16 THE CHAIRMAN: Yes.

17 MR WARD: Of course Mr Ridyard and the Tribunal will be well
18 alive to all of that. So I have explained the points
19 insofar as I am able on that.

20 THE CHAIRMAN: Yes. All right.

21 MR WARD: Then the other two areas where we have made
22 positive proposals that have been rebuffed by DAF are on
23 financing losses and tax. The financing losses claim
24 only arises in respect of Royal Mail in that BT has
25 a claim for simple interest and Royal Mail has a claim

1 for compound interest. The argument is essentially --
2 the claim is that it suffered additional losses from an
3 increased demand for debt and equity capital to finance
4 the overcharge.

5 Now, you have here two different experts,
6 Mr Earwaker for the claimants and Mr Delamer for the
7 defendants. There is a great deal of similarity in
8 their approach and they both apply the same corporate
9 finance framework. So it is not a case of ships passing
10 in the night.

11 But there is disagreement as to the relevance of
12 WACC as a measure of Royal Mail's losses. DAF think
13 there is a legal issue here that we do not agree with,
14 but we think this is an area where the Tribunal would be
15 assisted by hearing from the two experts concurrently to
16 be able to explain those areas where they do disagree.

17 Then beyond WACC --

18 THE CHAIRMAN: Well, the slight different in these areas is
19 obviously we do not have that expertise that we have in
20 Mr Ridyard for the other economic points.

21 MR WARD: Well, I must admit we tentatively had assumed that
22 these were issues that were probably not esoteric in the
23 sense of requiring a corporate finance expert to grapple
24 with them.

25 THE CHAIRMAN: I am sure we would be able to cross-examine

1 witnesses but I am not really sure whether there is any
2 direct benefit in us essentially taking the lead on that
3 rather than the parties.

4 MR WARD: Well, the thought we had was that it would simply
5 be beneficial to see that there was a relatively narrow
6 range of disagreement.

7 THE CHAIRMAN: Yes.

8 MR WARD: Rather than a sort of completely adversarial
9 process on that.

10 THE CHAIRMAN: Presumably that would lead to rather limited
11 cross-examination.

12 MR WARD: Yes, well that may be so.

13 THE CHAIRMAN: Quite.

14 MR WARD: I was just going to say as well that there are
15 also -- once one gets past WACC, there are alternative
16 measures of financing loss based on cost of debt and
17 foregone interest.

18 THE CHAIRMAN: Yes.

19 MR WARD: Again, there is some relatively narrow but
20 important disagreement really focusing around two
21 particular loans. Again, we think that one could easily
22 visualise a relatively distilled process here where
23 there is really not a huge amount of conflict.

24 Then the final candidate we were going to propose is
25 tax. This, again --

1 THE CHAIRMAN: Just on financing, you have both got a day
2 and a half on that, I think I am right in saying.

3 MR WARD: So sorry, let me see.

4 THE CHAIRMAN: Whether it is all cross-examination or
5 concurrent plus cross-examination.

6 MR WARD: That is right, and it may be that is more than we
7 need, realistically. But I think it is the same in
8 DAF's timetable as well, that is what I am being told.

9 THE CHAIRMAN: Yes, it is.

10 MR WARD: Then I was going to just turn to tax where we have
11 allowed a much shorter period of time.

12 There is no tax issue in the BT case because BT
13 reached agreement that the relevant rate of tax would be
14 the statutory rate, it is essentially a form of
15 compromise. But the issue here is more complicated.

16 The parties agree that in principle Royal Mail's
17 claim must be reduced to reflect the reduction in
18 corporation tax liability that accrued to it as a result
19 of the overcharge, but then increased to reflect the
20 corporation tax Royal Mail will have to pay on any
21 damages award; and it is common ground that these two
22 adjustments do not simply just cancel each other out.

23 The experts on this, Mr Singer and Mr Pritchard,
24 have been engaged in calculating the effects of this,
25 and as they say in the joint expert statement, there is,

1 to quote:

2 "... a very high level of agreement on the majority
3 of the principles used to calculate the effect of tax on
4 the claimants' claim. We are still working on the
5 possibility that there may end up being a single joint
6 model which may narrow the issues further."

7 But the remaining issues are of a nature rather
8 technical, and again we think hearing from the experts
9 together in a way that would enable them to articulate
10 the differences between them would be likely to be of
11 assistance to the Tribunal.

12 Now, so those are my headlines about the different
13 grounds.

14 THE CHAIRMAN: Yes.

15 MR WARD: When we get there I have got some points about
16 process for concurrent evidence, but that is probably
17 better dealt with at the next stage, unless you would
18 like to hear from me on that now.

19 THE CHAIRMAN: We can sort of establish what the timetable
20 will be once we have decided the form of the evidence.

21 MR WARD: I have just in mind some points of detail about
22 how the whole thing would be done, but I would suggest
23 that is probably better dealt with later this morning.

24 THE CHAIRMAN: All right. Shall we hear from Mr Beard,
25 then, about these issues.

1 Submissions by MR BEARD

2 MR BEARD: Sir, thank you.

3 As I say, in relation to the concurrent expert
4 evidence we were trying to be of assistance by providing
5 this supplemental skeleton yesterday.

6 THE CHAIRMAN: Yes.

7 MR BEARD: Only because, of course, we had been trying to
8 get engagement on this question of how to deal with this
9 evidence since February, and we had been somewhat
10 rebuffed until we saw the skeleton where there was
11 something of a volte face by Royal Mail saying:
12 actually, we do think concurrent evidence is sensible,
13 but then picking out the differences that Mr Ward has
14 identified today, and therefore we were seeking just to
15 clarify where we were on things.

16 I think, if I may, I will deal with the plausibility
17 theory of harm material first, and I will come back to
18 the independence point, because the independence point
19 was raised in correspondence. It is not suggested
20 anywhere in the skeleton, or until today, that the
21 independence point was a reason for changing the
22 ordering in relation to concurrent evidence or anything
23 of that sort. Indeed, as I will come back to, we do not
24 have all the case law here because it was not clear what
25 was going to be said about it. But, of course, if

1 a Tribunal is going to consider the independence of
2 an expert and what weight to be given, because to be
3 fair to Mr Ward he is not suggesting that the witness
4 should be excluded, one normally does that at the end of
5 the consideration of all of the evidence.

6 Now, that means that of course cross-examination
7 along the way is entirely feasible in relation to these
8 matters, but I will come back to that.

9 Plausibility and theory of harm. Well, it is the
10 same two experts as are dealing with overcharge, and it
11 is not volume of commerce, as Mr Ward kept saying, it
12 is, as the Tribunal kept rightly said, value of
13 commerce. These things fit together. We have
14 explained, I hope, relatively clearly why it is that
15 Professor Neven has explained why the consideration of
16 theory of harm is relevant here because as, sir, you
17 rightly indicated, what we are dealing with here is
18 a finding of infringement, and what this trial is about
19 is causation and quantum. Just in passing, that is why
20 there is not any vacuum in the evidence that we have
21 provided. We will deal with it in submissions, but what
22 we have provided is evidence about how pricing was done,
23 because what is critical here is whether there was
24 an impact on actual transaction prices, and you have the
25 liability found in the decision.

1 So it is causation as a matter of law, and quantum,
2 and of course what Professor Neven's approach to the
3 theory of harm is doing is looking at, from an economic
4 point of view, how one analyses the likelihood that
5 there is some sort of impact from the accepted
6 infringement, because DAF has accepted it did something
7 wrong. That is why it settled in the decision.

8 Professor Neven goes away and looks at whether or
9 not there is any impact, and by doing not only
10 a regression but looking at the conditions of the market
11 and carrying out some technical analysis, some technical
12 economic analysis about how the economic theory of harm
13 might work here, you get an overall picture of the way
14 in which there might be an impact and how you quantify
15 that impact from an economic point of view.

16 So, sir, as you anticipated, all of these aspects
17 will fall squarely within the experience of Mr Ridyard.
18 It seems to us that you have two experts who are going
19 to be talking about all of these issues with a member of
20 the Tribunal who is well aware of the sorts of questions
21 that arise in relation to these matters. It is
22 paradigmatically the sort of situation where
23 artificially trying to separate these issues out and
24 saying we are going to have separate cross-examination
25 in relation to plausibility, when the answers on

1 plausibility questions might well then refer to issues
2 concerned with the overcharge analysis and other
3 matters; and similarly, questions in relation to the
4 regression analysis might be referring back to theories
5 of harm, it is much more sensible for them to be dealt
6 with all together. Otherwise you get this sort of
7 artificiality.

8 We are not trying to keep Mr Ward out from any lines
9 of cross-examination he wishes to pursue, but it is
10 eminently sensible that the two aspects of the
11 consideration of economic issues here are dealt with
12 together.

13 As we have set out in our supplementary submissions,
14 Professor Neven himself talks about the plausibility and
15 theory of harm analysis being a complement to the
16 regression analysis in trying to assess these issues of,
17 in particular, overcharge, and the fact that they are
18 delineated in two reports does not change that.

19 In those circumstances, the idea that we should be
20 trying to separate the two schemes out and deal with
21 questions independently is going to be a recipe for real
22 problems, because if you start looking at what
23 Professor Neven is doing in his so-called plausibility
24 report, he is looking at the economic framework within
25 which one analyses the questions of cause and overcharge

1 in this case. He is looking at these issues as to
2 whether or not you could get agreement on particular
3 prices, transaction prices. Whether or not you could
4 implement some kind of coordination in relation to
5 transaction prices. He is thinking about those things
6 for the purposes of analysing overcharge, and in those
7 circumstances the idea that you separate them out is
8 just not a sensible way of proceeding.

9 We are going to end up, if we go with Mr Ward's
10 approach, of having Mr Harvey come in first, talking
11 about plausibility issues, where he is essentially
12 saying: you do not need to worry about these things,
13 just look at the decision.

14 Then we get Professor Neven dealing with these
15 issues under cross-examination, where he will be talking
16 about how this fits with and is a complement to the
17 overcharge analysis that is coming down the track. It
18 will all be back to front, it will be an artificial
19 boundary being imposed, and in those circumstances we
20 just do not see it as being the most sensible way of
21 proceeding.

22 THE CHAIRMAN: They will effectively have half a day of
23 cross-examination of Professor Neven at the outset in
24 order to put their questions on plausibility and
25 possibly independence.

1 MR BEARD: Yes.

2 THE CHAIRMAN: But that does not rule out either us in the
3 concurrent session dealing with it, or you and Mr Ward
4 coming back to it in your cross-examination at the end
5 of overcharge.

6 MR BEARD: If it is going to be broken up in that way we
7 fear that we might need more than a day in relation to
8 plausibility. It may be more than half a day each.

9 THE CHAIRMAN: Yes.

10 MR BEARD: If that is the way the Tribunal wishes to
11 proceed, of course we will make it work.

12 THE CHAIRMAN: Yes.

13 MR BEARD: The question is not whether or not any of this is
14 workable, we will do our best with whatever the Tribunal
15 decides. Is it the sensible way --

16 THE CHAIRMAN: You say in Professor Neven's thesis they are
17 not really separated, it is all part of the same thing,
18 or it frames the discussion about the regression
19 analysis. Whereas on their analysis it is a sort of
20 separate topic, and in a sense if you are right on it,
21 then that is game over, is it not?

22 MR BEARD: Well, I do not want to be hubristic about where
23 the games end here, but there is undoubtedly a question
24 whether, if the analysis in relation to plausibility
25 does not stack up for Mr Harvey, then he has

1 a significant problem with his regression analysis to
2 start with before we even get there.

3 THE CHAIRMAN: Right.

4 MR BEARD: That is undoubtedly true. What we are saying is
5 that when you come to critique that regression analysis,
6 so when you are doing the overcharge bit here, what you
7 want to be also thinking about are issues to do with
8 theory of harm and plausibility. It is that way that it
9 works and that is why it is sensible to think about
10 overcharge, ask yourself: what is this regression doing?
11 Because of course a regression is only talking about
12 correlation; it is not talking about causation. There
13 is authority on that, but it is obviously 101 for
14 economists in relation to these issues.

15 Therefore, in those circumstances, it is important
16 to think about what is actually being achieved by the
17 regression analysis and what the theory of harm story is
18 doing is trying to situate that and that is why we say
19 you consider them together, because if you have concerns
20 about particular aspects of the regression analysis
21 reference to how a theory of harm might work will assist
22 you in relation to that.

23 So it is not a question of could you ask questions
24 about plausibility for a day. I mean, obviously, giving
25 lawyers a day to ask questions, they will fill the time,

1 there is no doubt about that. The question is: is it
2 the most informative way for this to be dealt with? We
3 say not. We say think about it as what is going on in
4 the overcharge analysis, the regression, and how do you
5 best inform that and set questions in relation to it.

6 We anticipate that Mr Ridyard, and indeed other
7 members of the Tribunal, may well want to ask questions
8 that go to theory of harm and regression and deal with
9 it all together, in which case it is much more sensible
10 to have the same people in a single concurrent evidence
11 session and deal with these matters that way.

12 That also applies in relation, obviously, to the
13 value of commerce issues. I do not think there is any
14 dispute about that.

15 It is also true that it applies in relation to the
16 complements issues, because in relation to the
17 complements issues, of course what is being said by
18 Mr Ward is: well, we have got different models that are
19 being used. But it is at the point where you are
20 talking about economists using different models that
21 concurrent evidence is potentially the most valuable,
22 because you get the immediate and direct critique from
23 economists as to whether or not a particular model is or
24 is not the way forward from an economic point of view.

25 Therefore it is for that reason that we say dealing

1 with all of those matters in the round is obviously the
2 sensible way forward.

3 So that covers, we would say, all of the aspects
4 that relate to overcharge. Mr Harvey put forward
5 a single joint report in relation to these issues, and
6 Professor Neven broke it out into different reports but,
7 in essence, we are dealing with the same broad issue
8 here in relation to the extent of overcharge, and this
9 methodology will enable the experts most effectively to
10 explore the topics to benefit the Tribunal.

11 It is very easy to think of the problems that arise
12 if you have serial cross-examination in relation to
13 these issues. One of the problems you will encounter is
14 a risk of repetition between the plausibility
15 cross-examination if it is hived off at the beginning,
16 and then the overcharge concurrency -- concurrent
17 evidence provision because, as you say sir, well, we
18 could ask some questions later in relation to the same
19 matters. Yes, absolutely, you could. But that, at that
20 point, seems like a funny way of organising matters, to
21 anticipate that you are going to be duplicating
22 questions in those circumstances.

23 THE CHAIRMAN: It is slightly awkward, whichever way we go,
24 is it not, because it is Mr Bezant who is dealing with
25 supply pass-on, but that is also Mr Harvey. So

1 Mr Harvey will be cross-examined on that on the days
2 specified, and then Mr Bezant.

3 MR BEARD: Yes.

4 THE CHAIRMAN: But then they both -- is it Professor Neven
5 who deals with loss of volume?

6 MR BEARD: Yes.

7 THE CHAIRMAN: So he will come back in for that, and also
8 used trucks later on.

9 MR BEARD: Yes.

10 THE CHAIRMAN: So we are going to have lots of different
11 sessions with -- yes, this going --

12 MR BEARD: Yes, look, of course that is true. But I think
13 it is sensible to think of these issues in boxes,
14 broadly speaking. You have the overall question of
15 whether or not there is some sort of overcharge here,
16 and whether or not it is caused by the infringement.

17 Now, that question encompasses essentially the
18 theory of harm, overcharge, and relevantly value of
19 commerce issues, because the value of commerce is then
20 looking at over what scale you are applying that
21 overcharge.

22 Complements is linked to that, because that is
23 asking whether or not there is a sort of waterbed effect
24 going on between any putative overcharge on the price of
25 the truck and the price of the complement.

1 Now, we can see that that could be separated out as
2 a separate session, but given the technicalities
3 involved and given it is the same experts, we can also
4 see how that can run through. On the timetable, in
5 fact, we have it as a separate session. But I think
6 that it is now being suggested that that could all be
7 dealt with as concurrent evidence. So it would in fact
8 be the same people dealing with it.

9 Used trucks is effectively a manifestation of the
10 question of pass-on, because what you are asking is: if
11 there was a putative overcharge, was in fact some of it
12 recovered because the price of used trucks was elevated
13 as well? That is a distinct topic which we have marked
14 on the timetable accordingly.

15 Supply pass-on is a different mechanism of pass-on.
16 It is whether or not you changed your prices.

17 THE CHAIRMAN: Yes.

18 MR BEARD: Then, of course, loss of volume hangs on the end
19 of supply pass-on, because it is essentially an answer,
20 putatively, by Royal Mail, saying: well, if there was
21 supply pass-on and we raised our prices, actually we
22 lost volume here.

23 THE CHAIRMAN: Yes.

24 MR BEARD: So, again, it makes sense to think about these
25 things serially. So we do not have any issue with --

1 THE CHAIRMAN: Yet they are being dealt with by different
2 experts.

3 MR BEARD: They are also being -- well, certainly supply
4 pass-on is being dealt with by different people.
5 Therefore we recognise you are going to have, on
6 occasion, some of the same experts coming back in and
7 out of the box. We completely understand that, and that
8 is not unknown in these circumstances.

9 But I think I am just focusing, really, on whether
10 or not you separate out stuff at the start.

11 THE CHAIRMAN: Yes, all right.

12 MR BEARD: We say that is obviously a less sensible approach
13 and will be less efficient.

14 But I should also just pick up on some of these
15 allegations about independence because the allegations
16 about independence which have been raised -- Mr Ward
17 says, "We only saw this footnote recently", but they
18 have been raised extremely recently and have morphed
19 into this new story about how it is he needs to be able
20 to ask questions in relation to cross-examination right
21 at the outset.

22 As I say, case law on whether or not an expert is
23 independent tends to consider issues of independence in
24 the round at the end of the process, unless there is
25 a challenge to exclude the expert, which is not going on

1 here.

2 I would, however, ask the Tribunal to turn up tab 41
3 of the PTR bundle, if you would.

4 I am not going to make any assumption to the extent
5 to which the Tribunal may have enjoyed reading through
6 this bundle, but I would ask that the Tribunal just
7 review this letter, and then I will make just one or two
8 submissions in relation to it.

9 THE CHAIRMAN: Sorry, this is the letter of 14 March?

10 MR BEARD: I am sorry, it is the letter under the tab --

11 THE CHAIRMAN: It is 41.1, is it? {A/41.1/1}.

12 MR BEARD: Yes, it will be in your bundle, I am so sorry,
13 sir. It is the longer of the two.

14 THE CHAIRMAN: Yes.

15 (Pause)

16 MR BEARD: I am not for a moment pretending that Mr Ward,
17 having seen this letter, may not have further questions
18 for Professor Neven. That is obviously his right to ask
19 questions in that regard, but I do want to get this
20 issue in some perspective.

21 The former Chief Economist of the Commission is
22 accused of being somehow parti pris and not independent
23 in relation to these matters. That, on its face, is not
24 a compelling reason, and it has not been made as
25 a compelling reason to somehow change the order in which

1 we are dealing with matters. Mr Ward can ask those
2 questions, of course, during the course of
3 cross-examination. Indeed, those questions that he may
4 wish to ask will sensibly be considered alongside
5 Professor Neven actually talking about what he has done,
6 what he has considered, and how he has considered it,
7 which is all part of the process of him giving evidence.

8 In those circumstances, we are not stopping any
9 challenges, we are not seeking to stop any challenges
10 that Mr Ward may bring, but we are seeking to put in
11 perspective the nature of these points now being raised,
12 and saying that that should not alter the way in which
13 the issues of cross-examination in this case are to be
14 considered.

15 It is striking that in not one of these timetables
16 that have been exchanged, where it has said theory of
17 harm, has Mr Ward suggested that actually it is terribly
18 important that he has a separate category of time to
19 question in relation to independence. To be fair to
20 Mr Ward, he is right not to do so because he knows that
21 he can ask these questions following on from any hot tub
22 session where he can question what has been considered
23 and do so in the context of Professor Neven having
24 talked about the relevant material he has considered and
25 engaged with Mr Harvey in relation to it.

1 THE CHAIRMAN: There is a certain logic, though, in having
2 any challenges to independence dealt with right when
3 that person starts giving evidence.

4 MR BEARD: Well, if the challenge to the evidence were: you
5 should not hear from this expert, of course that must be
6 heard first. But, rightly, Mr Ward is not saying that.
7 He has quite properly said this morning the issue is it
8 goes to weight. Well, when you are talking about
9 whether or not issues of independence go to weight,
10 actually hearing the evidence and then deciding, in
11 circumstances where you hear cross-examination in
12 relation to the evidence that is being given, makes
13 sense.

14 THE CHAIRMAN: Are you saying that the only reason you can
15 see for them wanting cross-examination of theory of harm
16 right at the outset is in order to use that session to
17 ask questions about independence?

18 MR BEARD: Well, I am not saying that is the only reason.
19 But it is notable today that, in circumstances where we
20 have explained where theory of harm fits and that it all
21 makes sense being dealt with together, we today hear
22 that it is actually very important that independence is
23 dealt with at the outset by way of cross-examination and
24 should be in that section, even though it has never been
25 mentioned on a timetable before.

1 THE CHAIRMAN: You would not really mention that sort of
2 point in a timetable. It is not really a separate topic
3 as such.

4 MR BEARD: Well, certainly it was not a separate topic until
5 it turned up this morning.

6 THE CHAIRMAN: Oh, well.

7 MR BEARD: I do not have any issue with that.

8 MR WARD: I am sorry, but it is well flagged up in
9 paragraph 7 of our skeleton argument, and I am happy to
10 confirm that we do want to cross-examine on
11 plausibility. It is not a ruse.

12 MR BEARD: I am sorry, nothing I should have been saying
13 should have suggested that he did not want --

14 THE CHAIRMAN: No, it was probably my fault in the question
15 that I asked, which suggested that.

16 MR BEARD: I am not suggesting Mr Ward wants to do anything
17 other than cross-examine on plausibility; it is clearly
18 something he very much wants to do. The question is the
19 order in which it happens.

20 THE CHAIRMAN: Yes.

21 MR BEARD: The point I am making here is issues in relation
22 to questioning on independence should not change that
23 analysis.

24 THE CHAIRMAN: Yes.

25 MR BEARD: I have given you my submissions on how

1 plausibility should all be part of the same point.

2 I have then said in relation to independence itself,
3 where it is being suggested that we should have
4 a preliminary session cross-examining on independence,
5 I say there is no need for that. That is the point I am
6 making here, no more than that. The reason I directed
7 you to the letter is just to put it in context.

8 THE CHAIRMAN: In terms of a logical order in which to treat
9 events, or issues, you would agree that theory of harm
10 comes first, even though you say it is sort of bound up
11 with overcharge generally.

12 MR BEARD: I am not sure I would necessarily put it first.
13 Whether you put the regression analysis first and the
14 theory of harm second or the theory of harm first and
15 the regression second I think is a semantic distinction
16 for these purposes. We are not thinking of it in those
17 terms. We say they are bound up together.

18 THE CHAIRMAN: Yes.

19 MR BEARD: That is why we say they are to be dealt with most
20 sensibly together, but also with value of commerce, and
21 then it naturally flows into complements, albeit we have
22 delineated separate timing for complements in relation
23 to those issues.

24 So I think in relation to the complements analysis,
25 I have dealt with the principal reasons why it is

1 obviously sensible to have concurrent evidence. I think
2 it is wrong, just to correct Mr Ward, to say that what
3 Professor Neven is doing is simply some kind of abstract
4 analysis. He does carry out a simulation model but what
5 he does is he calibrates that model against existing
6 data, that is a very different issue. That,
7 I recognise, is drifting into the technicality of these
8 matters, but I just wanted to correct in relation to
9 what Professor Neven has actually done here.

10 That does not detract from the central proposition
11 which is it is obviously more central in relation to
12 these technical economic issues to have the two experts
13 in dialogue in circumstances where, as Mr Ward rightly
14 recognises, this is squarely within the expertise also
15 of Mr Ridyard, and therefore there is a natural sense in
16 having the Tribunal have a first go, as it were, in
17 relation to these questions. So that, I think, deals
18 with complements.

19 Then we get into financing and tax. Well, to some
20 extent, even if -- we have made the points in our
21 supplementary submissions, but I think there are
22 a number of issues here. One is, we say that these
23 issues to do with what the appropriate interest rates
24 are engage some legal points; second of all, they are
25 not matters of a competition nature or an economic

1 competition nature in the same way that the overcharge,
2 theory of harm, value of commerce and complements issues
3 are, or, indeed, issues in relation to supply pass-on
4 and loss of volume.

5 We think the Tribunal is obviously well equipped to
6 deal with these questions of interest which obviously
7 arise in a range of cases, not just in relation to
8 competition matters. We are obviously drawing on case
9 law that is broader than that in doing these things and,
10 in those circumstances, we see orthodox
11 cross-examination as being the most sensible way
12 forward.

13 THE CHAIRMAN: Yes.

14 MR BEARD: But if the Tribunal says: no, we really would
15 like to lead out and enjoy a session asking questions
16 about weighted average cost of capital and its role in
17 corporate governance, then obviously we are very happy
18 to engage with that process.

19 The same is true with bells on in relation to tax.
20 If the Tribunal has an appetite to lead out on the
21 technical issues in relation to tax, again, we will go
22 along with that. It is fine with us. We do, however,
23 think that it is unnecessary, and actually would be more
24 efficient to be dealt with by cross-examination, and
25 actually, as Mr Ward did say -- and on this I concur

1 with him -- it does feel like there is actually an awful
2 lot of agreement on the tax issues and the modelling of
3 the tax issues, and therefore the scope for
4 cross-examination may be relatively limited.

5 In those circumstances, if that is going to be the
6 case, it would be a particular cruelty for the Tribunal
7 to visit upon itself the preparation of questioning in
8 relation to tax issues if, in fact, they are going to
9 dissipate as matters of dispute. But obviously I do not
10 want to deter you beyond those considerations.

11 THE CHAIRMAN: Well, I do sit in the other Tribunal on tax
12 appeals, but I do not think that qualifies me for
13 asking detailed questions about this.

14 MR BEARD: I do not want to question, sir, either your
15 qualifications on this or even your appetite in relation
16 to these matters.

17 But in any event, we leave it. This is not us
18 resisting, we just think it is easier to deal with by
19 way or orthodox cross-examination.

20 Just in relation to leasing, it is true that we
21 think the leasing issue is going to go away. Just to
22 explain, when the claim was initially brought the
23 suggestion by Royal Mail was that it had only leased 50
24 trucks and it calculated its asserted damages on that
25 basis. In fact it turns out that thousands of

1 Royal Mail trucks were, in fact, leased, and in those
2 circumstances there has been a recalculation. But there
3 is a recognition on Royal Mail's part that, actually,
4 thousands of trucks were leased. That obviously changes
5 the way in which you assess any putative overcharge and
6 interest, because of course the payments are not made
7 upfront in relation to leasing. It also affects any
8 interest claims in relation to it.

9 I only mention that because I am hoping that may
10 well go away and it is not something we have put in
11 terms of the Tribunal's timetable.

12 THE CHAIRMAN: That comes in under the heading of financing,
13 does it?

14 MR BEARD: I think at the moment it does not come in
15 formally under the heading of anything, and I think it
16 may be undue optimism on the part of both parties that
17 it does not.

18 THE CHAIRMAN: Which experts are dealing with it; is it
19 Mr Delamer on your side?

20 MR BEARD: Yes, Mr Delamer.

21 THE CHAIRMAN: I am not sure who is dealing with it on the
22 other side though.

23 MR BEARD: I think it may be Mr Harvey. It is Mr Harvey on
24 that side.

25 THE CHAIRMAN: Okay.

1 MR BEARD: I think -- obviously if it turns out that there
2 are some issues in relation to leasing we will have to
3 squeeze in some time to deal with it. But I think both
4 of our timetables have not included separate time,
5 perhaps with delusional degrees of optimism about that
6 issue.

7 THE CHAIRMAN: All right.

8 MR BEARD: Unless I can assist further in relation to those
9 matters.

10 THE CHAIRMAN: Thank you, Mr Beard.

11 MR BEARD: As I say, we dealt with them in relation to the
12 supplementary skeleton, but I think that is now~...

13 THE CHAIRMAN: I have now read that.

14 I should have said at the beginning, we should take
15 a break for the transcribers, but I wonder whether -- do
16 you want to say anything in reply, Mr Ward, on this?

17 Submissions in reply by MR WARD

18 MR WARD: I was just going to make a couple of brief points
19 if I could on plausibility issues.

20 THE CHAIRMAN: All right, why not do that and then we will
21 take a break.

22 MR WARD: Mr Beard is very keen to emphasis that they are
23 highly interwoven. In reality Professor Neven served
24 two separate reports and we do not think that the
25 overcharge report even refers to the plausibility

1 analysis.

2 What we are contemplating in any event is
3 consecutive days when these will be treated. Of course
4 there might be a little bit of read across or bleed
5 over, if you like, but they are treated as separate
6 issues rightly.

7 As regards the question of independence, we are well
8 aware of the letter that you have been asked to read.
9 We do not think it answers our questions satisfactorily.
10 We do want to ask questions and we do think it is right
11 that you hear Professor Neven's evidence in light of
12 that cross-examination, even if you reach views at the
13 end of the hearing as to what weight to attach to it.
14 So that is all I was going to say.

15 THE CHAIRMAN: So you say Professor Neven has put in
16 separate reports on plausibility and on overcharge?

17 MR WARD: Yes. Yes.

18 THE CHAIRMAN: Right. So you would confine your
19 cross-examination at the outset to that first report?

20 MR WARD: Yes. I cannot promise that I will not also want
21 to allude to some points in the overcharge report.

22 I think it very likely I will, actually, thinking on my
23 feet. But there is clearly a difference between the
24 issues that are joined there and the issue of
25 plausibility. But, yes, I can say with confidence

1 I will be likely to be dipping into it, but not to
2 cross-examine the overcharge issues which will be, quite
3 literally, for another day.

4 THE CHAIRMAN: All right.

5 MR BEARD: Sorry, I just ought to correct something: the
6 overcharge reports from Professor Neven do refer to the
7 plausibility. That is why they are linked together.

8 MR WARD: I am grateful for the clarification.

9 THE CHAIRMAN: Well, they cross-refer.

10 MR BEARD: Yes, they cross-refer to one another and, as
11 I say, Mr Harvey puts them all together.

12 THE CHAIRMAN: Yes. Okay. What we will do is we will go
13 and have a little discussion and work out what we think
14 is the best thing to do.

15 We will take 15 minutes, then, and we will come back
16 at 12.05.

17 (11.49 am)

18 (A short break)

19 (12.07 pm)

20 Ruling (pending approval)

21 (12.14 pm)

22 Discussion on timetable

23 MR BEARD: Yes, I am most grateful to the Tribunal. As
24 I indicated, obviously we can make anything workable
25 within broad reason.

1 THE CHAIRMAN: Yes.

2 MR BEARD: I think if we are doing plausibility first,
3 though, we will need more than half a day in relation to
4 that, so we need to factor that into the Tribunal's
5 timetabling.

6 THE CHAIRMAN: Right.

7 MR BEARD: I think I mentioned that in the course of
8 submissions, that it would be our position in relation
9 to it.

10 I think the plan is it depends on how much fact
11 witness evidence time we are going to have as to when
12 that will be.

13 THE CHAIRMAN: All right. Shall we start at the beginning,
14 then.

15 MR BEARD: Yes.

16 THE CHAIRMAN: Then deal with the factual witnesses.

17 MR BEARD: Is it sensible to start with opening?

18 THE CHAIRMAN: Yes, okay.

19 MR BEARD: So our latest timetable, just for your notes, is
20 in the bundle at {A/52/1}.

21 THE CHAIRMAN: Yes.

22 MR BEARD: Now, given the indications of the Tribunal as to
23 opening, there has been a curtailment in the time for
24 opening of a day each.

25 THE CHAIRMAN: Yes.

1 MR BEARD: I think there is not an issue about that, we will
2 go along with that.

3 Then we reach the question about fact witnesses.

4 I think in the current version of our timetable we have
5 got three and a half days each.

6 THE CHAIRMAN: Each?

7 MR BEARD: Yes, there are not actually that many fact
8 witnesses to deal with. There obviously, in all of this
9 timetable, there must be the possibility of slippage,
10 even if we -- even if not.

11 THE CHAIRMAN: Yes.

12 MR BEARD: But we thought that that was a sensible way of
13 dealing with matters.

14 If Mr Ward says: no, no, no, we think we are going
15 to need four days, which was the previous calculation,
16 then we would end up running into 17 May and only
17 starting on the plausibility issues on the 18th.

18 THE CHAIRMAN: I think both are the same on that. I think
19 the difference comes with whether we sit on Friday,
20 6 May.

21 MR BEARD: Yes, I think that is right.

22 THE CHAIRMAN: Just comparing the two.

23 MR BEARD: We are content for it not to sit there, but we
24 put forward that --

25 THE CHAIRMAN: You think you can do it in three and a half

1 days, or at least you can try to cross-examine --

2 MR BEARD: We can try to cross-examine the witnesses.

3 Obviously at this stage we have done our best to do
4 a thorough triage. I think we are down to six
5 witnesses, we think, of the 19 that we need to
6 cross-examine.

7 THE CHAIRMAN: Okay.

8 MR BEARD: I think we had initially said four days given the
9 indication of the Tribunal that there was a desire to
10 take out the week of 30 May, we just tried to trim
11 everything, essentially.

12 THE CHAIRMAN: Thank you.

13 MR BEARD: But we obviously have to recognise that there may
14 be some slippage there.

15 THE CHAIRMAN: Yes.

16 MR BEARD: It was for that reason that the Friday sitting
17 was included, but if the Tribunal wishes --

18 THE CHAIRMAN: It was originally included, I think, because
19 of a particular witness, Mr Jeavons.

20 MR BEARD: That is right. But obviously if we are going to
21 hear witnesses on the Thursday he can come in on
22 Thursday, we do not need to sit on the Friday.

23 THE CHAIRMAN: Yes.

24 MR BEARD: So we are flexible there.

25 THE CHAIRMAN: That was originally going to be the openings,

1 was it?

2 MR BEARD: Yes, we planned for two days of openings each but
3 in the light of the Tribunal's indications we have
4 trimmed back. So that then solves the availability
5 issue for Mr Jeavons.

6 THE CHAIRMAN: Yes.

7 MR BEARD: If we are going to move, then, the Friday -- we
8 are not going to sit on the Friday, we are going to then
9 move things along, I think if Mr Ward thinks we are
10 going to have -- he is going to need four days with our
11 witnesses, then --

12 MR WARD: I was just going to say, I am quite happy with
13 three and a half actually.

14 THE CHAIRMAN: That is helpful. Thank you. So we can stick
15 with your timetable, then --

16 MR BEARD: I think so, for the moment.

17 THE CHAIRMAN: -- of not sitting on that Friday.

18 MR WARD: The issue with the Friday, sir, is just
19 Mr Jeavons, who is the Chief Financial Officer of
20 Royal Mail. All of this falls around the time of his
21 end of financial year.

22 THE CHAIRMAN: Yes, understood.

23 MR WARD: I gather if he is absolutely pushed, Thursday
24 would be possible, it is just a very, very difficult
25 time for him, so if his evidence could be heard on

1 Friday, that would be immensely appreciated.

2 THE CHAIRMAN: Right. I thought it was the following week

3 that he was in difficulties.

4 MR BEARD: Yes, I thought so too.

5 MR WARD: We have a sitting there on -- what is that, the

6 6th. That is the day that Mr Jeavons is available.

7 MR BEARD: So he is not available on the Thursday?

8 THE CHAIRMAN: He is not available on the 5th?

9 MR WARD: As I have explained, if really pushed, he could.

10 But it is a very strong preference for the 6th, is what

11 I am being told.

12 THE CHAIRMAN: All right. But will he be the only witness

13 on Friday? Right, so we would have a full day, then, on

14 the Friday?

15 MR BEARD: Well, I am content, if it suits the Tribunal,

16 then having Mr Jeavons the morning of the Friday and

17 finishing at lunchtime --

18 THE CHAIRMAN: Yes.

19 MR BEARD: -- on the basis of the triage that we have done

20 I think that that would be a safe assumption.

21 THE CHAIRMAN: I think so far as possible we should try and

22 keep Fridays free. If Mr Jeavons cannot give evidence

23 on the Thursday, then we will take him on the morning of

24 Friday and, as you say, finish at lunchtime and then

25 carry on on the Monday.

1 MR BEARD: That is understood. In which case, we are going
2 to move all of the witness process forward half a day
3 and it will finish halfway through Tuesday.

4 THE CHAIRMAN: Okay.

5 MR BEARD: We would then move on to plausibility and
6 overcharge. Or, more exactly, plausibility, with
7 Mr Harvey coming in on the afternoon of the Tuesday.

8 THE CHAIRMAN: Yes.

9 MR BEARD: As I say, we will need, probably, given that we
10 are separating this out, more than half a day with
11 Mr Harvey in relation to plausibility, and therefore we
12 will go into the Wednesday.

13 THE CHAIRMAN: Okay.

14 MR BEARD: Given that we have been focusing on concurrent
15 evidence, we have not finalised how long we would need
16 for Mr Harvey if we are just dealing with plausibility
17 alone. I do not know if we will need a whole day. We
18 may not do. But I do not want to essentially give
19 a false impression at this stage.

20 If that were the case, I do not know whether --
21 Mr Ward had previously indicated, I think, he wanted
22 half a day with Professor Neven, which would bring us to
23 the end of Wednesday, and that would work, I think.

24 THE CHAIRMAN: So the Thursday is not available that week
25 because Mr Harvey is not available; is that right?

1 MR WARD: Yes.

2 MR BEARD: It is only Mr Harvey. I had misunderstood that.

3 I thought there were others that could not make that

4 Thursday. If it is only Mr Harvey.

5 THE CHAIRMAN: If it is cross-examination, you will have

6 finished with Mr Harvey by Wednesday.

7 MR BEARD: Yes.

8 THE CHAIRMAN: To a certain extent -- I mean, obviously you

9 would prefer to have him there, but it is not essential,

10 is it? Or is it?

11 MR BEARD: I am totally agnostic as to whether or not the

12 opposition's witness is there.

13 THE CHAIRMAN: No, quite. You will have finished with him.

14 MR WARD: Obviously I would rather he was there.

15 THE CHAIRMAN: You would rather he was there, yes.

16 MR WARD: Of course.

17 THE CHAIRMAN: All right. How long do you think you will

18 need to cross-examine Professor Neven on plausibility?

19 MR WARD: Well, I have said half a day, and that seems like

20 a reasonable aspiration.

21 THE CHAIRMAN: All right. So if you start with Harvey on

22 the Tuesday, and you say you will finish by lunchtime on

23 the Wednesday.

24 MR WARD: Yes.

25 THE CHAIRMAN: Then we should be finished with plausibility

1 by the end of that day.

2 MR WARD: I suppose it is rather at my own risk if I ask you
3 to sit the next morning and I will not have the benefit
4 of Mr Harvey.

5 THE CHAIRMAN: Yes. All right.

6 MR WARD: I will take that risk.

7 THE CHAIRMAN: Okay. But as we have discussed, obviously
8 you will have plenty more opportunities to be
9 cross-examining the witnesses.

10 MR BEARD: Yes. So I think that that is going to be the
11 main change in relation to this timetable, because then
12 we have got two days on overcharge. We have put it
13 overcharge and theory of harm -- no doubt there will be
14 some theory of harm -- and value of commerce. That is
15 for both concurrent evidence and follow-on
16 cross-examination.

17 At this stage plainly there may need to be some
18 flexibility if the Tribunal thinks that it will want
19 more than a day in relation to these issues, then we
20 might need to accommodate more time in relation to those
21 two days. But I do not want to presume at this stage
22 one way or another.

23 THE CHAIRMAN: It is difficult for us to judge.

24 MR BEARD: No, sorry, this was not a question for the
25 Tribunal.

1 What I am conscious of is not trying to be too rigid
2 about these issues when the Tribunal will want to think
3 about what questions it has have and how long they might
4 take.

5 THE CHAIRMAN: Yes.

6 MR WARD: We had envisaged two days for concurrent evidence
7 and then a day for cross-examination on overcharge of
8 volume of commerce. Of course it is impressionistic.
9 I have to be frank, of course it is.

10 THE CHAIRMAN: We have usefully got that Monday as well not
11 sitting for us to prepare for that.

12 MR BEARD: Yes.

13 THE CHAIRMAN: I guess if we do not need that much time,
14 then you will go straight into cross-examination and,
15 I do not know, maybe we will even get through
16 complements by the Thursday.

17 MR BEARD: Yes, I think it may be one of those situations
18 where, if Mr Ward is suggesting that the Tribunal might
19 need two days for the concurrent evidence, and then
20 there will be a need for a day of cross-examination, we
21 might need to build in a little bit of flexibility
22 because I think complements, I think it is probably rash
23 to try and get it done in a day because, as Mr Ward has
24 indicated, he has some cross-examination issues as well
25 as any concurrent evidence.

1 THE CHAIRMAN: Yes.

2 MR BEARD: Used trucks, similarly. Then I think the only
3 other candidates that might warrant potentially
4 reduction might be loss of volume. But, again, because
5 loss of volume would be concurrent and then
6 cross-examination, I think putting in for less than
7 a day in total is dangerous. So I think there is a risk
8 that we end up having to think about Tuesday, 14 June
9 also --

10 MR WARD: Yes.

11 MR BEARD: -- being covered by expert evidence.

12 MR WARD: If I may in order to try to be collaborative, I do
13 agree with that, and I think with complements and used
14 trucks we had earlier suggested a timetable which would
15 be a day and a half for each and we compressed to a day
16 after the Tribunal's indication it would not be sitting
17 in the week of 30 May.

18 But I very much agree with Mr Beard, that is quite
19 ambitious. It may be the Tribunal will end up feeling
20 there are very few issues that really matter.

21 MR BEARD: Perhaps the sensible thing to do would be to
22 build in another day for the overcharge value of
23 commerce on the Thursday, move complements to the
24 Friday, because I think we are sitting that Friday, and
25 then move used trucks to the beginning of the week of

1 6 June, then we move to supply pass-on, loss of volume,
2 and financing, perhaps slightly unfortunately, will be
3 crossing a weekend. But I think that may be the only
4 weekend that there is a problem.

5 MR WARD: I am told there are real problems with this
6 because of Mr Earwaker's availability, who is in
7 Australia, working.

8 THE CHAIRMAN: Is he coming over or he is giving evidence
9 remotely?

10 MR WARD: Forgive me for just a moment. (Pause).

11 I am told he will be here to give evidence in
12 person. He is based in Singapore and he will be in
13 Australia working on the dates which are set out in the
14 schedule that we have provided.

15 MR BEARD: Would the sensible thing -- it is not totally
16 orthodox and it is with a degree of reluctance because
17 the logic does not follow, but if there is a real
18 problem with Mr Earwaker's availability, is the sensible
19 thing actually to switch loss of volume and financing?

20 I know that is not the logical course but given that
21 what we have got here is the logical course and it
22 cannot be precisely followed, it might be the next best
23 alternative.

24 MR WARD: Yes, we can see the force of that.

25 THE CHAIRMAN: So financing comes up immediately after

1 supply pass-on?

2 MR BEARD: Yes, in practice it does not move because
3 everything else is shifting right. Essentially loss of
4 volume gets bumped to Monday, 13 June, and tax is the
5 denouement of the evidence on 14 June.

6 I mean, it is suboptimal, but just dealing with
7 availabilities, I am not sure that anyone is going to
8 be... We will remember how loss of volume works,
9 I think, from the preceding evidence.

10 THE CHAIRMAN: Right. Okay. Well, that seems to fit, does
11 it not?

12 MR BEARD: Yes, then the remainder is the pleasure for all
13 concerned of preparing written closings following the
14 evidence and giving the Tribunal enough time to read
15 those written closings, and then starting closing.

16 We have indicated that we think we will need two and
17 a half days in closing because we think there are legal,
18 evidential and economic issues that are going to need to
19 be dealt with.

20 THE CHAIRMAN: Sure.

21 MR BEARD: We are obviously content for it to be an equal
22 split, two and a half days each, and that is what we
23 have timetabled here, and we have left in half a day's
24 spillover just in case there are any issues that come up
25 along the way, but in the hope that we finish by

1 lunchtime on the Thursday.

2 THE CHAIRMAN: You will finish lunchtime and then there is
3 the reply; is that right?

4 MR BEARD: No, no, sorry. We finish the close of Wednesday.

5 THE CHAIRMAN: Okay.

6 MR BEARD: Then there is a reply.

7 I know it looks slightly odd starting after lunch on
8 the Wednesday and leaving spillover, but experience
9 tells that it is better to do things that way and leave
10 a half-day spillover than be right back up against
11 a Friday where we are not sitting and it could create
12 all sorts of difficulties for people.

13 MR WARD: The only point we have on this is that on
14 Mr Beard's version the time is divided 50/50 in the
15 sense that we get a closing and a reply, but that comes
16 out of our 50, whereas we would submit we ought to be
17 allowed a brief reply on top of that time; in other
18 words that we would both get the same time for our
19 closing and then we get a brief reply. It may be a bit
20 sterile where we have half a day of spillover anyway.

21 THE CHAIRMAN: Well, it is normally the case that you both
22 get an equal amount of time overall, and~...

23 MR BEARD: It is really up to Mr Ward to decide how he wants
24 to split his 50, it is not for us.

25 MR WARD: I am not going to die in a ditch over that.

1 THE CHAIRMAN: We will, of course, have read all the written
2 closings thoroughly before then.

3 MR WARD: So actually what Mr Beard is envisaging is quite
4 a lengthy period of oral closing, in fact.

5 THE CHAIRMAN: Yes.

6 Well, I am grateful to you for managing to fit it in
7 despite losing those days on the week of the 30th. But
8 I think it does work.

9 MR BEARD: I think so.

10 THE CHAIRMAN: If someone can produce a new version.

11 MR BEARD: Yes, we will produce a new version with the
12 relevant colour coding, because it is quite helpful to
13 have that. We will sort that out and have an agreed
14 timetable.

15 THE CHAIRMAN: Excellent.

16 MR WARD: May I just make one point that relates to
17 Mr Beard's submissions. He has said just now that they
18 are only proposing to cross-examine six witnesses. We
19 have not been told which. By implication it must be
20 Mr Jeavons, as we were talking about him, but I would
21 respectfully say it is time now for them to tell us
22 which ones we need to make available.

23 THE CHAIRMAN: Yes, that would certainly be helpful.

24 Are you able to tell us which of the witnesses you
25 want to cross-examine?

1 MR BEARD: Yes, I will. I will try and do it within the
2 next week or so. We completely understand. We have
3 tried to narrow it down from the 19, and we also
4 understand that people want to know times and dates, and
5 now we have got the timetable set we can indicate that
6 and people can clear their diaries accordingly.

7 THE CHAIRMAN: Is there an issue the other way or are you
8 cross-examining all of DAF's witnesses?

9 MR WARD: We are, there are only four and we have questions
10 for all of them.

11 MR BEARD: Whilst we are on it, I do not know that it
12 matters, but one of our witnesses, I have discussed it
13 with Mr Ward, we have asked that he be able to provide
14 evidence by video link.

15 THE CHAIRMAN: Yes, I have seen that.

16 MR BEARD: I can go into the background reasons. I have
17 explained it to Mr Ward, but unless there is any
18 objection.

19 THE CHAIRMAN: No, that is fine.

20 MR BEARD: I am most grateful.

21 THE CHAIRMAN: So that is the timetable.

22 Just in relation to skeletons, I mean we have
23 obviously ruled about length of skeletons.

24 MR BEARD: Yes.

25 THE CHAIRMAN: But are we right in thinking that the

1 claimants' skeletons are being filed this week?

2 MR WARD: Yes.

3 THE CHAIRMAN: Yes.

4 MR WARD: Due to be filed on Friday.

5 THE CHAIRMAN: Right.

6 MR WARD: Still on track.

7 THE CHAIRMAN: Okay. So that referred to written openings
8 or something; that is the skeleton?

9 MR WARD: Whichever -- however we chose to provide it, with
10 the 80 pages, "skeleton" seems a bit ambitious.

11 THE CHAIRMAN: Great, so you are on track for that?

12 MR WARD: Yes.

13 THE CHAIRMAN: Excellent, and then you are~...

14 MR BEARD: We are on track. That is the plan, so those are
15 the skeletons.

16 THE CHAIRMAN: Yes.

17 All right.

18 MR BEARD: I do not know whether there is anything on the
19 modalities of the carrying out of the hot tub, but those
20 issues we can come back to. We have set out in our
21 skeleton argument the sensible course in relation to
22 this.

23 I think the only issue that, in practice, arises for
24 those that have not been involved in multi-topic
25 concurrent evidence is that the previous practice has

1 been that witnesses who are in the box but then are
2 going to come out of the box and then either do
3 concurrent evidence or evidence under cross-examination
4 later are released from their oath and are out of
5 purdah, essentially. Because otherwise you get
6 a slightly arbitrary situation where certain experts get
7 trapped in purdah for potentially quite long periods of
8 time when you actually want to be able to talk to them
9 about something.

10 THE CHAIRMAN: Yes. Of course.

11 MR BEARD: So that is the only issue.

12 MR WARD: I think, from the way that Mr Beard has just put
13 it, that that is common ground.

14 What we would be unhappy with is the idea that an
15 expert can be giving evidence concurrently on, let us
16 say overcharge, and then be released from purdah before
17 the cross-examination on overcharge. I do not think
18 that is what you are asking for, is it?

19 MR BEARD: No, we are content with -- normally what happens
20 is you can be released from purdah after the concurrent
21 evidence because you end up with a situation where
22 otherwise what happens is that the first witness that is
23 cross-examined is kept in purdah, and the second witness
24 is also kept in purdah, but then the first witness, when
25 they are released after their evidence, is able then to

1 comment and assist --

2 THE CHAIRMAN: Help the cross-examination of the other.

3 MR BEARD: Then it is somewhat unfair, and it just depends
4 on the -- that is the reason why. So if Mr Ward is
5 saying everyone must be in purdah for the whole period,
6 then that is one thing. If what he is saying is when
7 Mr Harvey is being cross-examined, Professor Neven, for
8 example, must stay in purdah, but when Mr Harvey comes
9 out, when his cross-examination has finished, he can be
10 helping us with our cross-examination of
11 Professor Neven. We say that would not be fair, that
12 would just be an arbitrary outcome of the process. At
13 that point we would say that Professor Neven has to be
14 released from purdah, because otherwise it is not
15 an equality of approach.

16 THE CHAIRMAN: I suppose we get it the other way round at
17 the beginning, if we are doing plausibility first, where
18 they are being cross-examined. So then one will be
19 sworn in and then will be released when they finish.

20 MR BEARD: Yes.

21 THE CHAIRMAN: So then able to help in the
22 cross-examination.

23 MR BEARD: So in a normal cross-examination there is no
24 problem because you have always got the person out of
25 purdah who can help.

1 THE CHAIRMAN: Yes, I follow.

2 MR BEARD: It is when you have concurrent evidence and then
3 flowing cross-examination, the coincidence -- the
4 arbitrariness -- it is not completely arbitrary because
5 obviously it will be the claimants mostly, who get the
6 benefit of their witness staying in purdah up until the
7 end of their cross-examination, but if what Mr Ward is
8 saying~...

9 THE CHAIRMAN: I follow that.

10 MR BEARD: That is just not fair.

11 THE CHAIRMAN: So either they remain in purdah --

12 MR BEARD: Throughout --

13 THE CHAIRMAN: -- so that no one can use their experts, or
14 they both get released.

15 MR BEARD: That is how we see it. It needs to be one or the
16 other, otherwise it is just not fair.

17 MR WARD: There is obvious logic in that. Our preference is
18 it is done issue by issue, so Harvey/Neven are in purdah
19 for the purpose of overcharge, but not in purdah for the
20 purpose of used trucks. But we are quite content with
21 the proposition there should be equality of treatment,
22 but our preference is they do stay in purdah while the
23 issues are still live.

24 THE CHAIRMAN: So that will mean that Mr Harvey, after his
25 cross-examination on overcharge, will not be released --

1 MR WARD: That is right.

2 THE CHAIRMAN: -- from purdah until the end of the
3 cross-examination on that aspect.

4 MR WARD: Yes.

5 MR BEARD: I have to say that does not seem the logical
6 course to me. It seems to me that you release both
7 experts, as we have said, after the concurrent, and then
8 you essentially treat cross-examination like you would
9 treat ordinary cross-examination, and that is the
10 natural way to do it. My recollection is that is the
11 way we have always done it previously, but I cannot
12 actually remember precisely. I do not remember ever
13 having this debate.

14 THE CHAIRMAN: The trouble is going in and out of the hot
15 tub, drying off and~...

16 MR BEARD: It is the towelling down is obviously an issue,
17 but it is not just that, it is because what you have is
18 multiple experts dealing with multiple topics and you
19 break it up. So it is just that normally when we are
20 talking about cross-examination across multiple topics
21 people just come in and out of purdah and no one thinks
22 about it.

23 THE CHAIRMAN: I think we do not need to decide at this
24 stage, actually, do we? I do not think we need to
25 decide at this stage; I think you can both think about

1 it a little bit more and we can deal with it when it
2 arises.

3 But I think you are all agreed that there has to be
4 equality. So whichever way you go~...

5 MR BEARD: That is helpful from Mr Ward, I just think his
6 approach is not necessarily the most logical.

7 THE CHAIRMAN: Maybe you will persuade him otherwise between
8 now and the trial.

9 MR BEARD: I will have a discussion with him later. That is
10 a tempting offer sir, thank you.

11 MR WARD: We will gladly talk about it.

12 MR BEARD: Unless Mr Ward had any other issues on the
13 modality of hot tub~...

14 MR WARD: I do.

15 MR BEARD: You do?

16 THE CHAIRMAN: You are going to provide us with some useful
17 points, points that we should cover?

18 MR BEARD: Yes, I think that is what we suggested, that
19 there should be a process whereby --

20 THE CHAIRMAN: I think that would be helpful.

21 MR BEARD: -- each side can contribute suggestions,
22 effectively, and that seems to us -- that has been what
23 has been done previously, and there is an attempt to
24 agree what the topic should be. That exercise,
25 experience tells us, is not necessarily fruitful, and

1 that an awful lot of time can be spent trying to agree
2 these things. So we are happy enough if there are
3 essentially just lists which are exchanged. We are
4 happy to build in a process whereby we exchange lists
5 early and see whether we can reach agreement.

6 THE CHAIRMAN: Yes, I do not really want to waste a lot of
7 time doing that.

8 MR BEARD: But we do not want, if you do not mind, not to be
9 insisting on an agreement.

10 MR WARD: I welcome that. The Tribunal will know that the
11 agree/disagree statements required extensions of time
12 and produced very lengthy and rather convoluted
13 documents. I anticipate that is not what would not be
14 of assistance, but what would be useful would be to hear
15 from you, sir, from the Tribunal, what you would like to
16 see. I do think, as you say, trying to get something
17 agreed -- I mean, who knows, agreement may break out but
18 it could become exhausting and a distraction. So if you
19 could give an indication as to what would actually be
20 useful, then we will do our best to comply.

21 MR BEARD: Adding to that, it does not have to be today
22 either.

23 THE CHAIRMAN: I think, certainly in my experience, a lot of
24 time can be wasted trying to agree a list of issues or
25 points to be raised, which does not really help anyone

1 in the long run.

2 So I think the suggestion of you preparing your own
3 ones and exchanging them early on, see if there is any
4 measure of agreement, but then on the points that there
5 is not agreement then we just get both sides and we make
6 of it what we will.

7 MR BEARD: We are entirely content with that.

8 Also I do not want to suggest to the contrary, in
9 the end this is a matter for the Tribunal and we may
10 well not cover everything the Tribunal wants to cover
11 and in the end it is within the Tribunal's gift. So we
12 will do that.

13 I will discuss with Mr Ward and those behind us can
14 liaise on timings of these things. I anticipate that
15 you are going to want those sorts of lists a week before
16 the start of the hearing, which is the reading week that
17 has been allocated.

18 THE CHAIRMAN: I think certainly in relation to the topics
19 that we are going to be first discussing, first dealing
20 with; namely overcharge, really, and complements.

21 MR BEARD: Yes.

22 THE CHAIRMAN: So everything before the break on 30 May,
23 I think would be helpful to have a week or so before the
24 hearing. Then the rest can probably come in at a later
25 stage.

1 MR BEARD: Fine. That is very helpful, thank you. We will
2 liaise on logistics between us and produce something
3 that we hope will be useful.

4 I do not have anything else on the logistics for
5 concurrent evidence.

6 THE CHAIRMAN: No. Was there anything else you wanted to
7 raise on that? No. Great.

8 So we have the disclosure issue and we have
9 potentially confidentiality; is that right?

10 MR BEARD: Yes, I do not know whether it is sensible to
11 start with disclosure now. Confidentiality can probably
12 be dealt with relatively quickly before the short
13 adjournment.

14 THE CHAIRMAN: Shall we deal with that first then?

15 Discussion on confidentiality

16 MR BEARD: Yes. I think the issue is no one is making any
17 applications in relation to how to deal with issues in
18 relation to confidentiality. I think there is
19 an exercise going on, we have described it in our
20 skeleton, as to how confidentiality needs to be dealt
21 with.

22 I think the concern we have is that there is a lot
23 of material that has quite extensive confidentiality
24 markings attached to it.

25 There is a process of de-designation going on,

1 albeit, the extent of de-designation by Royal Mail to
2 date has been extremely limited. I think no redactions
3 on documents -- in relation to documents over which
4 Royal Mail claims confidential statements have actually
5 been provided; in other words, they have not moved away
6 from a blanket claim on confidentiality for documents,
7 and I think that needs to happen.

8 I think Royal Mail now recognises that they need to
9 carry out that sort of review further, but assuming that
10 Royal Mail are going to be seeking to de-designate as
11 much as possible, there is one residual issue that
12 arises which was considered in particular in the recent
13 *BGL* litigation and there is a short judgment at
14 authorities bundle-tab 12. I will not take you to it
15 unless you want to go to it.

16 But the problem is this: you can end up with
17 a situation where a witness is having confidential
18 material put to them or wants to refer to confidential
19 information in response to a question that is put to
20 them. If the questions are being asked in open court,
21 that puts the witness in real difficulty.

22 THE CHAIRMAN: Yes.

23 MR BEARD: The Tribunal in *BGL* was very concerned about that
24 and sent out a very clear message in that judgment to
25 which I have referred, saying: please, the solution is

1 to de-designate as much as is humanly possible, because
2 that minimises the extent to which witnesses are having
3 to navigate round confidential information, and it also
4 minimises the extent to which the Tribunal has to go
5 into closed proceedings to hear answers from the
6 witnesses.

7 Now, at this stage, if Royal Mail is going to go
8 through a substantial de-designation process so that
9 this risk is minimised, there is probably nothing more
10 to be said about it at this stage. But we did want to
11 highlight it because we are trying to reduce the number
12 of documents that this claimed confidentiality in
13 relation to, or minimise the redactions for
14 confidentiality that are made, and we think that that is
15 an important process that needs to be followed.

16 THE CHAIRMAN: You have de-designated quite a lot, have you
17 not?

18 MR BEARD: I think we have. We have de-designated a very
19 substantial number. Yes, so just to give you some
20 numbers that Ms Mackersie has very kindly provided. We
21 have reviewed 570 underlying documents and we have
22 de-designated 370 of those as non-confidential entirely;
23 another 72 underlying documents have been partially
24 redacted, so what we have done is we have tried to sift
25 out the minimum that is confidential; and that leaves

1 only 126 documents confidential.

2 Royal Mail has reviewed 445 documents. It has
3 de-designated 312, so it has de-designated a large
4 number. It has said 133 documents remain fully
5 confidential, but what was striking about this was that
6 none of those -- there are no documents which are only
7 partially redacted, so Royal Mail appears to be carrying
8 out a binary process of either it is all in or all out.

9 Now, credit to them for all out, but we are a little
10 surprised that there is nothing that is partial, and
11 really it is a plea not an application that Royal Mail
12 review documents they are claiming confidentiality in to
13 make sure --

14 THE CHAIRMAN: So that is of the 133 documents, you are
15 saying they might be able to partially redact some of
16 those?

17 MR BEARD: We are hoping. Yes, I think that is the issue.
18 I will cover BT very briefly. BT has apparently
19 reviewed 240. 112 have been designated
20 non-confidential. Only five have been partially
21 redacted, but clearly the BT review has involved partial
22 redaction. That leaves 123 fully confidential, which
23 feels like quite a high percentage, but if that is the
24 claim, that is the claim. There is only so much we can
25 do about it, so that is why we are not in the territory

1 of making applications at this stage.

2 THE CHAIRMAN: Will these documents possibly be referred to
3 in relation to the factual witnesses or the expert
4 witnesses, or is it a mix?

5 MR BEARD: That I do not know the answer to. I think we
6 have to assume that they may well be referred to with
7 the expert witnesses but I think they are also relevant
8 to factual witnesses, so I cannot answer that question
9 in a helpful way, sir, I am sorry.

10 THE CHAIRMAN: All right. Will there be advance notice
11 ahead of any particular witness going into the box as to
12 whether confidential documents are proposed to be put to
13 them?

14 MR BEARD: Well, we have got a process that the claimants
15 have now agreed to. I think as we have set out in our
16 skeleton we have considered with the claimants a process
17 for confidentiality whereby, if a party wishes to
18 include in the trial bundle a document designated as
19 confidential by another party, they will give 48 hours'
20 notice in advance of the document needing to be
21 uploaded. So that will give an opportunity for
22 a confidentiality review.

23 But I do not think that that process actually
24 enables an indication as to whether or not there is
25 confidential documents that will be definitely put to

1 a particular witness. So I think that process has not
2 been --

3 THE CHAIRMAN: It is just in terms of practicalities,
4 really, in terms of when we will know whether we have
5 got to go into private at some stage, and the witness
6 will be -- if that witness wants to refer to other
7 potentially confidential documents we can all be
8 prepared for that.

9 MR BEARD: I think the difficulty is, and it may be that
10 there are better solutions to this, but given the
11 niceties of cross-examination, there tends to be
12 a reluctance to specify precisely which documents might
13 be referred to.

14 THE CHAIRMAN: Yes.

15 MR BEARD: There is also the question that sometimes
16 documents which contain confidential material can be put
17 to the witness because the witness is privy to that
18 material, but then has the difficulty in answering
19 openly, and it is very difficult to predict that issue
20 and therefore what tends to happen is that there is
21 a degree of playing it by ear as to what the
22 cross-examiner is going to be referring to, and that the
23 cross-examiner then gives an indication to the Tribunal
24 that the next chunk of cross-examination is going to
25 involve confidential material and now may be a good time

1 to go into closed; and that if the cross-examiner is
2 going to be putting some confidential material in the
3 course of otherwise open material, a warning is given,
4 at least.

5 Then there is a general warning to the witness that
6 if they wish to refer to anything that they are
7 concerned about being confidential, they should
8 highlight that. We have transcripts, the matter can be
9 returned to in closed session.

10 It is not clear that there is actually a much better
11 way of dealing with it, but that is why we are pressing
12 for the maximum amount of de-designation, because
13 practically that may be all we can do at this stage.

14 I do not know if Mr Ward has a better and magic
15 solution. We are certainly willing to listen, but I am
16 not sure we have anything particularly that~...

17 MR WARD: We do not. It is a reality we are all familiar
18 with in this jurisdiction where there is often
19 confidential material, and as Mr Beard says, the best
20 thing we can do is try to be clear. We very much
21 welcome the declassification that has been going on.
22 There is still, as you will actually see this afternoon,
23 some pretty stale cartel documents which are designated
24 as confidential, and the more of that that comes off,
25 the better.

1 But may I just raise a very closely related issue
2 which is going to arise, which is where witnesses need
3 to be shown material that is in fact confidential. So
4 we obviously have an extract from the Commission file
5 which deals with the cartel. There are documents in
6 there that emanate from DAF. All of the file has come
7 to us from DAF, I should say. We have not had any
8 third-party disclosure. But that file is comprised of
9 documents from DAF but also the other cartelist
10 manufacturers. So it is quite possible to envisage that
11 I will be wanting to put to DAF witnesses documents,
12 just hypothetically, that may have emanated from
13 Daimler, an email from Daimler, say, and it may be that
14 Daimler continue to regard that as confidential.

15 I have no other way to put that part of my case
16 other than to DAF's witnesses, and what we respectfully
17 suggest is, of course if I am putting a Daimler
18 confidential document to a DAF witness, it will have to
19 go into closed session, but that we would just invite
20 the Tribunal to approve the course whereby the witness,
21 Mr Smith, can nevertheless see this document even though
22 Mr Smith is not, of course, in the confidentiality ring.
23 It is another problem we cannot actually see any other
24 solution to.

25 MR BEARD: Sorry, I think we need to be a bit cautious here.

1 Some of the confidentiality claims, and it may well be
2 the documents that Mr Ward is referring to, are
3 documents that have come to DAF from the European
4 Commission on the investigation file. I mean, there are
5 more than 32,000 documents that have come to DAF and
6 I think almost all of them, or all the relevant ones,
7 have been provided to Royal Mail and BT.

8 Now, the difficulty there is that there are third
9 party confidentiality claims and they are just not
10 within our gift to do anything about. We cannot waive
11 confidentiality claims that have been approved by the
12 Commission in relation to third parties.

13 Now, if --

14 THE CHAIRMAN: They have been disclosed within the
15 confidentiality ring that has been established?

16 MR BEARD: Yes, exactly, so the difficulty we have --

17 THE CHAIRMAN: But that is established for the benefit of
18 Daimler, or the other third parties, in a way?

19 MR BEARD: Sorry, the confidentiality ring in this case --

20 THE CHAIRMAN: Yes.

21 MR BEARD: -- is only for the benefit of these parties.

22 THE CHAIRMAN: Yes, but it is partly so that you can all see
23 and use documents in which a third party has rights of
24 confidence.

25 MR BEARD: Yes, that is right, that is what has been

1 established here. But we cannot -- it is not a process
2 that we can go through and de-designate other people's
3 confidential information, effectively. So we do not
4 have the power to effectively solve this problem. If
5 Mr Ward has particular concerns about particular
6 documents that emanate from third parties, I suppose
7 Mr Ward can contact the third party, but I am not sure
8 that there is anything that --

9 THE CHAIRMAN: But we do not have the power either to
10 override that third party confidentiality.

11 MR BEARD: No, I do not think you do. I do not like to
12 suggest to tribunals they do not have powers.

13 THE CHAIRMAN: Well, we possibly do but~...

14 MR BEARD: Whether or not you have the power, the idea that
15 you could exercise it without the third party whose
16 confidentiality is being protected being consulted would
17 feel somewhat strange, I might suggest, and therefore
18 I am not sure that the Tribunal's powers, even if they
19 are sufficiently extensive, can solve that.

20 THE CHAIRMAN: So how do they, which they must be entitled
21 to, put documents to witnesses which are not within the
22 confidentiality ring.

23 MR WARD: Well, that is the problem, and of course the
24 document can be shown to the witness in closed session.
25 The witness need not be given a copy to take home, and

1 of course it is trite that the interests of justice will
2 override confidentiality in an appropriate case.

3 Otherwise, if I just use a totally stylised example,
4 as I am in no danger of spilling the beans because I do
5 not have an example at my fingertips. If there is
6 an email from Daimler, for example, saying, "Great news,
7 guys, the guy from DAF rang me to give me all the prices
8 for next year", I might want to put that to a DAF
9 witness, and the fact that Daimler assert
10 confidentiality over it, I am just hamstrung otherwise.
11 Otherwise I will be told I have not put my case.

12 So in my respectful submission, the appropriate
13 course is for the Tribunal to allow a very carefully
14 controlled incursion and, if necessary, the DAF
15 witnesses could be asked to give some sort of suitable
16 undertaking.

17 THE CHAIRMAN: Well, effectively the witness is going to be
18 brought into the confidentiality ring.

19 MR WARD: But only implicitly. At the moment they are not
20 in the ring.

21 THE CHAIRMAN: No, that is what I mean. We would have to
22 make an order that they be allowed into the ring, if we
23 can do that. (Pause).

24 Okay, I understand it may have been done in another
25 case.

1 MR BEARD: I think there have been situations where, very
2 rarely, commercial people are brought into
3 confidentiality rings, but it is extremely rare that
4 that is done. I mean, there is lots of case law about
5 when you can let someone into the ring and, in general
6 terms, commercially interested people are not allowed
7 into the ring and witnesses are the paradigm example,
8 often, of people that are not allowed into
9 confidentiality rings.

10 But I think the practical issue is that the course
11 that Mr Ward is proposing does not afford those whose
12 confidentiality is being protected any insight or
13 comment on this. I think there is an extent to which we
14 may well be relatively agnostic about these issues
15 because it is not our confidence that is at issue here,
16 but that is not a proper course for this Tribunal to
17 take if it is other people's confidence that is
18 essentially being undermined.

19 THE CHAIRMAN: As Mr Ward says, that has to give way to the
20 administration of justice; if it is -- you know, these
21 are documents that I assume you have disclosed --

22 MR BEARD: Oh yes.

23 THE CHAIRMAN: -- in these proceedings.

24 MR BEARD: In the confidentiality ring, exactly.

25 THE CHAIRMAN: Within the confidentiality ring.

1 MR BEARD: This has not been raised previously in relation
2 to these issues.

3 MR WARD: It is actually in our skeleton.

4 MR BEARD: Yes, but prior to this hearing it has not been
5 raised as an issue, and I am --

6 MR WARD: It has.

7 MR BEARD: Oh, it has, I am sorry.

8 THE CHAIRMAN: In any event you are talking about quite old
9 documents, I assume.

10 MR WARD: They are Jurassic.

11 THE CHAIRMAN: They were underpinning the Commission's
12 decision.

13 MR WARD: Which they have all admitted to.

14 THE CHAIRMAN: Exactly. So it is difficult to see that they
15 would have a particularly strong claim to confidence
16 now, anyway, the third parties.

17 MR WARD: It is hard to see how they have any, frankly. But
18 in any event, the other manufacturers are aware that
19 there is a confidentiality ring in these proceedings and
20 if I remember they were even consulted when it was set
21 up, although that was back in 2016 or something, so
22 I may be wrong. They cannot have a greater expectation
23 of confidentiality other than people might be added to
24 the ring. So if the witnesses are given even less
25 access than that, as they could easily be added to the

1 ring, it is quite difficult to see what legitimate
2 interests there might be for the other cartelists to
3 create any objection here.

4 MR BEARD: That may well be the case, but let us bear in
5 mind in 2019 there was a very extensive exercise
6 undertaken where the other OEMs commented on whether or
7 not they were claiming confidentiality in relation to
8 any of the documents on the file that would end up being
9 disclosed in these proceedings. What Mr Ward is
10 suggesting is essentially: well, it was jolly
11 interesting you carried out that exercise, but without
12 you commenting or having the ability to comment we are
13 going to put these documents to witnesses.

14 Now, to be clear, we are not here suggesting for
15 a moment that the interests of justice cannot, in the
16 end, override issues of confidentiality, but I think the
17 concern we have is that this proposal does not afford
18 the other OEMs, who have been through this extensive
19 process and de-designated vast amounts of the material,
20 the opportunity to say: no, we do not agree, it may look
21 like it is old but we care about it.

22 Now, we completely understand the Tribunal's
23 starting point, which is: well, it feels like this
24 should not be confidential, but it is just not for us to
25 say in relation to these circumstances.

1 MR WARD: It sounds like Mr Beard might have misunderstood
2 what we were saying. The document would remain
3 confidential, it would not be read out in open court.
4 It would be confidential against the world. There is
5 a confidentiality ring which, I will be corrected if
6 I am wrong, but I am pretty sure they were consulted on
7 the drafting of, as well as anything else, and in effect
8 there would be additional access under the ring given to
9 the witnesses. Even if it is even more constrained.

10 THE CHAIRMAN: Yes, subject to various undertakings about
11 not using the information disclosed, et cetera.

12 MR WARD: Exactly. Which could be adapted from the existing
13 rules which are in the ring.

14 THE CHAIRMAN: I am sure there must be a way to deal with
15 this, and it sounds like that might be the most
16 sensible.

17 MR BEARD: I do know, and Ms Mackersie has just been
18 emphasising to me, that actually in order for someone to
19 join the confidentiality ring in these proceedings it
20 has to be notified to the other OEMs because of these
21 sorts of issues.

22 THE CHAIRMAN: Right.

23 MR BEARD: So if what Mr Ward is saying is that he wants our
24 witnesses to be treated as part of the confidentiality
25 ring for these purposes --

1 THE CHAIRMAN: Some notice should be given.

2 MR BEARD: -- then he is going to need to make sure that
3 notice is given so that the OEMs have the opportunity to
4 comment on that, at least in outline terms, before the
5 hearing. That may well be the overall solution to this,
6 and if they then pipe up and say: we are not happy for
7 certain reasons, then it can be dealt with by that
8 means. But I do not think that can be circumvented,
9 because given the process that has been gone through, at
10 the last minute then to cut them out -- I understand
11 Mr Ward's point about resistance against the world, but
12 we have got commercial people turning up as witnesses
13 here and therefore I have no idea whether the other OEMs
14 have any concerns.

15 THE CHAIRMAN: The expert witnesses are within the
16 confidentiality ring, are they?

17 MR BEARD: Yes, the expert witnesses are.

18 THE CHAIRMAN: So that is fine.

19 MR BEARD: Because they are independent, that is fine, yes.

20 THE CHAIRMAN: So it is only the four, it is your four
21 witnesses.

22 MR BEARD: I think that is probably right.

23 THE CHAIRMAN: It is not going to be the other side's
24 witnesses, this is not an issue that is going to affect
25 them, third party confidentiality.

1 MR WARD: Mr Beard is going to cross-examine them on the
2 cartel --

3 THE CHAIRMAN: They have got their own confidential
4 documents.

5 MR BEARD: There may be other documents, but I don't think
6 any confidential --

7 THE CHAIRMAN: So this is particularly concerning documents
8 where third parties have rights?

9 MR BEARD: It is only that, as far as I understand it.

10 THE CHAIRMAN: It is only that, so I would have thought
11 notice should be given to those third parties as soon as
12 possible that witnesses, the four witnesses may be -- we
13 might want to take them to these documents and therefore
14 for them to be admitted to the confidentiality ring.

15 MR BEARD: I think in the first instance Mr Ward needs to
16 work out whether it is all of our witnesses and whether,
17 in those circumstances, he is going to tell us that he
18 wants them in the confidentiality ring for these
19 purposes so that the process that exists in the
20 confidentiality ring can be executed. If that is the
21 case, we are happy to go away -- well, in the first
22 instance it may actually be Royal Mail that has to do
23 this, but we are happy to follow that sort of process.
24 We are not trying to stop Mr Ward putting documents. We
25 are just concerned that there was an extensive set of

1 arrangements put in place that cannot just be
2 side-stepped.

3 MR WARD: If it comes to adding the witnesses to the
4 confidentiality ring, of course it can be done. It is
5 actually DAF's employees that we are talking about here,
6 and their witnesses. It sounds more sensible if they
7 write to the other manufacturers but no one is going to
8 stand on objection as to exactly who writes the letter.

9 But something less than them joining the
10 confidentiality ring would probably suffice in any
11 event. No one is suggesting they need to roam widely
12 over all of the vast material here, and frankly it is
13 not particularly attractive to my clients because, of
14 course, the ring contains all of their disclosure.

15 THE CHAIRMAN: I do not know whether those witnesses might
16 want to have some time before giving their evidence
17 looking at some of these documents, and they could only,
18 presumably, do so if they were then subject to the
19 confidentiality ring.

20 So it may be in both of your interests to be giving
21 notice now to the manufacturers to ensure that
22 everything is in place for when they come to give
23 evidence.

24 MR WARD: Although, just to be clear, to pick up on
25 something Mr Beard said, I very much concur with him

1 that we should not be asked to identify specific
2 documents in advance which give the witness a reading
3 list. It is just obviously unreasonable. I cannot
4 remember quite how he put it, but it is really
5 antithetical to the way that cross-examination proceeds.

6 But it may be that we need to try and discuss this
7 further with DAF, but --

8 THE CHAIRMAN: I think you should discuss it with DAF, but
9 also I think you should get on with giving whatever
10 notice you need to give to the third-party manufacturers
11 so that we do not have any delays when they come to give
12 evidence.

13 MR BEARD: I am entirely content with that process. That is
14 fine.

15 THE CHAIRMAN: All right. Okay.

16 So is that it on confidentiality, then? Yes. All
17 right. So we will just proceed with disclosure at 2.05.

18 (1.05 pm)

19 (The short adjournment)

20 (2.04 pm)

21 THE CHAIRMAN: Yes, Mr Ward.

22 Application by MR WARD

23 MR WARD: I propose to make our application for disclosure
24 of DAF's SPRINT configurator. You will have seen that
25 this is something which is available to DAF essentially

1 off-the-shelf, having been already disclosed to Ryder in
2 parallel proceedings concerning the trucks cartel. The
3 main objection to it here seems to be delay, but that
4 itself is the result of five months of stonewalling by
5 DAF.

6 You should have a hard copy of the confidential
7 version of the skeleton with the confidential parts
8 highlighted in yellow because, as was explained last
9 night, there were unfortunately some mistakes there, and
10 I will want to show you that confidential version.

11 This application also involves some other
12 confidential matters, but I think I can navigate around
13 them safely enough without suggesting that things need
14 to be dealt with in closed session.

15 The starting point is the order that is being sought
16 which you can find in the bundle A. I would like to
17 show you the confidential version, which is at
18 {A/IC2.1/1}. I do not need to read out anything
19 confidential but I would like you to at least look at
20 it, please.

21 You see what is asked for is effectively the same
22 disclosure as was provided to Ryder --

23 THE CHAIRMAN: One minute, where are we looking?

24 MR WARD: Sorry, sir, it is bundle A, the main PTR bundle,
25 and it is {A/IC2.1/1} is the draft order.

1 THE CHAIRMAN: Yes.

2 MR WARD: On the second page, where it actually provides the
3 operative part of the proposed order, it is asking for
4 the same disclosure as given in the Ryder order, and
5 this is behind -- annexed to it, and it orders various
6 categories of disclosure, Mr Malek.

7 Then the relevant part is on page 5, and you will
8 see that -- just for the sake of -- I am just seeing
9 what is coming up on the screen now, hopefully not~...

10 What I am about to show you is confidential, but
11 I do not need to show you any of the confidential parts.

12 You will see that some of it is highlighted in
13 yellow, which we can ignore. But we had a discussion
14 with DAF who thought this whole order was confidential,
15 and I admit we could not understand why. But what is
16 now agreed is the part CONF2 configurator is not
17 confidential, and that is what we are seeking, which is
18 the SPRINT software and some underlying data sets for
19 the period 2006-2015.

20 Now, the basis for the application is that the
21 configurator is directly relevant to one of the key
22 issues in the case that is, in fact, ventilated in the
23 pleadings, partly by reference to the configurator.

24 The central issue, of course, is whether the
25 infringement caused prices to be paid by the claimants

1 to be higher and, as the Tribunal has already heard this
2 morning, there is a question about whether it is even
3 plausible that that was the case, so we will be
4 submitting at trial that understanding the nature of the
5 collusion is of obvious importance to that, and DAF has
6 put the role of the configurator very much in issue in
7 its defence in regard to the nature of the collusion.

8 What I would like to do now is show you some
9 entirely non-confidential parts of the decision which
10 can easily be seen in bundle B/1 on page 54. {B/1/54}.

11 Mr Justice Roth has remarked once or twice in the
12 history of this case that there were too many copies of
13 the decision floating around and I think I have found
14 four so far in the electronic bundle but they are all
15 the same for this purpose.

16 So this is the first page of the decision and
17 I would like to go to page 64. Sorry, sir, you are
18 hunting~...

19 THE CHAIRMAN: Yes, I have got it up on screen.

20 MR WARD: It is annexed to the particulars of claim if you
21 are working off a hard copy.

22 THE CHAIRMAN: I will just look at the screen, that is fine
23 {B/1/64}.

24 MR WARD: Page 64 has a section under the heading,
25 "Description of the conduct":

1 "Further transparency between the addressees."

2 If I may I will just take you through the next few
3 paragraphs:

4 "All of the addressees exchanged gross price lists
5 and information on gross prices and most of them~...
6 engaged in exchanging computer-based truck
7 configurators."

8 That is what we are after.

9 "All of these elements constituted commercially
10 sensitive information. Over time, truck configurators,
11 containing the detailed gross prices for all models and
12 options, replaced the traditional gross price lists.
13 This facilitated the calculation of the gross price for
14 each possible truck configuration. The exchange was
15 operated both on a multilateral and on a bilateral
16 level.

17 "In most cases, gross price information for truck
18 components was not publicly available and information
19 that was publicly available was not as detailed and
20 accurate as the information exchanged between, amongst
21 others, the addressees. By exchanging current gross
22 prices and gross price lists, combined with other
23 information gathered through market intelligence, the
24 addressees were better able to calculate their
25 competitors' approximate current net prices -- depending

1 on the quality of the market intelligence at their
2 disposal."

3 Then at 48 it says:

4 "Similarly, the exchange of configurators helped the
5 comparison of own offers with those of competitors,
6 which further increased the transparency of the market.
7 In particular, it could be understood from the truck
8 configurators which extras would be compatible with
9 which trucks, and which options would be part of the
10 standard equipment or an extra. All of the addressees,
11 with the exception of DAF, had access to the
12 configurator of at least one other addressee. Some
13 configurators only granted access to technical
14 information, such as bodybuilder portals, and did not
15 include any price information."

16 Now, you have seen there the exception for DAF, and
17 there is a matter here which is being treated as
18 confidential for today, even though I think this was
19 referred to in open court when we were engaged in the
20 dispute over the binding recitals. So I would like to
21 take you to my skeleton argument, where we can see how
22 it is dealt with at paragraph 22 on page 7 of the
23 confidential version of the skeleton argument.

24 I am just going to be careful and avoid reading out
25 anything here but invite you to read paragraph 22, and

1 then footnote 23 to that paragraph in particular,
2 please. (Pause).

3 THE CHAIRMAN: Right.

4 MR WARD: You see those footnotes refer to DAF's *Ryder* RFI
5 response which they did provide us with and which is in
6 this bundle under tab 16, but we do not need to look at
7 it because we see this.

8 One of the points we make in our skeleton is that as
9 a result of matters that are explained there, access to
10 DAF's configurator is the only way for the Tribunal in
11 these proceedings to get a sense of what these
12 computer-based tools were actually like and what kind of
13 assistance they would have provided the cartelists.

14 Now, keeping the skeleton to hand, just to avoid
15 going through confidential material, you will see at
16 paragraphs 18 and 19 in some material that is
17 confidential, we have explained what the pleadings
18 actually say about this.

19 THE CHAIRMAN: Yes.

20 MR WARD: So you will see at paragraph 19 there is the issue
21 of putting in the value of the configurators to the
22 parties to the cartel, and it -- do you have that, sir?

23 THE CHAIRMAN: Yes, well I am just a bit confused because
24 the pleading is, what, two or three years old?

25 MR WARD: Yes, and more.

1 THE CHAIRMAN: Right. So these configurators were clearly
2 of quite a lot of importance to the case?

3 MR WARD: Yes.

4 THE CHAIRMAN: Yet it has taken until now for you to want it
5 disclosed.

6 MR WARD: Sir, what we say to that is we did ask for these
7 back in October. Could we have asked sooner? Yes.

8 THE CHAIRMAN: October 2021 was just at the time that
9 experts' reports were being finalised.

10 MR WARD: Yes.

11 THE CHAIRMAN: We can see its importance, but it is just
12 rather confusing as to why it is taken until a month
13 before trial for an application actually to be made for
14 it.

15 MR WARD: The application is made today because it was asked
16 for in October and has been refused, and there is quite
17 a lot of correspondence in the bundle between now
18 and October on this, but I cannot offer a reason why it
19 was not applied for sooner than that.

20 THE CHAIRMAN: But the fact that this particular one was
21 provided to other manufacturers, which I think is
22 challenged, but assume that it did happen, why does that
23 actually help you in terms of the assessment of DAF's
24 liability for loss in these proceedings?

25 MR WARD: Insofar as it is of assistance to the Tribunal to

1 see one of these configurators actually close up and
2 understand what role it could actually play in the
3 cartel, and obviously what we are interested in is DAF's
4 prices --

5 THE CHAIRMAN: It is just an example. It is not the actual
6 thing itself.

7 MR WARD: Well, it is not what DAF had access to, and you
8 have seen in footnote --

9 THE CHAIRMAN: Well, it is DAF's machine.

10 MR BEARD: DAF definitely had access to the software.

11 THE CHAIRMAN: Yes, exactly.

12 MR WARD: I am so sorry, foot in mouth. But it is not the
13 configurator DAF received.

14 THE CHAIRMAN: No.

15 MR WARD: You can see why we have not asked for that.

16 THE CHAIRMAN: Right.

17 MR WARD: So this is the configurator that DAF, we say,
18 contributed to the cartel.

19 THE CHAIRMAN: So it is just an example of the sort of
20 software that was available to the manufacturers and
21 which apparently was shared, although query how much DAF
22 participated in that sharing?

23 MR WARD: Yes, although of course the other thing that is
24 important to bear in mind here is that it is part of our
25 case that one of the relevant considerations is the way

1 the other manufacturers were behaving in accordance with
2 the cartel; in other words, that DAF was itself selling
3 into a wholly cartellised market. So understanding what
4 was available to those old manufacturers is also
5 relevant.

6 THE CHAIRMAN: But how is this -- if it is disclosed, who is
7 going to deal with it, for a start, at the trial? Are
8 there witnesses that will -- factual witnesses that will
9 have to speak as to how this was used and who had access
10 to it and whatever?

11 MR WARD: DAF have not called anybody with detailed
12 knowledge of the configurators.

13 THE CHAIRMAN: No.

14 MR WARD: One of their witnesses refers to them briefly and
15 says something like, "I very rarely had anything to do
16 with configurators".

17 So, again there is no -- in fact, DAF have not put
18 forward positive evidence at all about what
19 configurators they might have received or any of those
20 issues. It has just not been addressed.

21 THE CHAIRMAN: So how will you deploy -- you do not have to
22 tell me exactly -- but you would anticipate putting it
23 to the experts?

24 MR WARD: Potentially.

25 THE CHAIRMAN: The experts have not had an opportunity on

1 both sides, I think, to even look at it or consider it?

2 MR WARD: It is still nine weeks from trial.

3 THE CHAIRMAN: Is it?

4 MR WARD: Sorry, not nine weeks from trial, nine weeks until
5 the experts are giving their evidence. Six weeks until
6 trial. So in our submission -- of course we do not know
7 until we see it.

8 THE CHAIRMAN: Will they have to produce new reports?

9 MR WARD: I do not anticipate that.

10 THE CHAIRMAN: I do not know whether this is an easy thing
11 to disclose or not. I presume there is quite a lot of
12 information --

13 MR WARD: It is obviously available off-the-shelf. In that
14 sense it is easy because it is already been disclosed in
15 the *Ryder* proceedings. So there is no proportionality
16 question about making the disclosure, and of course we
17 will not know exactly how to deploy it and what may
18 arise from it unless we see it.

19 THE CHAIRMAN: But applying so late in the day, we need to
20 have some sense as to what sort of burden it is going to
21 place on parties, witnesses who have to deal with it.

22 MR WARD: Only DAF are in a position to explain that, and in
23 fact have not brought forward any kind of
24 proportionality considerations of that kind, other than
25 merely pointing to the timing of the application.

1 THE CHAIRMAN: You do not want it because it is probative of
2 anything particular to your case; it is as an example of
3 what was available on the market. I think that is what
4 you said.

5 MR WARD: Well, it is of potential relevance to the question
6 of whether the market was, as we say, transparent or
7 non-transparent as the defendants' expert is saying,
8 which is one of the issues in plausibility.

9 So Professor Neven has specifically raised the
10 question of whether the market was sufficiently
11 transparent to foster collusion. So that is where it
12 goes.

13 THE CHAIRMAN: You have the decision, as you have just shown
14 us.

15 MR WARD: Yes, we do.

16 THE CHAIRMAN: Which says that, does it not?

17 MR WARD: Yes, it does, and you may say it is surprising it
18 is even in issue as a result, but it is in issue. So we
19 would like the Tribunal to see what these configurators
20 involve and the only available source of that is the DAF
21 one.

22 THE CHAIRMAN: Okay.

23 MR WARD: Sir, what I want to do also is just try and
24 develop the submission as to why we say it does appear
25 to be the case that this configurator was, in fact,

1 shared. You have seen in the skeleton that we rely on
2 three documents for this proposition, and two of them
3 are non-confidential and one is confidential, and what
4 I would like to do is take you through those documents
5 and I will, of course, go through the confidential one
6 by mere pointing.

7 The first one is in bundle {A/3.3/1}. Yes, this is
8 a non-confidential document, as I understand it. This
9 is a translation, but this one is not in dispute, the
10 translation. Do you have that, sir? It is on the
11 screen as well.

12 THE CHAIRMAN: Yes.

13 MR WARD: This is a presentation, "Preismonitoring", and
14 this is a MAN document. It says:

15 "Price monitoring Agenda."

16 Item 1:

17 "Pricing process up until 2007."

18 Then:

19 "Price monitoring."

20 Then 2.3 is:

21 "ACON/competitors' price lists."

22 ACON is a MAN electronic database or possibly
23 configurator, and we can see that on the next page.

24 THE CHAIRMAN: That is the one, ACON, that can draw in
25 prices from all the other configurators; is that right?

1 MR WARD: That is exactly what we are going to see.

2 THE CHAIRMAN: Okay.

3 MR WARD: It says under 2.1 {A/3.3/2}:

4 "ACON Praise Configurator."

5 Which I assume means price:

6 "Vehicle and price configurator for all competitors;

7 data management, analysis~..."

8 Et cetera:

9 "Status: Active for Germany; internationalisation in

10 preparation."

11 Then 2.3:

12 "Target definition of the ACON.

13 "Comparison of several vehicles from the same or

14 different manufacturers. The selection of vehicles can

15 be largely automated in this regard."

16 Then:

17 "Post configuration of submitted dealer offers for

18 defining discount rates."

19 Then all sorts of comparisons.

20 Then the next set of bullet points also numbered 21

21 2.3:

22 "Data acquisition and maintenance.

23 "Oracle-based database for ACON.

24 "Configuration tools can be directly implemented in

25 the ACON."

1 Then the second bullet point there is:

2 "DAF SPRINT."

3 So that is the first document, and DAF says there is
4 no evidence that this actually happened, that they ever
5 got hold of the DAF document.

6 But now I want to show you a document that is
7 confidential, and I am not going to read out, and it is
8 under tab {A/OC3.2/1}, outer confidentiality ring, and
9 I just want to show you what this is about without
10 reading anything. You can see it is a DAF document, and
11 you can see in the middle of the page on the front
12 page --

13 THE CHAIRMAN: Sorry, have we got this in our file?

14 MR WARD: Yes, in bundle A, under OC3.2.

15 THE CHAIRMAN: I have got it. Sorry. Thank you.

16 MR WARD: You can see -- this looks like a slide deck --
17 what the title of this meeting is on the first page.

18 THE CHAIRMAN: Yes.

19 MR WARD: Then we see the author of this and his job title
20 at the bottom of this page.

21 Then if we flip through, there is an agenda of
22 topics, and then just noting on page 4 certain types of
23 information there.

24 THE CHAIRMAN: Yes.

25 MR WARD: Then moving on to page 10, there are several pages

1 here which are explaining something, if I can put it
2 that way.

3 MR BEARD: It is not problematic to refer to this specific:

4 "Special topic, configuration tools."

5 Just to help Mr Ward.

6 MR WARD: Thank you, that is most helpful. So what you see

7 there is just a setting out of essentially explaining

8 how the SPRINT configurator works. That is how that

9 appears.

10 I will just go back to -- you can see here who the

11 audience for this was from the front page, that is the

12 key point.

13 THE CHAIRMAN: Yes.

14 MR WARD: If Mr Beard does not mind, I will read out what

15 the title of the slide deck is. But he is entitled to

16 say if he does not want me to --

17 MR BEARD: No, that is fine.

18 MR WARD: It says:

19 "Competitor's meeting 2008."

20 THE CHAIRMAN: Is the apostrophe in the right place?

21 MR BEARD: A matter for submissions in due course,

22 obviously.

23 MR WARD: We make submissions about this in paragraph 25(b)

24 of our skeleton argument which I do not want to read out

25 but I would just invite you to look at. (Pause).

1 You will see this follows on in time fairly shortly
2 from the previous document we looked at.

3 THE CHAIRMAN: Okay.

4 MR WARD: Then the third one, which is non-confidential, is
5 under 3.1, which is another MAN document with the title:

6 "Market price research, MAN and competitors."

7 It says at 2.1 on the second page:

8 "The database is used for the automated storage and
9 processing of the gross list prices of MAN and its
10 competitors. It enables complete vehicles to be
11 configured and calculated for all manufacturers."

12 Then at 2.6 under, "Output", it says:

13 "Net retail prices for all vehicles included,
14 complete configurations, gross net prices for equipment,
15 price developments of the manufacturers, offer
16 simulation for competitors."

17 There is some debate with DAF about the exact
18 translation of this, but in our submission none of it
19 goes anywhere. What we say is that this raises at the
20 very least a prima facie case that, as pleaded, the
21 configurator was indeed shared, at least with MAN.

22 THE CHAIRMAN: This page is just talking about ACON, is it
23 not?

24 MR WARD: Yes, it is. Yes, indeed. But you can see the
25 input put into it is the complete configuration of all

1 manufacturers.

2 THE CHAIRMAN: So this shows that MAN might have had SPRINT?

3 MR WARD: Yes, that is the point.

4 THE CHAIRMAN: So what?

5 MR WARD: Simply we are meeting the point that is made by
6 DAF, DAF has raised the point in correspondence that the
7 SPRINT wasn't shared.

8 In the pleaded case it is just a non-admission, but
9 that has strengthened up through the correspondence.

10 THE CHAIRMAN: But having disclosure of SPRINT does not help
11 in answering that question, does it?

12 MR WARD: No, this is a matter -- in terms of when it was
13 disclosed will obviously be an issue at trial.

14 THE CHAIRMAN: Yes.

15 MR WARD: But for the purposes of today at the very least
16 what I need to show you is that there is at least
17 a prima facie case that it was, and in my submission it
18 is patently clear that that was, indeed, the case.

19 THE CHAIRMAN: I am still a bit confused as to why that
20 helps you in terms of DAF's liability?

21 MR WARD: Well, it helps -- the submission, albeit good or
22 bad, is it helps because it is the only configurator you
23 have a chance to consider which shows how this
24 configurator swap actually worked, and what it was that
25 the manufacturers were actually disclosing through the

1 configurator. That is the point.

2 I just want to touch on one other thing that arose
3 yesterday that you have seen some correspondence on, to
4 do with -- sorry, just one moment. (Pause).

5 Yes, I mean part of the answer to your question,
6 sir... can I just ask you again to read paragraph 19 of
7 our skeleton -- which is confidential -- to show why we
8 say that the quality of information contained within the
9 configurator is relevant.

10 THE CHAIRMAN: Paragraph 19?

11 MR WARD: 19, and it is all marked as confidential,
12 unfortunately. Although, again, I do not really know
13 why. It is just quotes from their pleading that are
14 marked as confidential in the pleading.

15 This is why we say it is illuminating to see the one
16 example of the configurator that is potentially
17 available to the Tribunal.

18 THE CHAIRMAN: Right.

19 MR WARD: I mean, all of that is potentially relevant to the
20 issue of plausibility. We are concerned that one should
21 not proceed entirely in the abstract on this point.

22 THE CHAIRMAN: So far as DAF was concerned, there is no
23 evidence, is there, that it had other manufacturers'
24 configurators?

25 MR BEARD: I will come to it but we have explained that we

1 did have other configurators.

2 THE CHAIRMAN: You did?

3 MR WARD: Yes.

4 MR BEARD: That they were ones that did not involve pricing

5 except possibly in relation to one, and we have

6 explained why there is not disclosure of them, because

7 we do not have them. So we have explained all of this.

8 THE CHAIRMAN: I can see that the ones that you actually

9 had, that disclosure of those would be highly relevant.

10 MR BEARD: We would have done, had we had them.

11 MR WARD: Mr Beard is now explaining things that we have

12 marked as confidential in our skeleton in line with

13 their requests, but I will just explain. It is there in

14 our skeleton, I showed you this in paragraph 22, they in

15 fact had configurators of at least four competitors and

16 have not called any witness at all to talk about any of

17 that.

18 So not only do we not have the configurators, but

19 they have chosen not -- Mr Beard has just given some

20 helpful explanation, but no witness of theirs has talked

21 at all about what configurators they received, what

22 configurators they disclosed, because none of their

23 witnesses in fact talk about the cartel at all.

24 THE CHAIRMAN: But that only came out in the *Ryder*

25 proceedings, did it not; the *Ryder* RFI? You didn't

1 actually ask the questions.

2 MR WARD: We asked questions about this and part of the
3 answer we got back was the Ryder RFI, that is what
4 happened here.

5 So they sent us a copy of the Ryder RFI as a way of
6 responding to questions about configurators. That is
7 how it comes to be here.

8 Now, you received a letter yesterday from DAF about
9 MAN's case on this in the Ryder claim. Now, as you will
10 be aware, we have not sued MAN, and indeed yesterday was
11 the first time any of this had been mentioned to us, and
12 what they drew attention to is that in the Ryder claim
13 MAN had pleaded a bare denial to the question of whether
14 they had ever received this configurator, and we are
15 very grateful for DAF drawing that to our attention,
16 which we were not aware of when the skeleton was
17 settled.

18 But, of course, MAN has just pleaded a bare denial.
19 It is not a party to this action. We understand that
20 they have settled in any event, in the proceedings that
21 they were involved in, and it will be a matter for trial
22 in this case whether, as we say, the configurator was
23 shared.

24 In our submission, this is of obvious utility. It
25 is available off-the-shelf. It is now close to trial,

1 of course, but we have been asking for it since October,
2 and there is still ample time for it to be considered.
3 We do not know yet what is in it and therefore what that
4 will involve, but of course DAF has not produced any
5 kind of explanation that would enable you to conclude it
6 is simply too late to be useful.

7 THE CHAIRMAN: Does it not need to be a bit more than
8 useful? It has to be necessary and proportionate.

9 MR WARD: Yes, sorry, just as shorthand for what I have
10 already explained.

11 THE CHAIRMAN: So you are saying it is necessary?

12 MR WARD: Yes. There is no issue of proportionality at all,
13 in terms of the disclosure itself: it is available
14 off-the-shelf.

15 THE CHAIRMAN: When you say "available off-the-shelf", you
16 mean because they have disclosed it in *Ryder* --

17 MR WARD: Yes.

18 THE CHAIRMAN: -- they can just press a few buttons and
19 disclose it to you?

20 MR WARD: Yes, exactly.

21 THE CHAIRMAN: But then there is who has got to deal with
22 it.

23 MR WARD: I have to say, frankly, we do not know, until we
24 are shown it, but DAF has not sought to say there is
25 something about this that is so fiendishly complicated

1 it could not be considered between now and the
2 nine weeks when the experts actually give evidence.

3 THE CHAIRMAN: Right.

4 MR WARD: Unless I can assist further, those are our
5 submissions.

6 THE CHAIRMAN: Okay, thank you.

7 Submissions by MR BEARD

8 MR BEARD: I suppose in one way the conclusion to this is it
9 is patently not necessary for this disclosure to be made
10 at this stage and in those circumstances there is no
11 good basis for this application.

12 If we were to track back somewhat, it was in its
13 re-amended particulars of claim served in December 2018
14 that Royal Mail relied on the Commission's finding in
15 relation to configurators. DAF responded in its
16 re-amended defence, which was served on January 2019,
17 and it confirmed that it had had access to the
18 configurator of at least one other manufacturer during
19 the relevant period.

20 But when we talk about configurators, as you may
21 have detected, both from the Commission decision and
22 from the material submitted, you can have technical
23 configurators and configurators that involve pricing.
24 A technical configurator is essentially -- I think of it
25 as a bit like truck blueprints, where you can plug

1 different bits and pieces in: different cabs, different
2 numbers of axles, different engines, different other
3 features, and you can work out whether they fit
4 together, essentially, to create a truck.

5 Now, undoubtedly we had technical configurators, but
6 in relation to price configurators, we did not. There
7 was a short period where we believe we may have had one,
8 a very short period during the whole infringement
9 period, but otherwise we did not.

10 But the most important thing was that we explained
11 this three years ago. We explained it three years ago.
12 We explained it not only in these proceedings but also
13 in the *Ryder* proceedings, in our pleadings.

14 Now, in *Ryder* they took a different course. They
15 came along and they made an application. The initial
16 application was backed by expert witness evidence, as
17 I understand it, saying: we want to have this SPRINT
18 configurator in order to feed into our expert's
19 analysis. There were to-ings and fro-ings and in the
20 end, as you saw, in a consent order disclosure was given
21 in *Ryder*, but some time ago, in circumstances where it
22 was prior to the whole expert exercise.

23 Mr Ward took you to the order in *Ryder* and he
24 said: we just want the Conf2 configurator material. But
25 it is worth just bearing in mind, where you look at that

1 table, where it says, "Conf2 configurator", it says:

2 "A copy of the SPRINT software and both a) the DPS
3 data set and DPS data in a flat file format for the
4 relevant period."

5 In other words, what Ryder wanted was not just the
6 software that can put stuff in an order in the SPRINT
7 software -- and I should say the SPRINT configurator is
8 not just technical, it did contain pricing information.
9 So when you built your truck in the SPRINT configurator
10 you got a gross list price number for it, not
11 a transaction price, a gross list price number for it.

12 But they wanted all the data for that to feed into
13 the expert process.

14 Now, Mr Ward has not turned up with anything from
15 his expert explaining why it is this is needed, and to
16 be fair to Mr Ward, he does not suggest that his expert
17 needs it. He just says: well, it is a sort of example
18 of what you might be able to have if there was a sharing
19 of price configurators.

20 Just to go back to the pleadings from several years
21 ago, Mr Ward did take you to the terms of the decision,
22 paragraphs 46 to 48, and he directed you to 48 and said
23 that in 48, as you will recall, it is said:

24 "Similarly, the exchange of configurators helped the
25 comparison of own offers with those of competitors. All

1 the addressees, with the exception of DAF, have access
2 to the configurator of at least one addressee."

3 Now, it is worth just bearing in mind, we corrected
4 that in our pleading. We said: look, the Commission
5 decision is not right, because we did get these
6 technical configurators at various times, and we
7 specifically pleaded to it.

8 So this was not as if we tried to duck the issue.
9 Back in 2019 we were explaining: that Commission
10 decision, it is wrong, and it is wrong against us on
11 your case. Still nothing. Still nothing.

12 Then in October 2021, they start saying: oh,
13 actually we would like information about your
14 configurators and more on your configurators. That is
15 the SPRINT configurator, which is now pursued, and also
16 the TOPEC configurator, which is our technical
17 configurator, and that is what we responded in relation
18 to.

19 It was at that point that we did provide them with
20 the Ryder RFI, because the Ryder RFI supplemented what
21 had been pleaded and spelled out our position in
22 relation to these matters, and that Ryder RFI, if you do
23 not mind, I would like to take the Tribunal to. It is
24 in the PTR bundle at tab 16.

25 So you have a cover letter, and then if you keep

1 going through, at page 6, so this is {A/IC16/6}, this is
2 actually the Ryder RFI response. What you will see over
3 the page are the -- so this is an introductory section
4 that you see at page 6, and then over the page you start
5 seeing the questions that were posed by Ryder.

6 You will see the first requests --

7 THE CHAIRMAN: I do not actually have a page 6, but this is
8 requests 1 and 2(A), is it?

9 MR BEARD: It should be {A/IC16/8}. I am using the external
10 numbering, sir, but yes, that is it. Requests 1 and
11 2(A).

12 THE CHAIRMAN: Yes, I have got it.

13 MR BEARD: You will see:

14 "Please state which other manufacturers'
15 configurators DAF had access to during the relevant
16 period and over what period of time."

17 Then:

18 "For each configurator that DAF had access to,
19 please particularise~..."

20 So here was Ryder, in its request for further
21 information -- I should say, dated 19 December 2019, and
22 this is in circumstances where the *Ryder* case started
23 afterwards.

24 THE CHAIRMAN: They responded in May 2020.

25 MR BEARD: Sorry?

1 THE CHAIRMAN: I think the statement of truth is
2 dated May 2020.

3 MR BEARD: Absolutely, sir, I am so sorry, I was just giving
4 an indication of when the request was made, I am sorry.

5 So they were asking these questions and we were,
6 therefore, setting out in response to that, clearly,
7 what we had had and what had been given further to these
8 issues. So this is more than two years ago the request
9 was made and around two years ago the response was
10 given. If I could just invite you to read paragraphs --

11 THE CHAIRMAN: Sorry, did the claimants in this case have
12 this? You only disclosed this in October to them?

13 MR BEARD: Yes, because they asked the further questions and
14 we said: yes, we actually answered these questions when
15 they were raised in other proceedings a couple of years
16 ago.

17 THE CHAIRMAN: Yes.

18 MR BEARD: If you could just read through 1.1 through to
19 1.8. (Pause).

20 This is all about the configurators that DAF had
21 access to.

22 THE CHAIRMAN: Yes, I have got 1.7, 1.8 redacted, but maybe
23 I am looking at the wrong -- oh, there is another one.
24 Maybe that is unredacted. Yes, if you go to the next
25 tab.

1 MR BEARD: I am so sorry, I apologise. I do not have the
2 (inaudible) version in my bundle, sir. (Pause).

3 THE CHAIRMAN: Right.

4 MR BEARD: So far from it being a situation where DAF, when
5 asked, had held back and not explained what was going
6 on, as soon as it was asked in the *Ryder* proceedings we
7 provided an answer.

8 When we were asked in these proceedings in October,
9 we then provided the material that was being -- setting
10 out the position here.

11 I think it is important to go over the page in this
12 RFI to what I have as page 11 in the external numbering,
13 paragraphs 3.1 and 3.3. {A/IC16/11}. (Pause).

14 THE CHAIRMAN: Right.

15 MR BEARD: So not only did we explain what we have received,
16 but we explained what it is that --

17 THE CHAIRMAN: You had provided.

18 MR BEARD: -- we had provided. We had made this clear.

19 Mr Ward keeps saying, "I have a prima facie case"; he
20 does not have even a price face case, we have explained
21 the position in relation to these matters, we have set
22 out what the position was, and this is not against the
23 backdrop of some sort of lack of evidence. We are
24 dealing with a situation where the Commission file was
25 developed on the basis of not one but four leniency

1 applications.

2 Now, for those of you that have not been involved in
3 processes engaged with regulators investigating
4 anti-trust events, what you have in a leniency process
5 is an incentive given to an alleged infringer to come
6 forward and cooperate with the Regulator and, in
7 consequence of cooperating with the Regulator and
8 providing all relevant materials and all information,
9 you can get a reduction in penalty. There were four of
10 them in this case, and the first one was MAN.

11 Now, we have included in the authorities bundle and
12 you may not need to go to it, but it is in the
13 authorities bundle 2.1, the Commission leniency notice.
14 Because what that document explains is the full extent
15 of cooperation that you have to give in relation to any
16 cartel investigation, and obviously in this cartel
17 investigation what needed to be considered by a leniency
18 applicant was any material that they have received from
19 the other parties in relation to any sort of pricing,
20 amongst other things. That would include all stuff to
21 do with configurators that included pricing, and MAN was
22 the first leniency applicant.

23 Just to emphasise, the Commission file runs to over
24 32,000 documents. So leniency was very fulsome in terms
25 of its provision of material. So not only do we have

1 the position where DAF has explained that it did not
2 receive pricing configurators, subject to the provisions
3 of the RFI, it has also explained that it has no
4 evidence that it provided SPRINT, its pricing
5 configurator, to anybody else. Nor is there any
6 evidence on the file showing that that was the case.

7 But, more particularly, MAN, as the leniency
8 applicant, has provided a specific pleading in the Ryder
9 proceedings, so the proceedings upon which Mr Ward is
10 relying, it has provided a series of responses because
11 Ryder specifically said, as we set out in our letter
12 yesterday -- Ryder said in its pleading that it
13 considered that MAN was using an ACON price configurator
14 to analyse the prices of the competitors. (Handed).

15 You have the letter from yesterday. I am just
16 passing up copies of the MAN pleading, which Mr Ward
17 referred to as a bare denial.

18 THE CHAIRMAN: Right.

19 MR BEARD: Because what had been pleaded -- this is from
20 paragraph 7 of our letter yesterday. For your notes it
21 is in the bundle at {A/53/2}.

22 Ryder had pleaded that:

23 "By at least February 2008 MAN was using an ACON
24 price configurator to analyse the prices of its
25 competitors. The ACON price configurator used

1 configurators of competitors including DAF, Daimler,
2 Iveco and Renault. The competitors' prices that were
3 analysed included those in the UK."

4 So Ryder, in its pleading back in 2017, had
5 specifically put this in issue but since MAN was being
6 sued by Ryder, it then responded. (Handed).

7 We have not given you the whole MAN pleading,
8 exciting though it is. We have given you the front
9 page. If you then turn over you will see at the top of
10 the page this is 21A.172 and this is MAN's response to
11 that pleading by Ryder that:

12 "The ACON price configurator used configurators of
13 competitors including DAF, Daimler, Iveco and Renault."

14 The first two sentences of 55A.172 are denied save
15 that it is admitted that by the February date MAN was
16 able to use its ACON price configurator to process the
17 data obtained from one configurator. Not DAF.

18 So Mr Ward was taking you to a series of documents
19 and speculating about the interpretation of those
20 documents, the MAN documents he took you to.

21 THE CHAIRMAN: So were you saying that in its disclosure,
22 MAN's disclosure to the Commission in relation to
23 leniency --

24 MR BEARD: Yes.

25 THE CHAIRMAN: -- they did not say that they had anything

1 from DAF?

2 MR BEARD: Well, there is nothing in the Commission file
3 that is from DAF in relation to it.

4 THE CHAIRMAN: No.

5 MR BEARD: In relation to the statement made by MAN to the
6 Commission, that is actually confidential. So whether
7 or not I knew that, I could not specifically say that.
8 But there is nothing in the documentation, and what I am
9 also saying is that all of that relevant documentation
10 is the material that has been disclosed. The only
11 things that Mr Ward can point to are those MAN documents
12 and the DAF document he has taken you to, and those do
13 not remotely suggest that MAN actually had price
14 configurators of other OEMs, apart from the one that it
15 has indicated in the pleading.

16 But what is remarkable is that Mr Ward has relied on
17 documents to try and encourage the Tribunal to draw
18 an inference that actually MAN had this configurator
19 when we have a pleading from MAN which sets out its
20 straight denial.

21 That means there is a straight denial and there are
22 documents he is trying to draw on for an inference that
23 simply do not maintain that. Because if we look at
24 those two documents, and I think I should probably go
25 back to them, if I may.

1 THE CHAIRMAN: Even assuming that is incorrect and MAN did
2 have SPRINT --

3 MR BEARD: Yes.

4 THE CHAIRMAN: -- do you accept that if that is the case,
5 then it is a document that should be disclosed?

6 MR BEARD: No. No, we do not see why it should be
7 disclosed.

8 THE CHAIRMAN: Even if it had been -- I mean, you can see it
9 is highly relevant to MAN's position.

10 MR BEARD: It may well be relevant to MAN's position, who is
11 not a defendant in these proceedings. We do not accept
12 that and we do not accept that that is necessary for
13 these proceedings because, as I have already indicated,
14 if you were seeking disclosure in relation to this
15 material, then it is obviously something that you should
16 have done so far earlier in order that these matters
17 could be properly dealt with, because again --

18 THE CHAIRMAN: Did your expert, did Professor Neven not want
19 to see a configurator or the sort of information that it
20 could generate?

21 MR BEARD: Well, Professor Neven can be asked these
22 questions about what he wanted and did not want and
23 thought was relevant.

24 THE CHAIRMAN: Right.

25 MR BEARD: But obviously he has provided expert reports

1 taking into account the exchanges of gross list pricing
2 that were referred to in the decision and carried out
3 an analysis on that basis. So he is there already
4 considering gross list price exchanges in those
5 circumstances.

6 THE CHAIRMAN: Right.

7 MR BEARD: So whether or not configurators were in any way
8 material I think may be a completely separate question
9 in relation to all of that.

10 But I think it is also important to bear in mind
11 that Mr Ward said we do not provide any factual
12 witnesses that explain how configurators work. That is
13 just not true. Mr Ashworth provides an explanation of
14 what the configurators were, TOPEC and SPRINT, and
15 indeed how they were used, so far as he was concerned,
16 for pricing.

17 Just for your notes, in particular at paragraph 221,
18 that is in bundle {D/IC22/56}, and also Mr van Veen,
19 paragraphs 39-40. That is bundle {D/IC24/10-11}.

20 In relation to the gross price information that we
21 are talking about, of course the experts already have
22 all this information from what is known as the OMS
23 system. So the extent to which they need a SPRINT
24 configurator in order to get this material I think is
25 beside the point, frankly, because they have the origin

1 material.

2 So in those circumstances we do say that it is clear
3 that MAN did not in fact have the SPRINT configurator.
4 The only real allegation, the only inference that
5 Mr Ward seeks to draw is that MAN did have the SPRINT
6 configurator, and if I may I will just take you back to
7 those two or three documents that Mr Ward was looking
8 at.

9 THE CHAIRMAN: Yes.

10 MR BEARD: I will take them in the same order as Mr Ward,
11 for ease.

12 THE CHAIRMAN: 3.3?

13 MR BEARD: Yes, this is the one, just so that we are on the
14 same page, it starts:

15 "Price monitoring current status 02/2008."

16 THE CHAIRMAN: Yes.

17 MR BEARD: Just working our way back through it, this is
18 a description of what the ACON configurator can do, not
19 what it does do or has been doing. You can see that
20 actually if you even look at the phrase, "Target
21 definition of the ACON". It is showing what it might be
22 able to do if you have these various other inputs.

23 Then if you go down to 2.3 under the heading, "Data
24 acquisition and maintenance", under the arrow it says:

25 "Configuration tools can be directly implemented in

1 the ACON."

2 The arrow at the bottom says:

3 "MS - Excel and PDF-based price lists are entered
4 into the database~..."

5 So there are all sorts of formats that could be
6 included within ACON.

7 Then if one goes over the page, you will see
8 essentially a pitch as to what it is that ACON might be
9 able to do.

10 Then over the page again, 2.3:

11 "ACON.

12 "Requirements for the service offer."

13 So it is actually saying there what it needs in
14 order to be able to do these sorts of comparisons:

15 "Countries must supply competitors' price
16 lists/pricing information~..."

17 Then at the bottom you have:

18 "Further action."

19 There you see:

20 "... (at the moment only German data are included)."

21 Now, to be fair to Mr Ward we cannot read from that
22 whether or not that is German MAN-only data or other
23 German data. But nonetheless the suggestion being made
24 here, that somehow you can infer from this that actually
25 MAN had obtained the SPRINT configurator and the data in

1 it from DAF just does not follow remotely.

2 So I will just deal with the other MAN document, if
3 I may, if we go back, this is the one, "ACON price
4 configurator". Now, this is undated, and really
5 Mr Ward's submission here appears to hinge on the fact
6 that the statement in 2.1 is the database is used for
7 automated storage and the processing of gross price
8 lists of MAN and its competitors. It enabled complete
9 vehicles to be configured and calculated.

10 Then it says:

11 "Time frame: ongoing."

12 Then it talks about "Responsibility, countries for
13 data collection". Then it says "Execution", what is
14 needed, and it talks about competitor meetings. Then it
15 talks about inputs and outputs.

16 But, again, you cannot remotely draw from that
17 an inference that in fact MAN had the SPRINT
18 configurator. But, as I say, you have to consider these
19 documents as part of this vast universe of documents
20 provided by way of leniency and then you look at the MAN
21 pleading, which says we did not have it.

22 Now, that means those inferences just cannot be
23 drawn and as for the DAF document that was referred to,
24 just to finish off, that section that says "Special
25 topic configuration tools", those are PowerPoint

1 pictures of what the tool was, SPRINT. It is not
2 remotely saying that we have shared it; it is explaining
3 what we have. Again, no inference can be drawn.

4 So you have got a series of problems here: it is not
5 necessary to disclose this material. It would
6 undoubtedly create all sorts of difficulty, because you
7 have a lot of data. It is not just the software
8 structure, it is the data underlying it. The reason
9 that was given in *Ryder* is because it was asked for as
10 an input into the expert analysis process. We are not
11 there here, we are long beyond that and Mr Ward is not
12 asking for it for any particular expert analysis at all.

13 Indeed, what he says, somewhat casually, is: oh,
14 well we have got nine weeks until they give evidence so
15 if something comes up, we have time to deal with it.
16 That is precisely the wrong way to deal with this
17 technical disclosure. He has not shown that it is
18 needed, necessary, or even potentially useful to the
19 experts. As high as he can put it is: well, it is sort
20 of an example of the sort of things that might have gone
21 across. But actually, his application relies heavily on
22 saying this was material that did go across, in
23 particular to MAN, that is not made out, and then to
24 say: well, this is an exemplar of what can be done, that
25 is not a good basis for disclosure of all the software

1 and all the data that is involved in the operation of
2 SPRINT across many, many years, which is what he is
3 asking for in relation to the Ryder order.

4 So in those circumstances, we --

5 THE CHAIRMAN: Are they asking for the configuration of
6 SPRINT -- the configuration of the configurator -- at
7 the relevant time?

8 MR BEARD: That is what we understand, because that is what
9 the order says.

10 THE CHAIRMAN: So is that available?

11 MR BEARD: It is the 2015 version, but that is a vast
12 amount -- that is all the data in relation to 2015; it
13 is not just a particular framework. Yes.

14 THE CHAIRMAN: I think what Mr Ward's argument was, was:
15 look, we have not got any configurators here before the
16 Tribunal because the ones that DAF obtained, albeit they
17 were --

18 MR BEARD: Technical.

19 THE CHAIRMAN: -- they were technical, they did not have
20 price lists, they were not available; is that right,
21 that they cannot be disclosed?

22 MR BEARD: Yes. The irony is they are not asking for our
23 technical configurator. They initially said: we would
24 like the technical configurator and the pricing
25 configurator and we said: look, you do not need either

1 of them. They said: okay, well, we want the pricing
2 configurator. So in terms of illuminating, it is not
3 illuminating at all; it is positively confusing in these
4 circumstances.

5 His example argument might work slightly better for
6 the technical configurator, but even then it is not
7 necessary for these purposes.

8 THE CHAIRMAN: But you would have thought if all that is
9 required is an example of a configurator that had
10 prices, and that this was in some way useful, that the
11 experts would have been asking for it, and saying they
12 cannot do a proper analysis without it but that is
13 not --

14 MR BEARD: Mr Harvey has never said that. You have got no
15 evidence before you and it is not Mr Ward's submission.
16 We have witnesses -- I have indicated the parts of
17 Mr Ashworth and Mr van Veen who have explained how
18 these configurators work. So it is not as if have
19 somehow concealed the position, I can take you to the
20 witness statements if that is of use.

21 So it is not like we are saying: no, no, no, no, it
22 is all a blank page for you, we have explained this.
23 These witness statements went in well over a year ago
24 and in those circumstances if you were going to have
25 this sort of engagement you would have expected expert

1 evidence explaining why it was necessary to have this
2 software with the relevant data for that year such that
3 it could then be considered by both sets of experts
4 insofar as was material, and that is no part of the case
5 here.

6 We have explained how the configurators work. We
7 have dealt with the case that somehow one can infer that
8 MAN received this configurator. It is not a -- it is
9 not even a prima facie case that he can get off the
10 ground here and, in those circumstances, the idea that
11 we should inject, at this stage in proceedings, another
12 chunk of disclosure which could have been sought -- and
13 that is not a hypothetical, it is exactly what Ryder did
14 in the parallel proceedings -- that you should do that
15 now is inappropriate.

16 There is one issue that I do just need to pick up,
17 which is the point that was made that somehow
18 Professor Neven had been saying: well, the market is not
19 transparent, and somehow that is contrary to what is
20 said in the Commission decision and that is why we need
21 the configurator, because it illustrates transparency.

22 This is a consistent confusion on the part of
23 Royal Mail. What Professor Neven says is that
24 transparency in the market does not exist at
25 a sufficient level in relation to transaction prices, so

1 that you cannot have effective coordination of
2 transaction prices.

3 It is accepted by Royal Mail, even, that the SPRINT
4 configurator is only about gross list prices. It does
5 not have any information about transaction prices at all
6 in it, and he has -- there is nothing in Mr Ward's
7 submission that has in any way explained why it is that
8 there is a contradiction between Professor Neven's
9 position in relation to transparency and the position in
10 relation to SPRINT.

11 Unless I can assist the Tribunal further~...

12 THE CHAIRMAN: Thank you.

13 Submissions in reply by MR WARD

14 MR WARD: Just a few points, if I may.

15 This is a request for a document that is readily
16 available. It goes to the nature of the collusion. If
17 MAN had access to this, as we say it did, that itself
18 affects the market that DAF were selling into.

19 As to the underlying data, Mr Beard said something
20 like the following:

21 "Of course the experts already have all of this
22 information from what is known as the OMS system."

23 It is absolutely right that there is high-level
24 description of DAF's configurator in Mr Ashworth's
25 witness statement, and we can look at that. But what it

1 does not do is more than that, than describe it in
2 a very general way, and nowhere is there any evidence
3 actually given about the way in which it was disclosed.

4 Now, Mr Beard has tried to persuade you that there
5 is no case that it was, in fact, disclosed to MAN, but
6 in truth those documents present a very strong
7 prima facie case at the least, and he invites you to
8 treat as binding and dispositive a pleading put in by
9 MAN in a case it was facing but has now settled, which
10 is not before you any more than MAN is. So one
11 obviously has to do the best that one can with the
12 material that is in front of us, and in our submission
13 that is very clearly, at the very least for today's
14 purposes, a very strongly prima facie case that it was
15 disclosed to MAN.

16 It is an expert issue, but it is not only an expert
17 issue. It goes to colouring, fully understanding what
18 the nature of this collusion was, which is, of course,
19 squarely in issue in determining the plausibility of the
20 infringement.

21 Mr Beard insists that this has nothing to say about
22 net prices, but I do want to just remind you of what is
23 actually said in document 3.1, which is
24 non-confidential, which talks about the ACON price
25 configurator. This is page {A/3.1/2}. The first bullet

1 point under the heading, "2.6. Output:

2 "Net retail prices for all vehicles included."

3 MR BEARD: I am sorry, I hope my position was clear. I was
4 talking about SPRINT, I am not going to pretend what is
5 in ACON.

6 THE CHAIRMAN: Yes.

7 MR WARD: What I have sought to make clear is that SPRINT
8 was the tool provided to MAN which, the inference is,
9 found its way into ACON through MAN's somehow combining
10 it all into a single database.

11 THE CHAIRMAN: I do not think there is any -- there is no
12 dispute that prices were included in SPRINT?

13 MR WARD: No. No, but Mr Beard is insisting that it is all
14 gross and it is never net. That is the point I am
15 taking you now to. Net meaning, we understand,
16 shorthand for transaction prices.

17 So those are my submissions.

18 THE CHAIRMAN: Right. Thank you.

19 We will take a break now, and we will come back and
20 give you our decision. We will have a 15-minute break.

21 (3.12 pm)

22 (A short break)

23 (3.29 pm)

24 Ruling (pending approval)

25 (3.38 pm)

1 MR WARD: Sir, thank you. May I just make a point of
2 clarification --

3 THE CHAIRMAN: Yes.

4 MR WARD: -- following on one of the observations you made
5 there in giving reasons. You referred to the fact that
6 Mr Beard in turn had referred to MAN's leniency
7 application.

8 THE CHAIRMAN: Yes.

9 MR WARD: I should say, what I am about to say I am not
10 suggesting in any way requires qualification of your
11 reasons, but it is quite important in the wider context.

12 Those leniency and settlement submissions by MAN,
13 all the other parties including DAF, are protected from
14 disclosure and are not before the court. Mr Beard was
15 making a point about that, essentially that MAN was
16 obliged to cooperate, but it is very important for the
17 Tribunal to appreciate that those leniency and
18 settlement materials are not going to be disclosed or
19 available to the Tribunal.

20 THE CHAIRMAN: No. Well, I am grateful to you. There was
21 no intention to disclose that and, indeed, I do not know
22 what they contain.

23 MR WARD: No, no, but just for a point of information for
24 the Tribunal --

25 THE CHAIRMAN: Yes, all right.

1 MR WARD: -- that is permanently missing piece of the puzzle
2 in these proceedings.

3 THE CHAIRMAN: Yes, I understand.

4 MR WARD: That is the only reason I mention it.

5 THE CHAIRMAN: Right. Is that it?

6 MR BEARD: Yes, sadly I think that may be all for today,
7 unless Mr Ward has other matters. I think we have
8 covered everything.

9 Obviously we have a little bit of homework to do on
10 sorting out timetabling and so on.

11 THE CHAIRMAN: Yes.

12 MR BEARD: We will obviously pull together an agreed order
13 in relation to these matters, and we will also sort out
14 timing in relation to the topics or questions for the
15 concurrent evidence proceedings and revert to the
16 Tribunal in the light of the timings that have already
17 been indicated.

18 But apart from that, as far as I am concerned, I do
19 not have anything else, but I think Mr Ward may do.

20 MR WARD: I have just got one thing and it is, in a sense,
21 for information, or if you like putting a marker down,
22 and it relates to something which is going to come to
23 a head at the trial that has been heavily prefigured in
24 correspondence, but I do not think the Tribunal is aware
25 of.

1 The Tribunal will be aware that the Tribunal itself
2 and the Court of Appeal found in favour of the claimants
3 on a preliminary issue in regard to the binding nature
4 of the decision --

5 THE CHAIRMAN: Yes.

6 MR WARD: -- and ruled that it would be an abuse of process
7 for DAF to resile from the admissions which are captured
8 in the decision, save on certain limited grounds that
9 are adumbrated in the CAT's decision.

10 THE CHAIRMAN: Yes.

11 MR WARD: My clients have been involved in a long
12 correspondence with DAF over that, challenging various
13 aspects of their case and, as a result, there have been
14 a lot of helpful concessions by DAF about the way they
15 put their case and the extent to which they are trying
16 to resile from that decision.

17 But there are, as we have made clear in the
18 correspondence, and remain a small number of points
19 which we do intend to contend at trial are precluded by
20 the terms of the judgment and the decision.

21 Alluding to something you said a few moments ago,
22 sir, there is not a formal application process in the
23 CAT rules, but we have been very clear in correspondence
24 about what we are doing. There is, of course,
25 a sequential exchange of written openings, so they will

1 be able to see exactly what we say. I am mentioning it
2 today only in case you had a concern that you require
3 some higher level of formality than that, but there is
4 certainly no possibility that anything is going to be
5 said that has not been fully flagged in correspondence,
6 and we put DAF on notice that that was our proposed
7 course, in part so they could object if they wished to.

8 THE CHAIRMAN: So you are saying that you may want to apply
9 at the beginning of the trial for certain matters to be
10 excluded from DAF's defence on the basis that it would
11 infringe the abuse of process ruling?

12 MR WARD: In effect we are saying part of what they are
13 saying in their defence is abuse of process.

14 THE CHAIRMAN: Yes.

15 MR WARD: The evidence would have to be read in that light
16 as well. But we are not making an application to, as it
17 were, strike through part of the evidence, or anything
18 of that kind. We are content for you to see the way
19 they have put it and to explain to you why we think it
20 is in conflict with the ruling. It is a very, very
21 small number of points at this stage. There have been
22 some very helpful concessions from DAF under continuing
23 pressure.

24 THE CHAIRMAN: So you will not be applying to strike out any
25 bits, but you will be saying that, at the end of the

1 day, those are matters which are not properly before the
2 Tribunal because they either were in the decision, or
3 they constitute an abuse of process?

4 MR WARD: In effect.

5 THE CHAIRMAN: All right.

6 MR WARD: We were not proposing to be more formalistic than
7 that.

8 THE CHAIRMAN: I do not think you need to be.

9 MR WARD: That is why I mentioned it today, in case you had
10 concerns about that (inaudible).

11 THE CHAIRMAN: Yes. But you will be flagging it up in your
12 skeleton argument --

13 MR WARD: Absolutely.

14 THE CHAIRMAN: -- and so it will be absolutely clear what
15 you are saying in that respect?

16 MR WARD: Absolutely. Yes.

17 THE CHAIRMAN: I think that is fine.

18 MR BEARD: From our point of view, we are looking forward to
19 receiving their skeleton and we will deal with it in due
20 course, I think is probably our position.

21 THE CHAIRMAN: All right.

22 Well, thank you very much for access to Opus, and
23 that is going to be very useful at the trial. What
24 I was just thinking, it might be useful for the members
25 of the Tribunal to have a little training session on

1 Opus, so that we can know how we can use it to our best
2 advantage, and how we can communicate with each other
3 confidentially using Opus.

4 MR BEARD: Yes, I was going to say, having the chat function
5 open to everyone can be very entertaining.

6 THE CHAIRMAN: Exactly. So we want to avoid that, if
7 possible, but it might be helpful if that could be
8 arranged.

9 MR BEARD: I am sure that can be arranged and I think
10 probably, beyond my saying: yes, I am sure that can be
11 arranged, there is probably not more to be done now
12 because I imagine there are dates, liaison with Opus
13 themselves.

14 THE CHAIRMAN: It probably will not take long, just an hour
15 or so.

16 MR BEARD: No, quite understood, and so that one can
17 navigate round the documents, possibly have a private
18 chat room --

19 THE CHAIRMAN: Exactly.

20 MR BEARD: -- and know how to use it offline as well. We
21 will make sure that is put in train.

22 There is one issue -- I am so sorry -- that, just as
23 a matter of formality, Ms Edwards reminds me of; that on
24 the second point on the agenda there was a question
25 whether or not the trial was going to be heard

1 in-person, remotely, or as a hybrid. I think, just to
2 confirm, that we are taking it that this trial will be
3 heard in-person, and we will just record that in the
4 order. Unless there is any...

5 THE CHAIRMAN: Subject to -- there is that one exception,
6 one witness who is going to give evidence remotely.

7 MR BEARD: Yes, we will include that. Mr Borsboom will be
8 providing his evidence by video link.

9 THE CHAIRMAN: Yes. Obviously it will be live-streamed in
10 the normal way.

11 MR BEARD: Of course.

12 THE CHAIRMAN: Are the parties proposing to also have
13 a Microsoft Teams link for people who are not attending
14 court?

15 MR BEARD: As far as we are concerned, probably not, because
16 the live stream is sufficient --

17 THE CHAIRMAN: That is good enough. All right.

18 MR BEARD: -- and therefore there is not any need. The only
19 time it becomes an issue is if there is someone in the
20 confidentiality ring who wants to hear stuff in relation
21 to confidential material. But I think that is a nuance
22 of complication too far for these purposes. So if they
23 want to hear the confidential stuff and they are in the
24 ring, then they turn up. I think that is where we are
25 with it.

1 THE CHAIRMAN: All right.

2 MR BEARD: Thank you. I do not have anything else, sir.

3 THE CHAIRMAN: All right. Well, thank you very much, and we
4 look forward to seeing you in a few weeks' time. Thank
5 you.

6 (3.46 pm)

7 (The hearing concluded)

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