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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1284/5/7/18  
1290/5/7/18

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 18 May 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 **Claimants**

v

DAF Trucks Limited and Others **Defendants**

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**APPEARANCES**

Tim Ward QC, Ben Lask and Clíodhna Kelleher (On behalf of RM/BT)  
Daniel Beard QC, James Bourke and Daisy Mackersie (On behalf of DAF)

Wednesday, 18 May 2022

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(10.30 am)

THE CHAIRMAN: Good morning.

MR BEARD: Good morning.

THE CHAIRMAN: Just before we start, I understand there has been a Covid issue. I think it is on your side, Mr Ward.

MR WARD: Yes. Ms Kelleher has tested positive. I am pleased to say she still feels well. She is obviously isolating at home.

THE CHAIRMAN: She was in court yesterday, I think.

MR WARD: She was in court yesterday and the key members of the BCLP team and myself and Mr Lask have done lateral flow tests this morning and we are negative --

THE CHAIRMAN: Good.

MR WARD: -- so we will carry on with --

THE CHAIRMAN: Everyone else is okay?

MR BEARD: As far as we know.

THE CHAIRMAN: Are you okay to carry on?

MR BEARD: We are certainly okay to carry on. We will be doing more testing essentially, as we appreciate that BCLP and the Royal Mail team will be doing, just to make sure we are on top of this. I am not sure that there is an awful lot more we can do. If we stop this because one person goes down --

1 THE CHAIRMAN: No, no, we cannot do that, but, yes, a good  
2 idea to do regular testing in the circumstances.

3 All right. We will do the same. Thanks for letting  
4 us know and I hope she is okay.

5 MR WARD: Okay.

6 THE CHAIRMAN: All right.

7 MR JAMES HARVEY (continued)

8 Good morning, Mr Harvey.

9 A. Good morning.

10 THE CHAIRMAN: You are still under oath.

11 Mr Beard.

12 MR BEARD: Thank you, sir.

13 Cross-examination by MR BEARD (continued)

14 MR BEARD: Mr Harvey, good morning.

15 At the end of your evidence yesterday we were  
16 talking about mandate structures and you were suggesting  
17 there are two ways that the existence of the mandate  
18 structure could be used somehow to drive higher  
19 transaction prices. The first way was if there were  
20 more deals rejected by DAF NV -- I think was the first  
21 of your propositions. You remember that?

22 A. Yes.

23 Q. Now, I just want to deal with a couple of questions in  
24 relation to that approach. The first point to make is  
25 the mandate structure was only introduced in

1           October 1998 so you are not suggesting that sort of  
2           mechanism applied before then, of course?

3           A. Not this specific mandate structure.

4           Q. Between 1998 and 2003, in fact DAF NV had much more  
5           limited oversight over approvals. We know that from the  
6           evidence. So, in those circumstances, the force of your  
7           putative effect would be attenuated; correct?

8           A. Yes.

9           Q. Now, once the mandate structure was introduced, you are  
10          aware that DAF UK was able to approve margins -- approve  
11          transactions up to 7% lower than the IKP target margin?  
12          Are you aware of that?

13          A. I do not recall the --

14          Q. -- precise number. It is in Mr van Veen's witness  
15          statement, but I hope I am presenting it faithfully. It  
16          is paragraph 54, but I do not think we need to go to it.

17                 You are not suggesting that the infringement in this  
18          case affected DAF UK's decisions on these deals,  
19          are you? You are focused on DAF NV?

20          A. In terms of DAF UK's decision-making, that could be  
21          influenced by the reactions of customers and competitors  
22          so, in principle, DAF UK's decision-making could be  
23          affected.

24          Q. Right, but that was not a point that was put to  
25          Mr Ashworth, who obviously was at the time responsible

1 for those issues. You heard that evidence?

2 A. Yes.

3 Q. You are aware that at DAF NV Mr van Veen was able to  
4 approve transactions up to 10% lower than the IKP target  
5 margin but you are not suggesting that the infringement  
6 affected Mr van Veen's decisions on these deals,  
7 are you?

8 A. No, it does not have to affect Mr van Veen's decisions  
9 on the deals.

10 Q. No, and it was not put to Mr van Veen as the person at  
11 DAF NV making those decisions. So the evidence of  
12 Mr van Veen is that a couple of transactions a week were  
13 rejected at the level of DAF NV during his time in the  
14 relevant role, and that was across Europe as a whole.  
15 You understand that?

16 A. [No verbal response]

17 Q. So we are talking about very, very tiny numbers of  
18 rejections here, are we not?

19 A. Yes.

20 Q. You I think have accepted that you have no evidence that  
21 more deals were rejected than otherwise would have been,  
22 have you?

23 A. No.

24 Q. There is also a further layer, of course, to the mandate  
25 structure that we know about, that some of the deals,

1 the lowest margin deals, they were not within the  
2 mandate of DAF NV, they were within the mandate of  
3 PACCAR. You understand that? That applied in relation  
4 to Royal Mail in particular; yes?

5 A. Yes.

6 Q. So these deals -- it is the evidence of Mr van Veen and  
7 it is not challenged -- were always discussed between  
8 DAF UK and PACCAR, and you are not suggesting those  
9 transactions could have been affected by the decisions  
10 of a person with information who was feeding that  
11 information to DAF NV, are you?

12 A. Can you repeat the question, please?

13 Q. Yes. So the deals -- it is the evidence of Mr van Veen  
14 and it is not challenged that these deals were always  
15 discussed between DAF UK and PACCAR, and you are not  
16 suggesting that those transactions could have been  
17 affected by the decisions of a person within --

18 THE CHAIRMAN: Is that really a question for this expert or  
19 is it a factual question?

20 MR BEARD: Well, it is really working out whether or not his  
21 contention is that those deals could be affected by the  
22 supposed influence of someone at the DAF NV level. That  
23 is really the point here because, of course, you are  
24 talking about PACCAR in the US in relation to these --

25 THE CHAIRMAN: Is that an economics question?

1 MR BEARD: Obviously I would say probably not an economics  
2 question, but since Mr Harvey is putting forward these  
3 theories in relation to how these mechanisms work, we  
4 are testing them.

5 A. I think, going back to my previous answer, in principle  
6 DAF UK's decision-making in relation to these deals  
7 could be affected by the reaction of its customers or  
8 its rivals so I do not think we need a direct influence  
9 from PACCAR to change that. In relation to the mandate  
10 structure, I think that -- well, I suppose it depends on  
11 who influences those decisions and whether DAF NV is  
12 involved in that at all.

13 Q. Yes, because what you are really referring to in the  
14 first part of your answer is your second theory in  
15 relation to the mandate structure rather than the  
16 rejections part, are you not?

17 A. I think the two are related because the rejection is the  
18 outcome of the -- a potential outcome of the mandate  
19 structure. The possibility of rejection is what could  
20 influence behaviour by DAF UK.

21 Q. Right. So the theory is they are not really two stages,  
22 you are saying. You are saying that the increase in  
23 rejections sends a signal back to DAF UK; is that the  
24 theory?

25 A. Or the possibility of rejection.

1 Q. The possibility of rejection.

2 A. Yes.

3 Q. I see.

4 A. A more stringent mandate structure.

5 Q. I see. But this is not something you have tried to test  
6 at all empirically?

7 A. No. I cannot.

8 Q. Well, let us just deal with the other aspect that you  
9 highlighted yesterday, the idea that somehow the  
10 subsidiaries would price higher in order to effectively  
11 avoid the need to enter into any sort of mandate  
12 approval. That is how I understood the point that you  
13 were putting yesterday; is that right?

14 A. Yes.

15 Q. So could I just go back to the notion of the  
16 implementation problem? We touched on it yesterday and  
17 you took issue with my use of the word "cheating"  
18 because you said, "Well, look, if we are not talking  
19 about transaction prices, it is not right really to talk  
20 about cheating on transaction prices if that is not the  
21 focus of my theory in relation to coordination". Do you  
22 remember that?

23 A. Yes. Well, actually what I said was, when you move  
24 outside agreeing transaction prices, it is not  
25 meaningful to talk about cheating.



1 Q. I want to see how much in fact there is actually  
2 agreement in relation to the definition of the  
3 implementation problem, so if we could just go to  
4 Professor Neven's first report, which is {E/IC10/10}.  
5 I am just going to pick it up at 3.3. I do not think in  
6 your reports you actually disagree with any of this.  
7 I just want to make sure that we are in the same place.

8 This is under the heading "Economics of  
9 coordination -- some key principles":

10 "As long recognised by the economic literature,  
11 firms that attempt to increase price beyond the  
12 competitive outcome face a problem of incentives."

13 I think you accept that is the case. If you try and  
14 raise your price above the competitive level, you do  
15 face problems with incentives; correct?

16 A. Correct.

17 Q. "This is often referred to as the implementation  
18 problem."

19 Again, I do not think there is a definitional issue.  
20 You recognise that this is what the implementation  
21 problem is; correct?

22 A. Yes.

23 Q. "Assume, for the sake of exposition, that firms have  
24 clearly identified through their discussions the price  
25 increase that they would all like to implement, say x%

1           above the competitive price. The problem is that each  
2           firm has an incentive to unilaterally deviate from what  
3           has been discussed and 'agreed' upon."

4           I think you accept that in the context of price  
5           coordination; correct?

6           A. Yes.

7           Q. Then he says:

8           " In other words, there is an incentive to 'cheat'."

9           So it is deviation that matters and he refers to it  
10          here as "cheating".

11          "Namely, if competitors have implemented the price  
12          increase, any firm will make more profit by charging  
13          a lower price, thereby taking advantage of the higher  
14          price charged by the competitors. As this holds for  
15          each firm, the 'agreement' cannot be implemented, and it  
16          is thus not plausible."

17          So here he is saying, "Look, if you have got  
18          a theory of coordination related to agreement, the  
19          implementation problem undermines it". That is what is  
20          being said here. You understand that?

21          A. Yes.

22          Q. Let us just go on slightly through here. He then talks  
23          about what the potential solutions to the implementation  
24          problem are at 3.4 and 3.5. If you just read those  
25          through. (Pause)

1                   So I do not think you disagree with anything --

2       A.   Sorry, I cannot see 3.5.

3       Q.   Sorry, if we go to 3.5. It would be cruel to ask you

4           whether or not you agree when you had not read it.

5           (Pause)

6       A.   Yes, I have read that.

7       Q.   I do not think you actually disagree with any of that,

8           do you?

9       A.   No, in the context of anti-competitive collusive theory.

10      Q.   Anti-competitive collusive theory. What you say is,

11           I think, that these sorts of principles do not apply in

12           your theory of harm, where what you are talking about is

13           an expectation that other OEMs would raise their prices

14           and therefore you could raise your price as well.

15           Am I understanding correctly your position?

16      A.   Yes. The difference is that in this theory firms are

17           seeking to tacitly reach an agreement with one another

18           as to a super-competitive price. In the unilateral

19           theory, that is the outcome of them acting on their own

20           incentives. So in a sense the outcome in, for example,

21           the Harrington model, that is the competitive outcome.

22      Q.   In the Harrington model, I can see. Let us just test

23           this, though, because what you are saying is that what

24           you refer to now as a "unilateral theory", which I do

25           not think is language you have used before but we will

1           just note that -- the unilateral theory you say would  
2           result in people posting super-competitive prices or it  
3           is possible that it would?

4           A. It is a new market outcome where competition is softer  
5           and prices are higher than they would have been.

6           Q. I see, but could we just go to footnote 21 on the  
7           previous page, please? {E/IC10/10}. This is  
8           footnote 21 to the proposition put in paragraph 3.3,  
9           that:

10                 "... if competitors have implemented the price  
11                 increase, any firm will make more profit by charging  
12                 a lower price."

13                 Here at footnote 21:

14                 "This follows from the fact that the elevated price  
15                 is not a competitive outcome in which firms would be  
16                 using best replies to one another. Hence any firm will  
17                 have an incentive to deviate. In addition, since the  
18                 'agreed' price is above the competitive outcome, the  
19                 best replies necessarily involve a discount relative to  
20                 the agreed price."

21                 Now, obviously this footnote is referring to  
22                 agreement structures, I see that, but the point is in  
23                 the middle sentence, "any firm will have an incentive to  
24                 deviate" from super-competitive pricing in order to win  
25                 business and tenders, will it not?

1       A. No. So I go back to what I discussed with you earlier.  
2       So prior to the information exchange, all firms will  
3       face a trade-off between raising their prices on the one  
4       hand and losing volumes on the other and where they  
5       pitch their price turns on how they evaluate that  
6       trade-off. That is in a very standard competitive  
7       model.

8               What we are concerned about here is an information  
9       exchange that softens competition and changes the way  
10      they evaluate that trade-off and pushes them more in  
11      favour of elevated prices rather than the volume loss  
12      because they reason that their rivals are not competing  
13      as fiercely. So that is the or one of the outcomes in  
14      the model that we spoke about yesterday. So in that  
15      sense they do not have an incentive to deviate.

16     Q. Let us just pause. I have a number of follow-up  
17      questions.

18               So the model we spoke about yesterday, you are  
19      referring to the Harrington model there; yes?

20     A. That is correct, yes.

21     Q. So you are not making a more generalised point. You are  
22      focused on that Harrington model but then you are also  
23      saying that, in relation to a situation where a rival  
24      might be expected to raise prices, you would react to  
25      that by raising prices, but doing it unilaterally

1           without a direct communication on prices -- correct? --  
2           transaction prices; yes?

3       A.   Yes.

4       Q.   But you also know that both you and the rival have an  
5           incentive to price lower to beat the other and win the  
6           tender, do you not?

7       A.   That is one possibility, but we have to be quite careful  
8           in terms of describing the incentive because, in that  
9           model and indeed all sort of competitive models that  
10          have this feature of trading off, raising prices and  
11          losing volumes, the outcome where you have higher prices  
12          is a best reply to one another, in the language here.  
13          So when it is a best reply, you do not have the  
14          incentive to deviate.

15      Q.   Yes, when it is the best reply, and Professor Harrington  
16          set out some fairly strict conditions as to when higher  
17          price equilibrium would be the best reply.

18                The point I am putting to you is that outside the  
19                constraints of Professor Harrington's approach, each of  
20                the participants in a tender will have an incentive to  
21                put in lower prices than they initially think about  
22                because they hoped to beat the other and it will still  
23                be more profitable for them to do so because we are  
24                talking about super-competitive prices here, are we not,  
25                Mr Harvey?

1 A. So outside of the Professor Harrington model, that  
2 general theory that I have just outlined, which is that  
3 prices rise when competition is softer, still holds.  
4 Now, Professor Harrington has prepared a particular  
5 implementation of that in the context of this case but  
6 that general theory still holds.

7 Q. The general theory --

8 A. It is to do with the strength of competition between  
9 rivals.

10 Q. The problem you have is that, even if you posit that  
11 generalised theory of softening of competition, you do  
12 not have, apart from Professor Harrington's model, any  
13 economic modelling or theory of harm that explains how  
14 you can have an equilibrium state here, do you?

15 A. Professor Harrington provides the base of the  
16 equilibrium state, yes.

17 Q. Just to be clear, you have accepted you have not done  
18 any further modelling on these matters and you are not  
19 suggesting that there is any sort of monitoring  
20 mechanism in relation to transaction prices that is  
21 set -- effective monitoring mechanism for transaction  
22 prices as set out in 3.4 and 3.5 that we just read?

23 A. Sorry, can you say that -- ask the question again?

24 Q. Yes, it was just a closure question effectively. I took  
25 you to 3.4 and 3.5 in Professor Neven's first report

1           where he talked about the potential solution to the  
2           implementation problem being a monitoring and punishment  
3           mechanism for transaction prices, and you are not  
4           suggesting that exists here, are you?

5           A. Sorry, that there is no -- are you saying that I am  
6           not -- I do not think that there is a monitoring  
7           mechanism that could be used?

8           Q. It is no part of your evidence that there is such  
9           a monitoring mechanism, is it?

10          A. No, I think I have outlined that there is the potential  
11          for monitoring with the information that was made  
12          available through the exchange.

13          Q. Through the exchange?

14          A. Yes.

15          Q. But in relation to transaction prices, there is no  
16          monitoring mechanism?

17          A. Well, they do not need to monitor the transaction prices  
18          for there to be an adequate monitoring mechanism.

19          Q. Well, I think what you are suggesting is that, so long  
20          as you could monitor the exchanges, in those  
21          circumstances that would be sufficient for your theory  
22          of harm. I have been testing your theory of harm. I am  
23          actually asking you a question about the lower level in  
24          relation to transaction prices. You are not suggesting  
25          there is a monitoring mechanism in relation to



1 transaction prices, are you?

2 A. I am not suggesting that anyone is collecting  
3 information on transaction prices but I do not think  
4 that is required to have an effective monitoring  
5 mechanism.

6 Q. Well, I think that may be a function of the difference  
7 in relation to the approach to the theory of harm.  
8 There is one other piece of economic modelling you do  
9 mention which we should probably pick up, which is just  
10 at -- in your third report -- I am so sorry, Mr Harvey--  
11 {E/IC52/27}. Sorry, back two. 25 perhaps, {E/IC52/25}.

12 So this is in the section where you are talking  
13 about Professor Harrington's report and you are engaged  
14 in a discussion about points that Professor Neven has  
15 made. You say -- in relation to the sharing of list  
16 pricing, having influence over transaction prices, you  
17 refer to features such as mandate structure and IKP  
18 costs, which we have traversed. Then:

19 "In this context, I note that Professor Harrington  
20 has, in a separate paper, shown that coordination on  
21 high list prices can cause buyers to believe that costs  
22 are higher than they actually are, thereby leading to  
23 higher transaction prices as buyers bargain less  
24 aggressively as they underestimate the true scope for  
25 sellers to cut their prices."

1           So this is the modelling that has been carried out  
2           by Professor Harrington with -- I think it is  
3           Professor Ye, but it may be Dr Ye, I am not sure.

4       A. That is right.

5       Q. Let us just briefly go to it. It is at {I5/143.1}. Let  
6           us just pick it up. I will come back to the abstract in  
7           a moment, but if we pick it up at the introduction just  
8           further down the page:

9           "Collusion involves firms coordinating their conduct  
10          so that, as long as all firms comply with how they  
11          agreed to behave, supracompetitive prices and profits  
12          will result."

13          So that is the starting point here. It talks about  
14          the nature of collusion. If we go over the page  
15          to page 2, {I5/143.1/2}, just picking it up, "In  
16          contrast ..." -- sorry, it is probably unfair.

17          "In contrast to those canonical forms of collusion  
18          ..."

19          So that is what is being referred to in the first  
20          part.

21          "... there are some recent collusive practices for  
22          which coordinated conduct does not directly constrain  
23          competition, in which case it is not apparent that  
24          compliance is sufficient to produce supracompetitive  
25          outcomes."

1           So this is just another example of  
2           Professor Harrington and Professor Ye here talking about  
3           how, absent the coordination economic framework formed  
4           for collusion, there are not actually theories of harm  
5           sitting out there and they are exploring one of those in  
6           this paper. You understand that?

7           A. Yes.

8           Q. They explain that here:

9                     "First, some cartels coordinated on list prices but  
10                    not on discounts, which meant firms did not coordinate  
11                    on transaction prices."

12                   So obviously I think you accept that that is the  
13                   case here. There is no suggestion of coordination on  
14                   discounts in relation to particular transactions, is  
15                   there?

16           A. I think there is some evidence of coordination over net  
17           prices.

18           Q. Well, we will deal with that in due course.

19                    "While it is easy to monitor and ensure that all  
20                    firms set the agreed-upon list price, collusion could  
21                    prove ineffective due to firms' competing in discounts  
22                    off of list prices. In fact, discounts were common in  
23                    some of the cases involving coordination on list  
24                    prices."

25                    You understand that DAF's case is that there is

1 competition effectively in relation to discounts, if  
2 that is how you want to characterise the arrangements.  
3 You understand that?

4 A. Yes.

5 Q. It is saying:

6 "That coordination on list prices presents a puzzle  
7 is evident from this observation ..."

8 If we go over to page 3, {I5/143.1/3}, at the top of  
9 the page, it says:

10 "The theory developed here is that these collusive  
11 practices work, not because they influence what prices  
12 sellers propose to buyers, but rather because they  
13 influence what prices buyers propose to sellers."

14 Now, this paper goes on and includes frankly  
15 terrifying maths in relation to the modelling, and I am  
16 not going to take you to any of that, because the  
17 central issue here is that the model that they are  
18 talking about is about list prices influencing buyers'  
19 conduct, not sellers' conduct, is it not?

20 A. Yes.

21 Q. The theories that you are talking about are about  
22 exchanges of information affecting sellers' conduct, are  
23 they not?

24 A. Yes, although I have not ruled out other mechanisms that  
25 could influence prices in the market, and this is one of

- 1           them.
- 2       Q. No, Mr Harvey, I would like to be clear that I do  
3           understand you have not ruled out any sorts of potential  
4           ideas that you might want to put out there as to why it  
5           is that there might be higher prices. What I am testing  
6           is whether or not there is any robust economic theory of  
7           harm here. The point I am making is that you refer to  
8           two sets of academic economic material. One is the  
9           Harrington report that we have been to and the second is  
10          this, and the modelling here is inapplicable to all of  
11          the theories and mechanisms that you have set out in  
12          your report. That is correct, is it not?
- 13       A. No, because my overarching theory is that the exchange  
14          led to a softening of competition, and this is one  
15          mechanism that -- through which that could arise.
- 16       Q. But what Harrington and Ye are doing here, even in  
17          relation to the influence on buyers, they are very  
18          carefully modelling the circumstances in which you could  
19          actually reach equilibrium in relation to higher prices,  
20          are they not?
- 21       A. Yes.
- 22       Q. Your generalised theories of softening of competition  
23          simply do not do that, do they, Mr Harvey?
- 24       A. No.
- 25       Q. No. You have done no modelling, whether it is in

1 relation to cost signals to buyers or cost signals to  
2 sellers, which analyse how those equilibria could be  
3 reached, have you?

4 A. No.

5 Q. Indeed I would suggest you cannot do so. You do not  
6 need to comment on that.

7 So I am going to move on from the economic theory  
8 and I just want to consider a little bit more in  
9 relation to claimant-specific evidence. I think your  
10 theory of harm is put forward as a market-wide theory  
11 but, of course, what we are dealing with here is claims  
12 by particular claimants. You understand that?

13 A. Yes.

14 Q. So I just want to look a little bit further about what  
15 you say about these claimants and the evidence you have  
16 considered in relation to those matters. If we go to  
17 your report -- your first report, paragraph 2.37, which  
18 is {E/IC1/35}. Feel free to read the beginning. I am  
19 just going to pick it up at the "I consider ...":

20 "I consider the points raised here to be consistent  
21 with the possibility that the Infringement led  
22 Royal Mail and BT to pay higher prices for their *Trucks*.  
23 Customers that negotiate more effectively with DAF are  
24 likely to pay less than other customers. This does not  
25 rule out the possibility that they paid more than they

1 would have done in the counterfactual ..."

2 So I think this is your reference to how the theory  
3 of harm might apply in relation to these particular  
4 customers; is that fair?

5 A. Yes, my starting point is that if a customer -- sorry,  
6 if a market -- if competition in the market is weakened,  
7 that the customer plays competitors off one another  
8 would be important to affect the prices that they pay.

9 Q. I understand that and I think that will be the subject  
10 of not only analysis of the evidence you have given but  
11 also cross-examination of Professor Neven, but I think  
12 here you recognise that different customers can  
13 negotiate more effectively with DAF and therefore are  
14 likely to pay less than other customers. You say that;  
15 yes?

16 A. Yes.

17 Q. I just want to check. It is right that, in considering  
18 these issues of theory of harm, you have not considered  
19 any evidence in your reports about the margins on sales,  
20 in particular to Royal Mail, have you?

21 A. No.

22 Q. You have not considered evidence about negotiations  
23 between DAF and the claimants, have you?

24 A. No.

25 SIR IAIN MCMILLAN: Can I ask a question, please, Mr Beard?

1 MR BEARD: Please, sir.

2 SIR IAIN MCMILLAN: It is on paragraph 2.37 and I think in  
3 your questioning you pointed to customers that negotiate  
4 more effectively with DAF are likely to pay less than  
5 other customers. If one reads the sentence after that:

6 "This does not rule out the possibility that they  
7 paid more than they would have done in the  
8 counterfactual scenario, in which the Infringement did  
9 not occur."

10 Is that because you could see a situation or your  
11 theory underpins a situation where, for example, the  
12 claimants expect the other bids to be higher and  
13 therefore they call the customer's bluff?

14 A. Yes, that is probably right, I think. Reading this  
15 paragraph again, there is two issues bundled up into it,  
16 I think. The first issue is whether the fact that let  
17 us say Royal Mail or BT were particularly good  
18 negotiators -- whether that removes the possibility of  
19 an effect on them. I am saying no it does not because  
20 they are potentially buying from a softer market than  
21 they would have otherwise bought from. So that is the  
22 first issue.

23 The second issue is that I think you could interpret  
24 this in that the competition will be particularly  
25 important for customers that use it to get good deals,



1           and that is the second point and they are obviously  
2           related. So that is, I think, what this paragraph is  
3           seeking to explain.

4       SIR IAIN MCMILLAN: Thank you.

5       MR BEARD: Now, I do not know if you were here during the  
6           openings in court, Mr Harvey.

7       A. I was, yes.

8       Q. So you are aware that there is evidence about the  
9           dynamics of price changes through the negotiations on  
10          contracts between DAF and the claimants over time?

11      A. Yes, and you are referring -- sorry. Mr Beard, you are  
12          referring to the tables that you prepared?

13      Q. Amongst other things, but yes. I cannot take full  
14          credit for the production of the tables, but it is on  
15          this side, yes, Mr Harvey.

16                So I think you do not disagree that it is desirable  
17                for any economic or econometric analysis to be capable  
18                of being benchmarked, in particular against  
19                contemporaneous documentary material. You would accept  
20                that?

21      A. Yes, you need to use -- I am not sure -- sorry. What  
22          do you mean by "benchmark"?

23      Q. Tested against.

24      A. So, yes, in principle. It depends what it is being  
25          tested against.

1 Q. I am going to, if I may -- since you have referred to  
2 them, can I go to one of those? Do we have a spare  
3 of -- I think it is on Opus as well. I am going to go  
4 to the Royal Mail CF85.380 timeline, which is the first  
5 one I started with in opening. It is {S/7} on Opus, if  
6 you want to have it electronically, although I imagine  
7 electronically it might well be quite hard to read.

8 Yes.

9 A. Impossible, I am afraid.

10 Q. Do you have a paper copy, Mr Harvey?

11 A. Yes.

12 Q. I can take this fairly quickly, I think, and we  
13 certainly do not need to go through the whole thing.  
14 Why do we not pick it up halfway through it, a new  
15 contract. So if we pick it up in the second row,  
16 2001, May 2001, you will see that is the start of the  
17 contract number TC01003, and this is the move to Euro 3  
18 and there is a new chassis price, although actually, as  
19 you see there, the Euro 3 chassis price was not in fact  
20 higher than the previous Euro 2 chassis price. But you  
21 will see there that there was a shift over in  
22 May 2002 -- you see the green flag -- over to European  
23 list prices and a list price increase in May/June 2002.

24 I am not going to take you back, in the  
25 circumstances of what you have indicated about what you

1 have looked at here, to Professor Neven's figure 5 and  
2 figure 8, which we were in yesterday, which were the bar  
3 charts and then the dispersion charts, but they tally  
4 with these various points along the way.

5 But what we see here is price increases occurring  
6 in May/June 2002, but when it comes to the amendment of  
7 the contract, we actually see a price fall in relation  
8 to the chassis price of this model. We just picked this  
9 model for clarity. There are a number of other models  
10 in this particular batch of contracts. I think you are  
11 saying that this evidence is irrelevant to your  
12 conclusions about whether or not it is plausible that  
13 the infringement had adverse effects on Royal Mail; is  
14 that fair?

15 A. Yes.

16 Q. I see. I am guessing that your answer is going to be  
17 the same when I take you to April 2003, where we see  
18 a 4% increase in list prices. It is the end of the  
19 middle row. Again, I will not take you back to the  
20 other figures that we have had from Professor Neven, but  
21 you see there that, even after that, in the next  
22 amendment, which is effectively in the beginning of the  
23 last row, the prices fall again, and you say it is  
24 completely irrelevant to your conclusions as to whether  
25 or not it is plausible that the infringement had an

1 effect that these prices fell; yes?

2 A. The issue is, as I think is (inaudible), I cannot tell  
3 from this what the transaction prices would have been  
4 without the infringement.

5 Q. I see, and the fact that the list prices are rising and  
6 the transaction prices are going in a different  
7 direction you say is irrelevant to your analysis?

8 A. Yes.

9 Q. Right. I perhaps, then, do not need to take you to the  
10 documents, but you know, if you were here during  
11 openings, that in 2010, in late 2010, DAF had apparently  
12 indicated in the German subsidiary communications -- so  
13 this is 2010, long after headquarters have stopped being  
14 involved; it was German subsidiary exchanges -- 2%  
15 increase was planned from October 2010.

16 Is it useful to have the documents? I am just not  
17 sure that they are going to assist Mr Harvey. I just  
18 want to ask him about the proposition not the  
19 interpretation.

20 THE CHAIRMAN: Well, you have said a couple of times that  
21 headquarters were not involved post 2004. Is there  
22 evidence to that effect?

23 MR BEARD: Well, the nature of the infringement, as is set  
24 out, focuses on exchanges between the German  
25 subsidiaries, and actually the point I am focusing on is

1           where the Commission said that the infringing  
2           arrangement had become more formalised and those  
3           spreadsheets were being exchanged, that they were  
4           exchanged between the German subsidiaries rather than at  
5           any headquarters' meetings.

6           THE CHAIRMAN: Was that said in the decision, that it was  
7           limited to the German subsidiary?

8           MR BEARD: The allegations in the decision and the materials  
9           referred to are all in relation to the German  
10          subsidiaries, yes. We will no doubt come back to this.  
11          I am not asking Mr Harvey about the accuracy of those  
12          statements; I am focusing on the fact that, in 2010,  
13          there was, through the German subsidiary,  
14          a communication of a price increase intended by DAF or  
15          that was going to occur by DAF at 2% from October 2010,  
16          but I do not know if you recall that actually the  
17          internal announcement at DAF was for a fall in pricing  
18          of 25% in October 2010.

19          MR WARD: I think you need to show him that.

20          MR BEARD: I am happy to. So let us go to {I2/347T/1}.

21          THE CHAIRMAN: We can put these away?

22          MR BEARD: Yes, I am not going to ask further questions.

23                 I think we have a pretty clear steer on the answer in  
24                 relation to them. We will be coming back to them in due  
25                 course, not with this witness.

1 THE CHAIRMAN: I do not recall them being put to any of the  
2 factual witnesses, those tables.

3 MR BEARD: Well, we actually did try to put a number of the  
4 negotiation documents and contract documents that  
5 underpin those to the various witnesses, so, yes, we  
6 will come back to those issues. But, actually, no, we  
7 did work through a good deal of that material.

8 Mr Harvey, I cannot remember whether you would have  
9 been able to see this. I think you probably would have  
10 been able to see it on the screen but I am not asking  
11 you if you recall it being called up during opening.  
12 But if you see there, this is a spreadsheet that was  
13 essentially circulated by someone in the -- I think it  
14 was the Daimler German subsidiary. You will see there  
15 that it has the names of the various truck manufacturers  
16 and down at the bottom you see "DAF". What is said is  
17 that "Currently from delivery date October 2010 2%  
18 planned [increase]". Do you see that down at the  
19 bottom?

20 A. Yes.

21 Q. If you read back across the left, you will see that is  
22 by reference to different models.

23 A. Yes, I can see that.

24 Q. So this is one of the spreadsheets that the Commission  
25 decision is referring to essentially as the sort of more

1 formalised exchange of information that occurred in the  
2 later period. That 2% indication of price increase  
3 planned to occur in October 2010 we actually do not see  
4 occurring in the UK. So if we could go to {I2/360},  
5 this is one of the product information bulletins and you  
6 will see it is dated 4 October 2010. If we scroll down,  
7 you will see "Key Points":

8 "All chassis & option list prices generally reduced  
9 by 25%."

10 MR WARD: Can you read the third bullet as well, please?

11 MR BEARD: "Sales allowances are adjusted to give consistent  
12 transaction prices."

13 So the point I am dealing with here is that the  
14 communication in the spreadsheet that has been relied on  
15 in relation to the information exchange is suggesting  
16 a rise in list prices by 2%. The chassis option and  
17 list prices are in fact being reduced by 25% in the UK.  
18 But that mismatch between the material that is being  
19 communicated in the infringement and what was occurring  
20 in relation to list prices in the UK, that was not  
21 something that you took into account in the formulation  
22 of your theory of harm. That is correct, is it not?

23 A. Yes.

24 Q. I will just go to one more document that I went to in  
25 opening in relation to this. This is {I2/IC343.1/12}.

1 This is an internal DAF document and you would not have  
2 seen it other than in relation to opening, by the sound  
3 of things. It says at the bottom, fifth bullet point:

4 "DAF is the first to lower list prices drastically,  
5 competition will be confused and have to react."

6 You did not take into account any of this  
7 contemporaneous evidence in your assessment of the  
8 theory of harm?

9 A. Correct.

10 Q. I am going to move on to another topic.

11 THE CHAIRMAN: Did you take us to that in opening?

12 MR BEARD: Yes.

13 THE CHAIRMAN: Okay.

14 MR BEARD: I will double-check, but I am pretty sure I did.

15 THE CHAIRMAN: I had not noted that, but maybe ... Okay.

16 MR BEARD: I am going to move on to another topic where  
17 I want to clarify the extent to which there are actual  
18 differences between you and Professor Neven in relation  
19 to the characterisation of market conditions, because  
20 actually I think in fact the differences between you  
21 might be more limited than actually they might have  
22 appeared.

23 Now, we will work through them, but I think in  
24 relation to significant product complexity, I think it  
25 is common ground between you and Professor Neven that



1 trucks are highly customisable products and that each  
2 truck configuration is tailored to the needs of the  
3 customer, I think, is it not?

4 A. Yes.

5 Q. No dispute there.

6 I think that you do not disagree with  
7 Professor Neven that that degree of product complexity  
8 would make it more difficult to monitor whether anyone  
9 had deviated from coordination on transaction prices.

10 A. Yes, that is agreed.

11 Q. Yes, and it would make it more difficult to settle on  
12 a focal point for coordination in the first place.

13 I think you actually agree with that?

14 A. Where it is a fine-tuned transaction price focal point,  
15 yes.

16 Q. Well, even if it is not that fine-tuned in relation to  
17 identifying a focal point -- because I think  
18 Professor Neven has explained how he dealt with these  
19 matters in relation to the assessment of focal point and  
20 I think a question was raised by you about how granular  
21 that focal point was and I think Professor Neven  
22 clarified that it was not especially granular -- you are  
23 not qualifying your answer in relation to the level of  
24 granularity that Professor Neven used, are you?

25 A. I am still actually a little unsure as to what level of

- 1           granularity Professor Neven is working with.
- 2       Q. I see. Well, Professor Neven will no doubt be able to
- 3       explain that. But you are saying that -- I think you
- 4       are still accepting that, whatever the level of
- 5       granularity, complexity of the trucks in question will
- 6       make it more difficult to settle on a focal point;
- 7       correct?
- 8       A. Yes.
- 9       Q. Yes. Just in relation to another market feature,
- 10      asymmetry between manufacturers and market share
- 11      variation over time, your main point on asymmetry is
- 12      that it does not affect your theory of harm. That is
- 13      correct, is it not?
- 14      A. Yes.
- 15      Q. Right. But you agree, I think, that there is
- 16      a significant degree of asymmetry -- a significant
- 17      degree of asymmetry in the market would make
- 18      coordination more difficult. You agree with that?
- 19      A. Yes.
- 20      Q. That is in particular because it would make it harder to
- 21      reach a common view on, say, what a focal point for
- 22      pricing might be; correct?
- 23      A. Yes, all things being equal.
- 24      Q. Now, I think you suggest that Professor Neven has
- 25      overstated the degree of asymmetry in the market. Could

1 we just look at the UK to begin with? So this is  
2 {E/IC28/26}. I am just going to check. I think this is  
3 the right figure. I just want to make sure I am looking  
4 at the right ...

5 Sorry, I think it should be {E/IC10}. Page 25, if  
6 we could go back to {E/IC10/25}.

7 I think you suggest that this picture is unusual and  
8 the market shares are less asymmetrical in other years,  
9 but I think you accept this is a 2005 snapshot of market  
10 shares and so this is right in the middle of the  
11 infringement period; correct?

12 A. Yes.

13 Q. If we go on to page 28 {E/IC10/28}, so this is showing  
14 the changes in market share over a period both running  
15 before and after -- right through till after the  
16 infringement period. We see quite a degree of  
17 variability in market share over that period; correct?

18 A. Correct.

19 Q. I think your point is that around 2000 or 2001 the  
20 market shares appear to be sort of closer together.  
21 Am I capturing your point fairly?

22 A. Yes.

23 Q. But even then we see that, in 2000/2001, DAF and  
24 Volvo/Renault had around 20% of the market share whereas  
25 *Scania* only had 10, so there is still a very significant

1 variance between the manufacturers, is there not, even  
2 then?

3 A. I think the difficulty with this type of analysis is  
4 there is no real threshold for saying when the  
5 differences are large or small. So, you know, you can  
6 look in one year and see 20% and look in another year  
7 and see 30. So the extent of the differences vary and  
8 at any one point in time whether one says it is too  
9 large or too small to have an effect is a pure judgment.

10 Q. It is a pure judgment. But in a period where you say  
11 they are closest together, which is that point in  
12 2000/2001, you are accepting that two of the  
13 manufacturers essentially had twice the market share of  
14 another of the manufacturers?

15 A. Yes, I am.

16 Q. That is obviously a significant asymmetry between those  
17 three, is it not?

18 A. Yes.

19 Q. Just before we move away from this, I think you accept,  
20 do you not, that this level of variation, which if we  
21 actually -- I think if we go down the page here, we see  
22 the spread, so this is just the same data presented in  
23 a slightly different form. Everyone's market share is  
24 zeroed at 1994 and then it is the dispersion from that  
25 thereafter, but it is just a re-presentation of the

1 material above.

2 But in relation to both of those graphs, I think you  
3 accept, do you not, that this level of variation in  
4 market share could well be consistent with a market in  
5 which competitors are actually engaged in fierce  
6 competition and indicative of firms deviating from focal  
7 points, if that were the way in which it were to be  
8 suggested that there were a theory of harm from the  
9 infringement; correct?

10 A. This chart shows that it is consistent with either firms  
11 competing, as they would have done in the  
12 counterfactual, or a softened level of competition in  
13 the factual. I cannot ...

14 Q. Can I just ask one passing question in relation to that  
15 because I know that there are lots of technical economic  
16 points that may be made about market shares. But if you  
17 are Iveco, you have gone from -- you have lost almost  
18 50% market share across the period of the infringement;  
19 on the other hand, if you are DAF, you have increased.  
20 But if you are Iveco, you are really losing out in the  
21 overall battle for the market in the UK, are you not,  
22 across the period?

23 A. You are losing market share, but on this chart you  
24 cannot see the starting point of Iveco so I expect they  
25 are relatively small in terms of their market share, so

1           this chart emphasises the reduction by rebasing at zero  
2           for them.

3       Q.   Okay.  Let us go back up to the other chart because we  
4           do not want to ... if you would not mind, thank you.  So  
5           there we do see Iveco, there is no rebasing and it is  
6           a slide, is it not, downwards?  From above 20% -- it is  
7           the lightish-green line -- from above 20%, being the  
8           second-largest in the market, to being, by the end of  
9           the infringement, the smallest in the market.

10       A.  Yes.

11       Q.  That is a pretty significant change, is it not?

12       A.  Yes, it is.

13       Q.  Now, you make some further points on asymmetry and  
14           market shares, suggesting that the extent of variation  
15           is lower at the European level, but it is right, is it  
16           not, that the market conditions were different in the UK  
17           from other national markets?  You are not disputing  
18           that, are you?

19       A.  No.

20       Q.  I think at least for questions like the feasibility of  
21           coordination on transaction prices and indeed your  
22           theories of harm, what we are interested in is the  
23           conditions of the market in the UK; correct?

24       A.  We are.  I think the market shares at the European level  
25           remain relevant because, of course, later on they were

1 harmonising EU list prices.

2 Q. Well, we will come back to that. I do not think we need  
3 to go to market instability. I do just want to pick up  
4 some points on transparency and then I have one more  
5 topic to go to. I do not know whether now is a good  
6 time for ten minutes and then I should be, I would  
7 guess, around an hour at most.

8 THE CHAIRMAN: Right. Okay. Ten-minute break. Thank you.  
9 (11.26 am)

10 (A short break)

11 (11.40 am)

12 MR BEARD: Before I go to the next set of market condition  
13 questions, there was something I wanted to pick up.  
14 There was something you said was correct yesterday. It  
15 is that Professor Harrington, in his October 2021  
16 report, did refer to the fact that he was involved in  
17 the *Trucks* litigation, so your memory that in one of the  
18 reports he had referred to that fact is correct.

19 A. That is reassuring.

20 Q. I will leave you to decide on that!

21 The other point, sir, just for your notes, you asked  
22 about my reference to that document that I put --

23 THE CHAIRMAN: Yes, I understand it was.

24 MR BEARD: Yes, Day 2, pages 172 --

25 THE CHAIRMAN: Yes, I just had not marked it up.

1 MR BEARD: No, no, sorry. I am not even sure I opened it.

2 I may just provided the reference and the quote so  
3 completely understandable. We double-checked because  
4 I was having doubts.

5 THE CHAIRMAN: No, the one before you had referred to, the  
6 one about the 2%.

7 MR BEARD: Yes. That is fine. I thought I would  
8 double-check.

9 THE CHAIRMAN: Thank you.

10 MR BEARD: No problem.

11 So, on market conditions, the last point I wanted to  
12 just again test the extent of difference between you and  
13 Professor Neven is just on transparency. I am not here  
14 talking about market transparency; I actually just want  
15 to focus on the specific point about transparency of  
16 transaction prices.

17 As you know, Professor Neven says transaction prices  
18 are not transparent, and he will no doubt be  
19 cross-examined on that, but leave aside all the issues  
20 about whether you need transaction prices to be  
21 transparent for monitoring for your theory of harm, I do  
22 not think you actually disagree that transaction prices  
23 are not generally public observed in this market;  
24 correct?

25 A. Correct.



1 Q. I think you also agree that there might be two limited  
2 exceptions to this: that sometimes manufacturers had  
3 access to competitive offers during a tender process if  
4 some sort of intelligence was passed to them by the  
5 customer; correct?

6 A. Yes.

7 Q. The other might be if a customer -- if they engaged in  
8 a mystery shopping exercise with a customer; correct?

9 A. Yes.

10 Q. Just in relation to the first category, I think you also  
11 accept that competitor offers presented by customers,  
12 they could be an effective negotiating tactic in the  
13 tender discussion process; agreed?

14 A. They could be.

15 Q. But they might not always be wholly reliable information  
16 as well; correct?

17 A. I do not know.

18 Q. You do not know. Understood. On mystery shopping --  
19 I think there has been reference to it, but we have also  
20 seen that Professor Neven actually carries out a sort of  
21 empirical exercise, trying to undertake a sort of  
22 surrogate mystery shopping exercise.

23 You referred in your first report to findings that  
24 the manufacturers had access to further data through  
25 mystery shopping, but you have not looked at any

1 evidence on mystery shopping specifically in relation to  
2 your theory of harm?

3 A. No.

4 Q. I think it is clear you have not tried to carry out any  
5 sort of experiment or assessment of the relevance or  
6 reliability of mystery shopping?

7 A. No.

8 Q. So could we just go to {E/IC34/10}? This is  
9 Professor Neven's second report and at paragraph 2.13  
10 sets out his explanation of the experiment he carries  
11 out. Do you want to just refresh your memory on that?  
12 (Pause)

13 So Professor Neven did not obviously go and carry  
14 out mystery shopping himself. What he is doing is  
15 asking: if you have been a super-effective mystery  
16 shopper and you have been able to obtain transaction  
17 prices accurately, using the parameters that he has  
18 applied here, what might it at most tell you? You  
19 understand that that is the exercise he has engaged in?

20 A. Yes.

21 Q. He then calculates the average discount on list price  
22 that you would be able to calculate from this  
23 experiment, so the average discount on the transactions  
24 that he is identifying through this experiment. You  
25 understand that as well?

- 1 A. Yes.
- 2 Q. So if we go down the page to figure 1, {E/IC34/11}, we  
3 see the outcome of his experiment and the range of  
4 discounts he observes in the data. So these are  
5 accurate transaction prices and therefore perfectly  
6 accurate calculations of discount, but you still get  
7 a range which is represented by the green bar; correct?  
8 You understand that?
- 9 A. Yes.
- 10 Q. The red cross is the average actual discount. So what  
11 we see is -- it is a very simple point and I do not  
12 think you disagree with this -- the average actual  
13 discount is often not within the range that the  
14 competitor could have predicted from the mystery  
15 shopping exercise. You understand that?
- 16 A. Yes.
- 17 Q. But I think you say at one point in your report that the  
18 mystery shopping exercise actually shows that, if you  
19 did it, you would get a good handle on discounts and  
20 that the differences appear modest over time; is that  
21 correct?
- 22 A. Can you take me to the part of my report?
- 23 Q. Yes, sure, {E/IC52/22}.
- 24 A. Yes.
- 25 Q. Let us take this in two stages. First of all you say it

1 appears modest over time, but you are not suggesting  
2 that the 0.9 to 2.4% that you are referring to here is  
3 a cumulative difference, are you? You understand that  
4 is a per quarter snapshot difference, do you not?

5 A. Yes.

6 Q. Then, as I say, you are quoting the final sentence of  
7 Professor Neven's second report at 2.15. It is perhaps  
8 worth just going to that. That is {E/IC34/12}. You see  
9 there that Professor Neven -- I am not going to go  
10 through all the commentary here, but he says there:

11 "The inaccuracy of the predictions can be put in  
12 perspective. The typical list price change implemented  
13 by DAF was between 2% and 3% -- this means that the  
14 magnitude of the error that would have been made in  
15 inferring prices by the hypothetical competitor is close  
16 to and sometimes larger than the price increase that  
17 they are supposed to be able to monitor."

18 Now, I understand you say, "No, no, they do not need  
19 to be able to monitor these sorts of things"; is that  
20 right?

21 A. Yes.

22 Q. But I think you recognise and do not dispute the  
23 arithmetical observation that Professor Neven is making  
24 there, that the scale of error that we are talking about  
25 is very similar to the list price changes that are being

1 identified here.

2 A. Yes.

3 Q. Just to be clear, I think you accept this, but, as  
4 I say, Professor Neven's is a hypothetical mystery  
5 shopping exercise and actually doing mystery shopping  
6 could be a very large and costly exercise in order to be  
7 able to gather any sort of meaningful quantity of data;  
8 correct?

9 A. I do not know what a mystery shopping exercise costs,  
10 sorry.

11 Q. But you would need to have a relatively large number of  
12 data points in order for it to be of assistance,  
13 presumably?

14 A. Presumably.

15 Can we look at the chart again?

16 Q. Yes, sure. {E/IC34/12}.

17 THE CHAIRMAN: Which chart?

18 A. Sorry, the chart with the red cross on it that had  
19 a green --

20 MR BEARD: Yes, in the first report.

21 A. The first one, yes.

22 Q. It is page 10 in this report so it is just two pages  
23 out -- page 11, sorry. So it is just the page above  
24 here, I think, {E/IC34/11}. There we go. That is the  
25 chart you were referring to?

1       A. So there are various ways of putting these figures into  
2       context. Professor Neven has shown one way, which is to  
3       compare it to the list price. The point I was making  
4       was that this does give you quite a good handle on the  
5       size of the discount because it is telling you that your  
6       discount would be between, say, in the first bar, 33% to  
7       35% and in fact it is 36%. So I am merely observing  
8       that there is information here that you would not have  
9       otherwise had on that sort of order of magnitude of the  
10      discount.

11      Q. Well, let us just pause there. This is discount off  
12      list prices and I think it has been relatively clear  
13      throughout that transaction prices are vastly different  
14      from list prices, are they not?

15      A. Yes.

16      Q. What we are really focused on is whether or not the  
17      changes that come about as a result, you say, of  
18      exchanges of infringing information cause an incremental  
19      increase in transaction prices, are we not?

20      A. Yes.

21      Q. In those circumstances, the fact that it might well be  
22      widely known that there would be significant gaps  
23      between list prices and transaction prices means that  
24      that information you are talking about, what you talk  
25      about as order of magnitude indication, is not

1 meaningful here; is that correct?

2 A. No. It depends what you thought it was before doing the  
3 mystery shopping exercise.

4 Q. Well, I will leave Mr Ward to cross-examine  
5 Professor Neven on the significance of these matters in  
6 due course. I have put the point to you.

7 A further point, just I wanted to pick up one or two  
8 issues in relation to emissions, if I may. I am going  
9 to start with the timing on emissions. You have seen,  
10 I think -- we can stay in this document actually. If  
11 you can go to page 20, {E/IC34/20}. So this is  
12 Professor Neven's table in this document which sets out  
13 timing of introduction of different Euro emission  
14 standards and truck manufacturers. You have seen this?

15 A. Yes.

16 Q. I am not going to focus on particular dates because  
17 I think you have made it clear that you have not looked  
18 at detailed evidence in relation to it. But on the face  
19 of it, this table provides an indication of divergences  
20 between the manufacturers when it came to the  
21 introduction of emission standard compliant trucks.  
22 I think you agree with that.

23 A. Yes.

24 Q. As I say, you have not sought to investigate the facts  
25 in relation to timing of introduction of different

- 1 emission standard trucks, have you?
- 2 A. In terms of what caused these differences in timing,  
3 do you mean?
- 4 Q. Both in terms of the timing and the causes of the  
5 timing.
- 6 A. No.
- 7 Q. No. Now, if we go to your supplemental report,  
8 {E/IC52/33}, 2.62, you say:  
9 "... I do not consider that Professor Neven's  
10 examination of the factual timing of the introduction  
11 ... is necessarily informative as to what would have  
12 occurred in the counterfactual ..."
- 13 So you are saying here that the difference might  
14 have been greater or less absent the infringement?
- 15 A. They may. I am saying they may have been greater in the  
16 counterfactual.
- 17 Q. Could they have been less in the counterfactual?
- 18 A. Potentially.
- 19 Q. So there is a factual question, I think you accept, as  
20 to whether or not that is the case; yes?
- 21 A. Sorry, as to what is the case?
- 22 Q. A factual question as to what caused the different  
23 delays in relation to the introduction of the timing of  
24 different emission standards trucks; correct?
- 25 A. Yes, and I think there is also a question as to how the



1           infringement influenced the timing to inform the  
2           counterfactual scenario as well.

3       Q.    You have read the evidence of Mr Borsboom and were you  
4           in court for his evidence yesterday?  I imagine you  
5           were.

6       A.    Yes.

7       Q.    He has explained that DAF's projects for these new  
8           emission standards spanned many years and there were  
9           delays and technical issues.

10      A.    Hmm.

11      Q.    So he is providing a factual account of the causation of  
12           the timing of the introduction of the emission  
13           standards, is he not?

14      A.    Yes, from his perspective, obviously.

15      Q.    From his perspective, as the head of engineering and  
16           a board member?

17      A.    Yes.

18      Q.    Right.  Just to be clear, you are not disagreeing with  
19           any of his evidence or taking issue with it?

20      A.    I cannot.

21      Q.    I did not think so.

22      THE CHAIRMAN:  I do not think it is really for him.

23      MR BEARD:  No, that was a question perhaps too far.

24           I recognise that.

25           The second point I wanted to ask you about relates

1 to one or two of the issues about the requirements for  
2 entering into this. You have referred to the fact that  
3 there was an agreement not to enter into Euro 3 standard  
4 compliant trucks before it was compulsory to do so, so  
5 you have emphasised in your reports, I think, the  
6 agreement that was being identified here; correct?

7 A. Yes, but not exclusively that.

8 Q. You do refer to an agreement but we can see from the  
9 table that the participants were not sticking to that  
10 agreement; correct? I can go back to the table if you  
11 want. Sorry. So if we go to the table, it is  
12 {E/IC34/20}. You see there on the left-hand side --  
13 after the different models, you see the legal dates?

14 A. Yes.

15 Q. You recognise there that they are not sticking to that  
16 agreement to leave introduction till that legal date?

17 A. Yes.

18 Q. So does that not undermine the credibility of your  
19 suggestion that the introduction dates would have been  
20 different in the counterfactual, even leaving aside  
21 Mr Borsboom's clear evidence?

22 A. Well, it still, I think, depends on what they would have  
23 done in the counterfactual without the agreement. So  
24 I recognise that they are not delivering on  
25 October 2001, but that is not the same as saying that

1           they would not have chosen a different date in the  
2           counterfactual.

3       Q.   I see. We will no doubt come back to that in closing.

4           So you refer -- if we go to {E/IC52/30}, you refer  
5           at 2.57 to Professor Neven's observations that  
6           differences in timings of introductions of new emission  
7           standard compliant trucks would be a further factor in  
8           making it difficult to coordinate the passing on of  
9           costs, and I think you would agree with that; correct?

10       A.   Yes.

11       Q.   Then I think there you are just saying that the date of  
12           introduction would have been public information once the  
13           trucks were introduced and it could be observed once it  
14           had happened. Is that what you are saying in that  
15           paragraph?

16       A.   Yes.

17       Q.   You are not suggesting that a manufacturer could have  
18           monitored whether its competitor was able and committed  
19           to launch its new standard earlier or later, are you?

20       A.   No.

21       Q.   If we just go on to 2.58, {E/IC52/30}, you say that  
22           Professor Neven has not considered the possibility that  
23           coordination on timing was complementary to the rest of  
24           the infringement. You mean to the exchange of gross  
25           list pricing information, other information exchange;

1 correct?

2 A. Yes.

3 Q. You would accept I think, would you not, that the first  
4 question we have to ask ourselves is whether the  
5 coordination on timing was successful, would you not?

6 A. Yes, or it had an effect.

7 Q. If it was not, then it cannot be complementary to  
8 anything?

9 A. Yes.

10 Q. If we could just go back to page 29, {E/IC52/29}, so  
11 2.54, do you just want to remind yourself of the points?  
12 This is about costs now rather than about timing,  
13 I should say. (Pause)

14 A. I have read it.

15 Q. So you are dealing here with the point made by  
16 Professor Neven. You quoted what he says. He says --  
17 I am summarising -- that it would be very difficult to  
18 monitor whether or not the manufacturers had implemented  
19 a particular charge for a new emission standard.  
20 Actually I just want to test the extent to which you in  
21 fact agree with him. I think you agree with the second  
22 sentence in this quote, that new emission standards  
23 trucks were, so far as DAF was concerned, accompanied by  
24 other improvements to the vehicle in addition to the new  
25 engine strictly required for compliance with the

- 1 standard; correct?
- 2 A. Yes, that is my understanding.
- 3 Q. You take issue, we know, with whether or not the  
4 improvements would have resulted in a willingness by  
5 customers to pay a margin premium above the incremental  
6 cost, and that is going to be a matter that will be  
7 picked up next week, but you are not disagreeing about  
8 the improvements here. So presumably you do not  
9 disagree that the transaction price paid by a customer  
10 would include --
- 11 A. Sorry, Mr Beard. Apologies. When you say  
12 "improvements", I know that changes were made to the  
13 vehicle. Of course I cannot stand in the shoes of  
14 a customer and know whether they were improvements from  
15 their perspective, if you see what I mean.
- 16 Q. I see.
- 17 A. Sorry.
- 18 Q. No, that is fine. So are you suggesting that the trucks  
19 were not improved?
- 20 A. No. No, I am not. I am just saying I know changes were  
21 made to the trucks.
- 22 Q. Right. Okay. I will not question you about cab comfort  
23 and extra seats and space --
- 24 A. No.
- 25 Q. -- those sorts of benefits.

1           So, presumably, just to be clear, you do not  
2           disagree that the transaction price paid by a customer  
3           would include the cost of the additional features as  
4           well as the cost of the new emissions standard?

5           A. No, I do not disagree.

6           Q. It would be possible, would it not, for a competitor --  
7           sorry, you do not suggest, I do not think, that it would  
8           be possible for a competitor, even if they knew the  
9           transaction price paid by any particular customer, to  
10          check what cost DAF had passed on to the consumer in  
11          relation to compliance with new emission standards  
12          specifically, do you?

13          A. No.

14          Q. It is right, is it not, that different manufacturers  
15          undertook their own developments to produce trucks which  
16          were compliant with the different standards -- you  
17          understand that?

18          A. Yes.

19          Q. -- and that they used different technologies?

20          A. Yes.

21          Q. I am not going to test you on your EGR versus SCR but  
22          you recognise that EGR and SCR are acronyms for two  
23          different technologies that were used in relation to the  
24          introduction and compliance with Euro 4 and Euro 5  
25          standards; correct?

1 A. Yes.

2 Q. You would accept, I think, that the incremental costs of  
3 those two different technologies, even though they are  
4 seeking to ensure compliance with the same standard,  
5 would likely be different?

6 A. I do not know.

7 Q. You do not know?

8 A. No.

9 Q. But if they are fairly radically different technologies,  
10 you would assume there is a good likelihood that the  
11 costs are going to be different, presumably?

12 A. I do not know.

13 Q. But what it would do, it would make it very hard to  
14 agree on what the additional charge for particular  
15 trucks complying with the standards would be if there  
16 are different technologies that involve different costs?

17 A. No, it would not.

18 Q. But you would then be suggesting that there should be  
19 different levels of increase depending on which  
20 technology is deployed?

21 A. Well, first of all, I do not know that the costs are  
22 different. That seems to be fundamental in the  
23 question. Second of all, I think it is a separate issue  
24 as to the addition amount that you decide to charge. So  
25 it may well be that the costs are different but they

1           agree a common amount for the introduction of new trucks  
2           that satisfy the new Euro standards. So I do not see  
3           the connections that you have made.

4       Q. But if the agreement were to pass on the incremental  
5           costs of compliance, then if you have two different  
6           technologies with two different costs, you would accept  
7           that reaching an agreement in relation to that would be  
8           more difficult?

9       A. It depends what -- precisely what is meant by the  
10          passing-on of costs because two costs could be quite  
11          different and you pass them on with the same increase.

12      Q. But one of the problems that would arise is that, if  
13          different manufacturers are using different  
14          technologies, they would not have any way of essentially  
15          assessing what the incremental costs of the other  
16          technology were, would they?

17      A. I do not know. I would think they would have  
18          a reasonably good handle in terms of making a decision  
19          as to which technology to adopt. I do not know.

20      Q. They might make a global assessment, but when it came to  
21          the actual implementation further down the project line,  
22          they would not have a sense of the incremental costs of  
23          a different project, would they?

24      A. Again, I do not know.

25      Q. But I think you agree that it would not be possible to



1 monitor the costs in the way that has been described by  
2 Professor Neven in the quoted passage at 2.54. You  
3 agree with that, I think.

4 A. Yes. I do not think you could split out the price into  
5 different bits and monitor it.

6 Q. At 2.55, if we just go down, the point that you actually  
7 make here is that it would still be, you say, plausible  
8 for the infringement to have an effect and you refer  
9 back to your section 2A and paragraph 2.9. Can we just  
10 go there? It is {E/IC52/11}. Can you see that?

11 A. Yes.

12 Q. Do you want to just cast your eye? (Pause)

13 A. Thank you.

14 Q. This is where you are talking about your theory of harm  
15 being DAF or other manufacturers may be making different  
16 pricing decisions absent the information that you say is  
17 obtained through the infringement. So would it be fair  
18 to understand that you agree with Professor Neven or you  
19 are not disagreeing that coordination on the passing on  
20 of costs is not plausible but your theory of harm is  
21 that information obtained may nonetheless have affected  
22 DAF's pricing decisions? Is that a fair appraisal of  
23 your position?

24 A. I think I agree with the statement that it would be hard  
25 to agree and monitor that agreement for the slice of the

1 truck price that relates to the emission standard, yes,  
2 but I do not think that is required for that type of  
3 exchange to have an effect on prices.

4 I think I have answered your question, Mr Beard, but  
5 there were a few negatives in it.

6 Q. We will study the transcript with interest in due  
7 course.

8 But just finally in relation to these issues,  
9 I think you are aware of the evidence of Mr van Veen  
10 last week in relation to Euro 4 and Euro 5. There was  
11 a lot of information in the public domain through trade  
12 press about the incremental cost to consumers of Euro 4  
13 and Euro 5. You are aware of that?

14 A. Yes.

15 Q. You would agree that the fact that the information about  
16 incremental costs of new emission standards was widely  
17 available in the public domain is relevant to the  
18 assessment of whether the infringement would have any  
19 effect in this regard; correct?

20 A. Yes.

21 MR BEARD: I do not have any further questions for you,  
22 Mr Harvey. I do not know, the tribunal may do and  
23 Mr Ward may also.

24 THE CHAIRMAN: Mr Ward, do you have any re-examination?

25 MR WARD: I have no re-examination actually. Thank you.

1 THE CHAIRMAN: No re-examination, okay.

2 I know Mr Ridyard has some questions. I have just  
3 got two.

4 Questions by THE TRIBUNAL

5 THE CHAIRMAN: Yesterday you were asked about your use of  
6 the word "plausibility" --

7 A. Yes.

8 THE CHAIRMAN: -- or "plausible". You suggested that where  
9 you said something was plausible or possible, what you  
10 actually meant was "more likely than not", although  
11 I think you slightly rowed back from that at some stage.

12 Can you clarify what you mean by "plausible" in  
13 relation to your theory of harm?

14 A. Yes. What I was seeking to do was to find routes or  
15 understand the routes by which this infringement had  
16 taken effect. I identified several that I think could  
17 work in this context. I am not saying that it is  
18 inevitable that they would have an effect. I have not,  
19 and as you found yesterday, I backtracked somewhat.  
20 I had not reached a view on probability of effect,  
21 partly because I looked at the theory of harm alongside  
22 the overcharge analysis. That was the purpose of the --  
23 that was the way I approached the problem. So when  
24 I say "plausible", I mean I have found avenues that  
25 I think would work in this context.

1 THE CHAIRMAN: So plausibility as such is not a sort of  
2 specialist economic term?

3 A. No.

4 THE CHAIRMAN: You are using it in its ordinary sense?

5 A. Yes.

6 THE CHAIRMAN: Is it right to say that the use of it first  
7 emerged from Professor Neven's report and --

8 A. Yes.

9 THE CHAIRMAN: Because he was saying it was implausible and  
10 you picked up on that then in your supplemental report  
11 about theory of harm.

12 A. That is right. The genesis of -- hopefully my  
13 colleagues will correct me, but the genesis of the  
14 plausibility phrase came from some time ago when we were  
15 thinking about disclosure and it was suggested that  
16 Professor Neven would undertake an empirical  
17 plausibility analysis, so that was the original point at  
18 which the phrase I think came into use.

19 THE CHAIRMAN: Okay. Thank you.

20 The other issue I just wanted to ask you a question  
21 about: it was put to you yesterday that the IKP targets  
22 would not feed through into dealer prices -- do you  
23 remember that?

24 A. Yes.

25 THE CHAIRMAN: -- because the dealers do not themselves have

1 the IKP figures.

2 A. Yes.

3 THE CHAIRMAN: You accepted that, but there are two stages  
4 in relation to the deal with the dealers. There is the  
5 sale from DAF UK to the dealers and the dealers then  
6 sell on to their customers.

7 A. Yes. I was reflecting on that and I am not sure, with  
8 hindsight, which level of the supply chain we were  
9 talking about at that time.

10 THE CHAIRMAN: Yes. Do you want to clarify what your answer  
11 is in relation to that?

12 A. So I think -- for the prices that the dealers set for  
13 its customers, I can see that there is not a direct link  
14 with IKP, but for the prices that DAF sets to the  
15 dealer, I can see that there would be through the IKP  
16 margin --

17 THE CHAIRMAN: It could feed in?

18 A. It could feed in and therefore ultimately feed in  
19 indirectly to end prices.

20 THE CHAIRMAN: All right. Thank you.

21 MR RIDYARD: Yes, just a few questions, if I may, Mr Harvey.

22 The first one goes back to the Harrington paper.  
23 I just wanted to be clear to what extent you are relying  
24 on Harrington's theory of harm. To put it colloquially,  
25 have you subcontracted the theory of harm to Harrington

1 or do you have your own theory of harm?

2 A. The way -- I started with my own theory of harm and it  
3 was not developed in a sort of mathematical way, in the  
4 way that Professor Harrington has done. It was based  
5 more on an economic intuition, which was the information  
6 exchange created information for the rivals that they  
7 did not have before. I believe the working assumption  
8 is that they used it and that it was useful and that  
9 that would possibly give rise to a change in pricing  
10 decisions. So it was kind of broader than  
11 Professor Harrington's theory of harm.

12 Then I paused and I asked, well, the difficulty with  
13 that, as has been identified, is, well, that could tell  
14 you the price would go higher or the price would go --  
15 but they could make any use of that with that  
16 information. So then I went back to: how do I call  
17 that? How do I work out which is more or less likely?  
18 I considered that from an economics perspective, the  
19 fact that the exchange did continue for a long period of  
20 time is relevant because it indicates that the use of  
21 that information was profitable for the defendants and  
22 it was all that chain of thinking that, in very broad  
23 terms, got me into my theory of harm.

24 So Professor Harrington's work, the usefulness of  
25 that, I considered, was firstly that, well, he is

1           essentially a world-renowned expert in the theory of  
2           collusion, he prepared a paper that studied a theory  
3           that seemed highly relevant to the trucks market and was  
4           able to add some academic rigour to my economic  
5           intuition, and so I think that is how I rely on it, as  
6           sort of support for that intuition rather than  
7           outsourcing it.

8           MR RIDYARD: Okay. So one way to characterise the  
9           Harrington theory, which may be accurate or may not,  
10          I am not sure, but it would be to say if the facts fit  
11          within his sort of range, the Goldilocks range, if I can  
12          use Mr Beard's phrase, then information exchange can be  
13          bad, but if it does not fall within that range, then it  
14          would be inappropriate to consider information exchange  
15          as being anti-competitive. Do you agree with that or  
16          do you think there are forms of information exchange  
17          which do not fall within the Harrington range and yet  
18          can still be bad for competition?

19          A. I think that is probably the right interpretation of the  
20          Harrington model. The way that he ultimately calls  
21          between the low price outcome and the high price outcome  
22          is through the stage zero that was discussed, which is  
23          the decision to exchange information. So that sort of  
24          links quite closely to the way that I thought about the  
25          theory, sort of the broader theory of harm, which was,

1 well, if they persist in doing this, it sort of suggests  
2 there is a profit motive, otherwise they would stop.

3 I do not think that Professor Harrington's model is  
4 exhaustive in this case in terms of capturing all of the  
5 routes by which an information exchange could affect  
6 competition, so it is very much focused on the list  
7 price/net price feature of the exchange. But in this  
8 case of course we know that there are other features of  
9 the information exchange, some of which we have spoken  
10 about over the last few days. I do not know how that  
11 would play out in this type of mathematical model and  
12 the extent to which that would put more into the  
13 Goldilocks range or less.

14 MR RIDYARD: Right. Thank you.

15 Now, just focusing on your theory of harm and this  
16 distinction between unilateral conduct and coordinated  
17 conduct, sometimes this is not such an easy distinction  
18 to pin down and I know people sometimes disagree on  
19 where the line falls, but how would you characterise  
20 your theory of harm? Is it one of unilateral conduct or  
21 coordinated conduct and can you explain to me what the  
22 difference is?

23 A. Yes. I agree with the observation about it actually  
24 being quite hard to locate and draw a strong distinction  
25 between unilateral and coordinated conduct and I think



1 I said earlier in the session that, in a sense,  
2 everything that we are talking about here arises because  
3 of coordination.

4 I think the -- in my theory of harm I was sort of  
5 open-minded in terms of the routes through which price  
6 effect could arise. I think I leaned more on the  
7 unilateral-type conduct. It seemed to me it aligned  
8 more closely with the way the Commission described the  
9 effect of the information exchange.

10 Where I think there is some force in the coordinated  
11 story is -- and I think where there is a difference  
12 between myself and Professor Neven is that some of --  
13 I do not think to have a coordination story you need to  
14 be agreeing on every individual transaction price.  
15 I think it could be a higher level coordination around  
16 price increases, either for Euro standards or percentage  
17 price increases. So I think that type of coordination  
18 I think also requires -- is less stringent I think in  
19 terms of the type of monitoring that would be required.

20 So I think that is a feature of my theory of harm.  
21 So it is a lot if -- if you have a pure coordinated  
22 story that: the transaction price level over here, you  
23 have a unilateral story over here, I think I locate  
24 somewhere in the sort of towards unilateral but with  
25 potential elements of coordination, albeit at a higher

1 level than Professor Neven has considered.

2 MR RIDYARD: One way in which the distinction is drawn is  
3 coordinated theories require repeated -- multi-stage  
4 games, so you get to learn and feed back from what  
5 happened last time, whereas unilateral conduct, you can  
6 get anti-competitive outcomes or higher priced outcomes  
7 at least, even if it is only a one-shot game, to use the  
8 jargon. So if you think about that distinction,  
9 where -- do you rely on it being multi-stage? You said  
10 you thought it was relevant that it lasted a long time,  
11 the infringement, but do you rely on that for your  
12 theory of harm?

13 A. No, it is not essential in my theory of harm. So, as  
14 you say, the outcome of a unilateral theory of harm, it  
15 can be a one-shot game. The elements where I talk  
16 about -- where I have spoken about in terms of the  
17 agreement, the sort of higher level, that obviously does  
18 require repeated interaction and that is indeed what we  
19 seem to have here.

20 For me, the repeated interaction, without knowing  
21 how the information was used, suggests that there is  
22 some utility in it and some benefit in it and so it is  
23 used more indirectly to sort of sort the possible  
24 outcomes of the unilateral theory, (inaudible).

25 MR RIDYARD: Okay. Understood.

1           You said a few times in your evidence that  
2           monitoring does not need to take place -- you do not  
3           need to monitor transaction prices because indeed it  
4           would be hard, maybe impossible, to do that. You said  
5           that you think monitoring can take place at different  
6           levels in order to satisfy your theory of harm. But can  
7           you tell me what kind of monitoring you think did happen  
8           or needed to happen in order to meet the criteria for  
9           your theory of harm?

10          A. Yes. So for the unilateral-type theory, I think it is  
11          sufficient to believe that and understand that your  
12          profit position is better than it would have been, so  
13          I think it is very much looking at what you have done,  
14          what you have -- how well you have achieved. So I think  
15          that would be basic commercial information.

16                 For the --

17          MR RIDYARD: Sorry, but compared to what?

18          A. Sorry?

19          MR RIDYARD: Compared to what? Obviously you can look at  
20          your profits in any period, but what are you comparing  
21          them to or what are you monitoring?

22          A. Well, what you are monitoring could include whether you  
23          have achieved a higher rate of profit when the cartel --  
24          sorry -- when the infringement began compared to prior  
25          to that or an improved price -- you were able to

1           implement an improved price in line with the information  
2           you have exchanged. So I think it is that sort of  
3           level, so almost matching your expectations with what  
4           you have agreed.

5           MR RIDYARD: Against expectations?

6           A. Yes. Then in terms of the coordination story, the  
7           simple point I was making is obviously there what you  
8           are trying to do is understand whether your rivals have  
9           adhered to the tacit agreement that you have reached or  
10          not. One way of doing that would be to look at  
11          transaction prices, but, as discussed, we do not think  
12          that is available.

13                 So the other way of doing it, though, is to  
14          understand whether, again, your sales and potentially  
15          their sales are consistent with the agreement or whether  
16          it looks like somebody has stolen -- has deviated and  
17          stolen a march on you. So I do not think it points to  
18          you having to see the transaction price of others. You  
19          need to know whether you have lost out or not and why.  
20          I think in that regard, the information that we have not  
21          discussed and that was exchanged could be useful in  
22          that.

23          MR RIDYARD: Thank you.

24                 My last question, which I should warn you might be  
25          quite a long one, but it is sort of my last question:

1 just going back to Professor Neven's pass-through  
2 analysis where he looked at the -- in his conclusion  
3 anyway -- the lack of a linkage between list price  
4 announcements and transaction price changes. It was in  
5 section 5 of his plausibility report. We went to it  
6 yesterday. Obviously we have a chance to question  
7 Professor Neven on that in due course but I just would  
8 find it helpful to get a summary of your critique of  
9 that analysis. What is it you think in that analysis  
10 is -- what is your criticism of that analysis?

11 A. One criticism is sort of an empirical criticism, which  
12 is that -- we have to be careful about -- we might need  
13 to bring up the --

14 MR RIDYARD: Yes.

15 A. I have spoken about various analyses over the last ...

16 MR RIDYARD: It is in section 5 of Professor Neven's  
17 plausibility report.

18 MR BEARD: {E/IC10} is the document and we will just find  
19 the page. Sorry, sir, if you are looking for section 5,  
20 I think it is at page 32, {E/IC10/32}. I do not know if  
21 that was, sir, what you were looking for or is it the  
22 dispersion figure at --

23 MR RIDYARD: It is the charts.

24 MR BEARD: That is at 42, I think, {E/IC10/42}. Is that the  
25 one?

1 MR RIDYARD: Yes, I think the neatest one was -- just  
2 scrolling through -- was probably the --

3 MR BEARD: That was the one I took.

4 MR RIDYARD: The one on page 42, yes, paragraph 5.20. Thank  
5 you very much.

6 A. So there is a measurement issue which is, in order to  
7 identify this basic chassis, Professor Neven has  
8 deducted options from the list price and then has  
9 prorated, I think, the net price so it is the same  
10 discount. There is a measurement issue which  
11 I understand the rationale for, which is try and compare  
12 like for like. So that is the first. So we are not  
13 actually looking at prices of trucks that were  
14 actually -- sorry, we are looking at trucks that were  
15 actually sold but not the price they were sold at. That  
16 is the first issue.

17 The second issue is that many of these analyses are  
18 sort of presented as comparing -- we spoke about this  
19 yesterday -- comparing like with like, so -- because we  
20 are looking at the same truck model over time and I have  
21 a slight difficulty with that, which is that: that you  
22 have got the same truck model is not the same as  
23 comparing like with like because there may be different  
24 customers making up these dots which affect the way  
25 these numbers move around. So that is the second issue.

1           Then the third issue is I think more fundamental  
2           than that: what are we trying to understand? I think  
3           what we are trying to understand is the extent to which  
4           list prices contain relevant information about your  
5           future net pricing and I do not think that this  
6           necessarily tells us that because I do not know if  
7           I spoke to someone and said, "My list price is going up  
8           5%", what that person would interpret that to mean in  
9           terms of their net pricing, *ex ante*, and so I show what  
10          we saw as the kebab chart, which showed there is a very  
11          strong correlation between list prices and net prices,  
12          and I consider that to be a relevant indicator as well  
13          of the extent to which a change in list price might be  
14          taken to mean a change in the net price.

15                 So those are the broad issues that --

16         MR RIDYARD: I think yesterday you said -- that is helpful  
17                 so far. Yesterday you said that what you really wanted  
18                 to compare would be the effect of the actual list prices  
19                 against the counterfactual list price announcements that  
20                 would otherwise have been made had there not been some  
21                 coordination.

22         A. Yes, and they are sort of related points about  
23                 controlling for other things that affect the net prices,  
24                 which I think perhaps got lost yesterday in my answer.  
25                 So, yes, that is the related point. So I am saying on

1           these charts, I think the charts show the list prices  
2           rising and the net prices falling. I do not know how  
3           those net prices would have evolved without the  
4           information exchange, and that is what we really need to  
5           know to understand the relationship between list and net  
6           prices. What we see here is how much the net price  
7           changes when a list price changes, but that is not  
8           really what we are getting at.

9           MR RIDYARD: Okay, thank you.

10          THE CHAIRMAN: Can I just ask one follow-up on that? You  
11           said in terms of problems that you had with this figure,  
12           this graph, that there would be different customers over  
13           time.

14          A. Yes.

15          THE CHAIRMAN: Obviously there would be. How does that  
16           actually affect the issue?

17          A. It seems to me the way that it could affect it is those  
18           different customers could have different net prices  
19           before the change in net prices, so it is hard to  
20           understand whether the change that we are seeing here is  
21           a consequence of the customer mix changing between two  
22           periods or a lower pass-through rate.

23          MR RIDYARD: You are talking about customers with more or  
24           less bargaining power, for example?

25          A. Potentially, yes.



1 THE CHAIRMAN: Thank you.

2 All right. I think those are all the questions from  
3 us. There are no further questions arising out of that?

4 MR BEARD: I will come back to deal with some of these  
5 things in submissions, I think.

6 THE CHAIRMAN: All right. Thank you.

7 Thank you, Mr Harvey. That is the end of your first  
8 session with us and you are released from purdah,  
9 I think --

10 MR BEARD: Yes.

11 THE CHAIRMAN: -- is the arrangement.

12 MR BEARD: Yes. That is absolutely fine for this. At some  
13 point it might be good to come back to the very helpful  
14 protocol and so on in relation to --

15 THE CHAIRMAN: The coordinated -- the concurrent evidence.  
16 I have got coordination on the mind!

17 MR BEARD: Yes, I say it enough.

18 I do not know whether now is the moment or whether  
19 we should leave this until later, but we had a question  
20 about the role of purdah in relation to the operation of  
21 the protocol. But for now we have no concern for  
22 Mr Harvey being released and, similarly, at the end of  
23 Professor Neven's evidence, he will be released as well.

24 THE CHAIRMAN: Well, we had the discussion at the PTR,  
25 I think, about that issue and --

1 MR BEARD: Yes.

2 THE CHAIRMAN: -- whether they should all be released after  
3 the concurrent session or whether they stay in  
4 throughout, to be equal to both sides.

5 MR BEARD: Yes, that was what we wanted to just clarify in  
6 relation to it.

7 I do not know whether the best thing to do is to  
8 sort out that housekeeping, have an early stop or  
9 whether or not it is sensible to move on to  
10 Professor Neven now.

11 THE CHAIRMAN: Well, we still have another 25 minutes.

12 MR WARD: I would like to move on, if we may, sir.

13 MR BEARD: That is fine.

14 THE CHAIRMAN: We can move straight on. We can sort out  
15 that housekeeping at the end.

16 MR BEARD: That is fine.

17 THE CHAIRMAN: All right.

18 MR BEARD: So I call Professor Neven.

19 PROFESSOR DAMIEN NEVEN (affirmed)

20 THE CHAIRMAN: Thank you, Professor Neven. Please sit down  
21 and make yourself comfortable.

22 Examination-in-chief by MR BEARD

23 MR BEARD: Professor Neven, good morning. You have provided  
24 three reports in relation to this particular topic in  
25 the course of proceedings. I am just going to take you

1 to each of those electronically but you may also have  
2 a hard copy bundle. I do not know what is in that hard  
3 copy bundle but there may well be an index on the front  
4 of it that indicates you have copies of your three  
5 reports. But if I may, I will just call them up  
6 electronically.

7 A. Okay.

8 Q. So the first, I think, is at {E/IC10}. Do you recognise  
9 this as the front page of your first report?

10 A. Yes.

11 Q. If we could just go to page 61, {E/IC10/61}, is that  
12 your signature, Professor Neven?

13 A. Yes, it is.

14 Q. Is this report true to the best of your knowledge and  
15 belief?

16 A. Yes.

17 Q. Let us go to the next one, which is {E/IC34}. This is  
18 your second or reply report on theory of harm. If we  
19 could go to page 28 there, {E/IC34/28}, that is your  
20 signature again; correct?

21 A. Yes.

22 Q. Again, true to the best of your knowledge and belief?

23 A. Yes.

24 Q. Then the third is at {E/IC61}. This is your  
25 supplemental report. Page 26, {E/IC61/26}, and again,

1 true to the best of your knowledge and belief?

2 A. Yes.

3 Q. Just in addition to that, there is a joint expert  
4 statement at {E/77}. This is the joint expert statement  
5 and you recognise it?

6 A. Yes.

7 Q. If we go down to page 3, {E/77/3}, again your signature  
8 and your entries in this are true to the best of your  
9 knowledge and belief; correct?

10 A. Yes.

11 MR BEARD: Professor Neven, I do not have any questions for  
12 you. I would bear in mind that we are in open session,  
13 so if there were to be any material that you wanted to  
14 refer to that is confidential, please do indicate and we  
15 will arrange for your answers to be provided in  
16 confidential session, otherwise, I do not have any  
17 questions for you. Mr Ward will have questions for you  
18 and the tribunal may also have questions for you. It  
19 looks like you are receiving gifts! Mr Ward will no  
20 doubt navigate you round those files that you have just  
21 received --

22 A. Thank you.

23 MR BEARD: -- because I do not know the content of them.

24 Thank you.

25 THE CHAIRMAN: Mr Ward.

1 Cross-examination by MR WARD

2 MR WARD: Good afternoon, Professor Neven.

3 Do you prefer electronic or hard copy when we are  
4 looking at documents?

5 A. In general I prefer hard copies.

6 Q. Well, we will do our best. Could we please start with  
7 your first report, which is {E/10/4}.

8 A. Yes.

9 Q. The pagination I am going to use is the  
10 bundle pagination, not the internal pagination. So this  
11 was your original page 2 but it has now been renamed  
12 E/10, page 4.

13 A. Okay.

14 Q. I would like to look at footnote 3, please. Can you see  
15 that?

16 A. Yes.

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

25 I would like to explore that footnote with you. You

1 say here you started work on the investigation in 2013,  
2 so that was before -- it was after the dawn raids but  
3 before the statement of objections, before access to the  
4 file or before the settlement procedure, was it not?

5 A. There was indeed in April 2013, so it is before the  
6 statement of objection, yes.

7 Q. You will be aware that we have written to DAF's  
8 solicitors to try and get more information about the  
9 basis of your instructions during that period. Can we  
10 look at the letter which you will find in tab 1 of the  
11 bundles in front of you and electronically it is  
12 {J4/354}. This is the latest letter we received with  
13 the fullest information on this topic. Can we go  
14 towards the bottom of the page, please, to paragraph 4?  
15 This is in answer to our request for disclosure of the  
16 scope of instructions. If I can just read this out and  
17 then we will talk about it:

18 "As to the Commission's investigation specifically,  
19 we understand that Professor Neven was instructed  
20 in February 2013 to consider potential economic  
21 arguments that might be advanced by the Commission and  
22 lines of enquiry that DAF might pursue in order to  
23 address them."

24 So I am going to call that the first phase of your  
25 work.

1           "Subsequently Professor Neven was instructed [by  
2           DAF] to ... give his economic opinion on the potential  
3           theories of harm and objections put forward by the  
4           Commission following its investigation ... DAF and its  
5           European counsel ... have been unable to locate  
6           a formal letter of instruction. Compass Lexecon has  
7           also confirmed that it cannot locate a letter of  
8           instruction ..."

9           So it seems as though this is all we have to go on  
10          and I would like to ask you about it.

11          So the first phase was considering potential  
12          economic arguments that might be advanced by the  
13          Commission and lines of enquiry DAF might pursue, and  
14          that is distinguished from the second phase, in which  
15          you actually gave economic opinion on theories of harm.

16          So at that first stage you had no formal document  
17          setting out the Commission's case, like a statement of  
18          objections, so if you were advising DAF at that stage  
19          they must have given you some form of instructions; yes?

20        A. Well, at the time they described to me the scope of the  
21        infringement.

22        Q. So did they give you documents at that stage?

23        A. No.

24        Q. So was it written instructions?

25        A. There were -- I mean, there was a formal letter of

1 instruction between DAF and CRA because at the time  
2 I was affiliated with CRA, and so I think that there  
3 was -- there must have been because I would not imagine  
4 CRA to do this work without a formal letter of  
5 instruction so there must have been one.

6 Q. As well as a formal letter saying "We hereby instruct  
7 you under the following conditions", you must have been  
8 provided with content, actual information of content,  
9 about the cartel if you were going to advise at that  
10 stage?

11 A. I remember that in my first meeting in 2013, I was  
12 explained by DAF what the scope of the investigation  
13 was. Yes, I was explained.

14 Q. So is that it? Just a single meeting?

15 A. There was a meeting in April 2013, yes.

16 Q. Is that the only meeting you had at that stage?

17 A. Yes.

18 Q. So you received no instructions at all at that stage?

19 A. I had a meeting and then they asked me to consider the  
20 type of conduct that -- or the type of evidence that the  
21 Commission was likely to have uncovered and to consider  
22 indeed potential theories of harm and potential  
23 empirical evidence.

24 Q. So to know what kind of evidence the Commission was  
25 likely to have uncovered, they must have told you about



- 1 the cartel?
- 2 A. They told me very little. I mean, they basically told  
3 me at the time about their pricing, so they explained to  
4 me how the pricing operated and the role that was -- or  
5 the role that was not played by list prices. I remember  
6 very clearly that, you know, the only thing they  
7 described to me at that time in that first meeting was  
8 the link or the absence of link between list price and  
9 transaction prices.
- 10 Q. So you advised on the basis of just one meeting and no  
11 documents at all?
- 12 A. They -- at that time I did not get any documentation  
13 from them, no.
- 14 Q. Did you have more than one meeting?
- 15 A. The only meeting that I remember is in April 2013.
- 16 Q. What sort of work product did you deliver? Was it  
17 a written opinion?
- 18 A. Honestly I cannot recollect. The first report that  
19 I provided was after the statement of objection --
- 20 Q. After the statement of objection?
- 21 A. Yes. I do not think that I did before the statement of  
22 objection because -- when did the statement of objection  
23 come out? It must have been 2013.
- 24 Q. November 2014.
- 25 But you were advising them on "potential economic

1 arguments ... advanced by the Commission and lines of  
2 enquiry that DAF might pursue in order to address them".  
3 That is advising DAF on how it might defend itself, is  
4 it not?

5 A. I guess, you know, as an expert economist, what I saw as  
6 my role is to look at the type of conduct that they were  
7 describing to me and to see whether there was an  
8 economic theory that could indeed analyse that type of  
9 conduct and what sort of consequences you would obtain  
10 in the context of those economic theories, as well as  
11 considering, I mean, the evidence that might be brought  
12 to bear on these theories.

13 Q. So in substance it is the theory of harm issue that we  
14 are also debating today?

15 A. Yes.

16 Q. But what the no doubt very carefully drafted solicitors'  
17 letter says is that you were considering "potential ...  
18 arguments that might be advanced by the Commission and  
19 lines of enquiry that DAF might pursue in order to  
20 address them". That means in order to meet the  
21 Commission's concerns, does it not?

22 A. Okay. I mean, clearly the first part is correct, that  
23 they explain to me the type of conduct that may be  
24 uncovered by the Commission and the type of theory that  
25 could be used in order to analyse that conduct, and of

1 course in particular to show that this conduct was  
2 anti-competitive. From the very beginning I -- you  
3 know, that is what you refer as the theory of harm that  
4 is discussed here and that is the way I saw it at the  
5 time.

6 Q. Sorry to press my question again. Considering lines of  
7 enquiry they might pursue in order to address them means  
8 helping them formulate a defence, does it not?

9 A. I mean, this is what the solicitors here say, yes.

10 Q. But you must have talked to them about this. They must  
11 have asked you, did they not?

12 A. No, actually.

13 Q. This letter was drafted without your input, Professor?

14 A. This letter was drafted with my input, but the  
15 particular wording that is used here is not my wording.

16 Q. So you do not think it is accurate?

17 A. I think that -- I do not think that at the time I acted  
18 as a consultant. Honestly not. I mean, I think that at  
19 the time they drew to my attention the type of evidence  
20 that the Commission might uncover, that was before the  
21 statement of objection, and they asked me to think  
22 about, you know, the theories of harm that might be  
23 considered in light of this evidence, and that is what  
24 I did.

25 Q. So it is just not true, then, that you considered lines

1 of enquiry they might pursue in order to address them?  
2 Is this solicitors' letter untrue? It is difficult for  
3 us. We do not have any documents.

4 A. No, there is no document, no.

5 Q. Did you not see this letter in draft?

6 A. I did see this letter in draft, yes.

7 Q. You did not disagree at that stage with what is said  
8 there?

9 A. I did not disagree at that stage, no.

10 Q. What I am suggesting to you is that your role here  
11 sounds very different from an independent expert and  
12 sounds exactly like a consultant. You do not agree?

13 A. No.

14 Q. Let us look at the next stage. At this stage you say  
15 you were thinking about theories of harm, so if we go  
16 back to the letter, you say you were instructed to  
17 consider and give economic opinion on the potential  
18 theories of harm following -- put forward by the  
19 Commission following its investigation. At that stage  
20 I infer that there was a statement of objection.

21 A. Yes, that is right.

22 Q. The theories of harm issues you were considering at that  
23 stage were, again, the same ones that you are  
24 considering in these proceedings? Do you mind saying  
25 "Yes" for the transcript when you are nodding?

1 A. Yes.

2 Q. Thank you. I will try and remind you. At that stage  
3 you have the statement of objections --

4 A. Yes.

5 Q. -- and we know that access to the file was given at  
6 around the same stage, so did you have access to the  
7 file?

8 A. No.

9 Q. Were you given documents from the file?

10 A. No, I was only given access to the statement of  
11 objection.

12 Q. Did you get instructions from DAF about their view on  
13 the statement of objections?

14 A. No.

15 Q. So they asked you to advise on the statement of  
16 objections but without telling you their version of  
17 events?

18 A. Well, they gave me the statement of objection and they  
19 asked me, I mean, to think about the theories of harm on  
20 the basis of the facts that were reported in the  
21 statement of objection and to think about evidence that  
22 might validate or invalidate these theories of harm.

23 Q. Sorry, you said "think about evidence that might  
24 invalidate" --

25 A. I said "validate or invalidate". I mean, you know, when

1           you are confronted with evidence about conduct, when you  
2           build a theory, I mean, you need to look at the evidence  
3           that might actually disprove the theory or prove the  
4           theory or disprove alternative theories.

5       Q.   So you were asked to think about evidence that might  
6           validate or invalidate --

7       A.   I was asked to act as a professional economist, I mean,  
8           as an expert professional economist, which is to look at  
9           the theory, to consider the theory and then look at  
10          whether the evidence or some evidence can be brought to  
11          bear in order to indeed check whether this theory is  
12          borne out by the facts.

13      Q.   When you say "evidence could be brought to bear", what  
14          kind of evidence do you mean?  Factual evidence or  
15          economic evidence or both?

16      A.   I mean it is evidence like the type of evidence that  
17          I am discussing in the context of these proceedings, so  
18          it is economic evidence.

19      Q.   In order to give that -- to found that economic  
20          evidence, just like in these proceedings, you would need  
21          to have some factual content, would you not?

22      A.   Yes.

23      Q.   Is it really your position that you were given no  
24          factual instructions at all other than the statement of  
25          objections?

1       A. After the statement of objection, I mean, as far as  
2       I remember, I was not given particular instructions by  
3       DAF and I was given data and I was given actually the  
4       transaction data -- actually it was a subset of the  
5       transaction data that I used in these proceedings and  
6       not with respect to UK, obviously. The transaction data  
7       that was used was with respect to some countries in the  
8       Continent.

9       Q. You were given no file documents at all?

10      A. No.

11      Q. You were given no instructions from the client?

12      A. No.

13      Q. Did it occur to you that it might be useful to hear  
14      their version of events?

15      A. Of course. I mean, as I pointed out to you earlier,  
16      they explained to me, I mean, why they thought this --  
17      what the Commission had uncovered did not lead to  
18      anti-competitive effect, so I heard, you know, from the  
19      very beginning why they thought that there was no  
20      effect, that the conduct uncovered by the Commission did  
21      not lead to anti-competitive effect. This I heard. yes.

22      Q. So that is factual instructions, then, is it not?

23      A. Okay, I heard a narrative from them and this narrative  
24      has been constant throughout. It is the idea that --  
25      what they say is that the way in which competitor

1 interactions was taking place and the role that list  
2 price do not have with respect to transaction prices is  
3 such that the conduct uncovered by the Commission from  
4 their perspective did not lead to effect.

5 Q. How was that narrative delivered to you?

6 A. This narrative was delivered in the context of a meeting  
7 with the person who was the general counsel of DAF at  
8 the time.

9 Q. So you had one meeting, did you?

10 A. I mean, I know for sure that I had a meeting in  
11 April 2013. This for sure I remember correctly because  
12 I was going on holiday immediately afterwards and so  
13 I remember. But in 2014, after the statement of  
14 objection, I do not remember the sequence of meetings.

15 Q. But the --

16 A. I think that -- I mean, I really -- no, I do not think  
17 there was any. I mean, they gave me the statement of  
18 objection, they asked me to write a report on the basis  
19 of the data they had given to us, but I do not think  
20 there was any -- maybe there was a meeting but I do not  
21 remember.

22 Q. So there was a single report that you wrote?

23 A. Yes.

24 Q. I see.

25 THE CHAIRMAN: Presumably you would have a diary that would



1 show whether there were further meetings?

2 A. Yes, I mean -- but, you know, this is 2014; right?

3 THE CHAIRMAN: Yes.

4 A. Yes.

5 THE CHAIRMAN: I am not expecting you to remember, but if

6 you had a diary, that might jog your memory.

7 A. But I do not think I have a diary. I have sort of the

8 archive of my diary in 2015 or 2014.

9 MR WARD: So there was a formal report?

10 A. Yes.

11 Q. Did you discuss the report with them?

12 A. I sent them the report. They provided comments on that

13 report, as far as I remember.

14 Q. There may have been meetings as well?

15 A. I do not think there was actually.

16 Q. Did you have any further involvement after the report

17 that you wrote --

18 A. No. I mean, that is the interesting thing -- one of the

19 interesting events, that then there was complete silence

20 from them until they contacted me after the settlement.

21 Q. Well, let us look now, if we may, in the few minutes we

22 have left before lunch, at your letter of engagement,

23 which is under that tab 1 that you are in now and it is

24 page 5, which was included with the solicitors' letter

25 we have just looked at, {J4/354/5}. This is a letter on

1           30 August 2016 and that is about six weeks after the  
2           decision was published. The heading is "... truck  
3           investigation and damage claims".

4           A. Yes.

5           Q. So by then the investigation is over, the decision is  
6           out. What the letter says is that you and Mr Andreu  
7           "will lead this engagement and provide expert  
8           [consultancy] services ... The services ... may include  
9           providing expert testimony".

10          A. Yes.

11          Q. So this engagement is broader than expert testimony, is  
12          it not?

13          A. Yes, the wording suggests it is broader, yes.

14          Q. So can you tell us about the other work you have done  
15          under this other than providing expert testimony, as you  
16          are today?

17          A. I mean, in terms of substance, the work that I have done  
18          since 2016 has been of a constant nature. I have been  
19          considering possible theories of harm, I have been  
20          considering evidence with respect to the validation or  
21          the invalidation of those theories of harm and then of  
22          course I have undertaken work in order to assess whether  
23          there was indeed an overcharge, not only in the UK but  
24          also in other countries.

25          Q. Some of it has been in the form of expert testimony and

1           some of it has been in the form of consultancy, has it?

2       A. Yes, I am not exact -- what I am trying to say is that  
3           I do not personally see the distinction very clearly.

4       Q. No.

5       A. What I see -- what I know is what I have done; okay?  
6           What I have done has been, in terms of substance,  
7           consistent and coherent over time.

8       Q. What you have done, as you say, has involved considering  
9           evidence.

10      A. Yes.

11      Q. So you have seen documents from the file in that  
12          capacity?

13      A. From the Commission's file, you mean?

14      Q. Yes.

15      A. Actually I never looked at the Commission's file in  
16          detail. I mean, I was given access to the Commission's  
17          file, yes. I never looked at the Commission's file sort  
18          of systematically. I was also given extracts from the  
19          Commission's files by the solicitors.

20      Q. So you have never looked at it so you would not know  
21          whether it contained material that was consistent with  
22          your accounts in the course of (inaudible)?

23      A. I mean, what I have of course looked at in detail is the  
24          Commission's decision. I have also looked at the  
25          decision of the Commission towards *Scania* and I have

1 looked at the judgment. I have had access to the  
2 Commission's file but I never looked into every single  
3 piece of evidence and, as I said, I was given access --  
4 I was actually given an extract of the Commission's file  
5 that was prepared by the solicitors.

6 Q. Did you get any help in terms of factual narrative from  
7 your clients?

8 A. What do you mean?

9 Q. Well, their explanation of events, because you have got  
10 the decision -- as we can see they are fighting cases  
11 all over the place -- have they also told you their  
12 version of events?

13 A. I think that -- I mean, as I mentioned earlier, from the  
14 very beginning they gave me a narrative as to why they  
15 thought that this infringement did not lead to effects,  
16 but, you know, this is their narrative and I am an  
17 economist and I am using, you know, the methodologies,  
18 the methods of my field, in order to assess the evidence  
19 and to assess, validate or invalidate theories.

20 Q. By assessing the evidence, you mean the decision, the  
21 judgments, the database you refer to and the very few  
22 file documents?

23 A. Yes. I think that what I mean by this is that, in  
24 developing a theory of harm, you need to relate to the  
25 facts of the case and, I mean, the main source of

1 information in order to think about possible theories of  
2 harm for me was the Commission's decision and actually,  
3 I mean, the statement of objection, but the statement of  
4 objection is very similar in any event to the  
5 Commission's decision. So these are -- you know, the  
6 facts, the description of the conduct that you have in  
7 the Commission's decision, of course, is important in  
8 order to think about possible theories of harm.

9 So I used that in order to think about possible  
10 theories of harm in the same way that I used the  
11 documents that were extracted from the Commission file  
12 in order to think about possible theories of harm.  
13 Then, when I came to the stage of trying to validate or  
14 invalidate these theories of harm, of course I used data  
15 and in particular I used data that I obtained from DAF  
16 with respect to the list price -- well, with respect to  
17 the transaction prices from which list prices could be  
18 inferred.

19 Q. So you used data but you did not use anything like  
20 a sort of factual narrative or account from your clients  
21 of what they thought was going on?

22 A. I mean, what I have had access to is the so-called  
23 pricing statement of DAF. I mean, DAF has this pricing  
24 statement --

25 Q. What, the one that is disclosed in these proceedings?

1 A. Yes, that is right.

2 Q. Let me just show the tribunal what that is and then we  
3 will stop, sir. I see the time. It is in your bundle  
4 and I am afraid I do not know -- someone will tell me  
5 the reference, but electronically it is {C/9}. It is  
6 18 in your bundle, which will be in the second volume.  
7 Is this what you are talking about?

8 A. Yes, this is it. I see.

9 Q. Yes, and this was prepared under an order of the  
10 court -- of the tribunal I should say, and it is dated  
11 December 2019. So you do not mean this document,  
12 do you?

13 A. Sorry?

14 Q. You do not mean that document, do you? It is  
15 December 2019.

16 A. Yes, I mean that document.

17 Q. Okay. So from 2016 until that document in  
18 December 2019, did you have no factual instructions from  
19 your client?

20 A. No, I had no factual instructions. I mean, I heard the  
21 narrative from them about, you know, what they thought  
22 about the conduct and why they thought it was not  
23 anti-competitive. In terms of formal documents, I mean,  
24 this pricing statement is, you know, setting out how  
25 they see their pricing practices.

1 Q. In 2019?

2 A. That is in 2019. There were previous versions of that,  
3 clearly. I have seen previous versions.

4 Q. You have seen previous versions which were presumably  
5 drafts?

6 A. Yes.

7 Q. I see. Before we stop, sir, if I may, just two more  
8 questions. Did you ever see the leniency or settlement  
9 submissions of DAF? I am only asking if he has seen  
10 them. I am not going to ask him what is in them.

11 A. No, I have not. As I said before, it was complete  
12 silence from DAF from the time at which I submitted the  
13 report after the statement of objection until  
14 August 2016, after the decision.

15 Q. My final question for this morning: you never thought to  
16 ask them for any such instructions?

17 A. No, because, you know, my role as expert economist is  
18 very clear to me.

19 THE CHAIRMAN: What is that?

20 A. My role as expert economist, I mean, is to consider  
21 possible theories of harm in light of the evidence that  
22 is in the Commission's file, in the Commission's  
23 decision and try to assess whether these theories of  
24 harm are supported by the facts and, in particular,  
25 relying on the data that I obtained from DAF.

1 THE CHAIRMAN: You understand that your duty is to assist  
2 the court --

3 A. Yes.

4 THE CHAIRMAN: -- by giving independent economic evidence?

5 A. I mean, I understand that my overriding duty is a duty  
6 to assist this court and, you know, in ... Yes.

7 THE CHAIRMAN: Did you say in your report -- I have not seen  
8 it -- that you were engaged by DAF as a consultant to  
9 provide advice?

10 A. Yes, I think -- as I tried to explain, I do not think  
11 that I was -- I never -- I do not think I ever saw  
12 myself as being a consultant to DAF. I think that,  
13 throughout the beginning as a -- I saw myself as an  
14 expert economist and I know the consistency of what  
15 I have done over time, and the consistency of what  
16 I have done over time is to independently look at  
17 possible theories of harm and evidence with respect to  
18 those theories of harm and of course to look at whether  
19 there is evidence of an overcharge, yes.

20 THE CHAIRMAN: I think it was your letter, was it not, to  
21 DAF saying -- the engagement letter that you were  
22 providing expert consulting services to DAF?

23 A. Yes. No, I agree with you, but this letter makes  
24 a distinction between expert work and consultancy work.  
25 What I am saying is that, throughout this procedure,





1 Q. You had a narrative from DAF which you said contained  
2 what they thought about the conduct and why they thought  
3 it was not anti-competitive?

4 A. That is right. One thing, I also had the *Ryder*  
5 pleading.

6 Q. The *Ryder* pleading as well, okay.

7 You explained you did not ask any questions to  
8 elicit further factual information from your clients?

9 A. Factual information about these pieces of evidence that  
10 were given to me?

11 Q. That could conceivably be relevant to your work.

12 A. Well, I had lots of questions about the data, of course,  
13 and we had a lot of interactions with DAF in order to  
14 understand what this data is about and how to interpret  
15 it.

16 Q. About the data but not about the cartel?

17 A. About the data, not about the -- I mean, the  
18 interpretation of the conduct or DAF's interpretation of  
19 the conduct, no.

20 Q. Did you get anything else at all from DAF's lawyers --  
21 not just DAF, but DAF's lawyers?

22 A. Of course I had been involved in procedures outside the  
23 UK and so outside the UK, because I was involved in  
24 these procedures, I got the pleadings from the  
25 plaintiffs in those actions and I also got the reports

1           that were submitted by these plaintiffs in these other  
2           procedures.

3           Q. So if we go back now, please, to your footnote 3, which  
4           is {E/10/4} -- thank you -- just at the bottom of the  
5           page, so at the end of the footnote, you say:

6                     "Nevertheless, the only material that I have relied  
7           on in making this report is set out in Annex B."

8           We can find annex B on page -- sorry, let me check  
9           the reference before I ask you to go there. Page 88,  
10          please, {E/10/88}. Sorry, in the hard copy as well,  
11          I cannot help you, Professor Neven, other than the  
12          internal numbering is 86 at the back of your first  
13          report. Do you have it?

14          A. I have seen the electronic version --

15          Q. Okay. Thank you. That is good enough.

16                     What we see is publicly available documents, a large  
17          number of reports and studies, and then that goes on for  
18          about four pages. Then we have a lot of database  
19          information from page -- line 30 through to 52. Then if  
20          we pick up at 93, please, {E/10/93}, line 53 at the  
21          bottom of the page, there are a couple of entries which  
22          look like file documents. Over the page, please,  
23          {E/10/94}, there is four more file documents and then  
24          a list of PIBs.

25          A. Yes.

- 1 Q. So there are hardly any file documents referred to  
2 there, are there?
- 3 A. What do you mean by "file documents"?
- 4 Q. Documents from the Commission's file. I am so sorry.
- 5 A. No, it does not appear here, but I have received an  
6 extract from the Commission's file by the solicitors.
- 7 Q. Which was wider than the ones you have referred to here?
- 8 A. Which was what?
- 9 Q. Which was wider than the documents you have referred to  
10 here?
- 11 A. Yes, it was a selection of about 30 documents from the  
12 file.
- 13 Q. 30 documents, and the narrative that you received from  
14 DAF, that is not listed in here either, is it? The  
15 narrative of --
- 16 A. No, that is the narrative that I referred to earlier,  
17 that I actually got from the very beginning from DAF in  
18 the first meeting that I got from them, and that has  
19 been explained already.
- 20 THE CHAIRMAN: Can I just clarify? Annex B is the documents  
21 that you have relied upon in your report?
- 22 A. Yes.
- 23 THE CHAIRMAN: It is not all the documents that you have  
24 seen?
- 25 A. That is right.

- 1 MR WARD: That narrative that you received is of obvious  
2 relevance, is it not, to the theory of harm?
- 3 A. It is their narrative, but, you know, this is the way  
4 they look at it and, you know, my role as an independent  
5 expert is to look at the facts as reported in the  
6 Commission's file and to consider possible theories and  
7 to consider whether there is evidence that is consistent  
8 or inconsistent with it.
- 9 Q. Can we now go back -- this is tab 1 of your bundle,  
10 Professor Neven, and electronically it is {J4/354}.  
11 This is your letter of engagement again, at page 6 this  
12 time, {J4/354/6}. Now, here is a list of the people who  
13 are going to be involved; you by name and then the  
14 others by just job title. There are hourly rates which  
15 I am not going to read out, but this is from 2016. Are  
16 these still -- sorry, do you have it?
- 17 A. I do not see it, no.
- 18 Q. I am so sorry. So tab 1 of your hard copy bundle is  
19 the --
- 20 A. Okay, I have got it now.
- 21 Q. You have got it now. Thank you so much. Page 6 which  
22 says "The hourly rates ..." below.
- 23 A. Yes.
- 24 Q. It says they have been discounted in accordance with the  
25 prior engagement. So were these the rates that were

- 1 applied through the sort of 2013 period as well?
- 2 A. I suppose so, yes.
- 3 Q. Are they still the rates?
- 4 A. Have these rates changed?
- 5 Q. Yes.
- 6 A. Honestly, I do not know because I do not follow these  
7 matters, but I suppose they must have changed over time  
8 with inflation and things because this is, what, 2016?
- 9 Q. Yes.
- 10 A. They must have changed because of, you know,  
11 negotiations, but I am not party to that.
- 12 Q. Okay. Can you give us a sense, though, of how many  
13 people are involved working on these damages claims at  
14 these different levels? You are obviously named as the  
15 sole principal.
- 16 A. Yes.
- 17 Q. Then you have a senior vice-president.
- 18 A. Yes.
- 19 Q. Is that Mr Andreu?
- 20 A. Mr Andreu, that is right, who has been promoted since,  
21 I think.
- 22 Q. Congratulations to him. So there is just one senior  
23 vice-president?
- 24 A. Yes.
- 25 Q. Then vice-presidents, how many?

1 A. Honestly I have no idea.

2 Q. You have no idea. So you would not be able to tell us  
3 how many people in these other positions are helping  
4 with these cases?

5 A. At the various levels, the breakdown at the various  
6 levels, no, I could not tell you this.

7 Q. Could you even guess how many people are involved?

8 A. I mean, across Europe -- you mean with respect to all of  
9 the --

10 Q. Yes.

11 A. I mean, it is a large number. It is probably 20/25,  
12 something like this.

13 Q. I want to ask you now about those other proceedings, so  
14 if we can keep this open and go back now, please, to  
15 page 2 of the document, which is back in Travers'  
16 letter. This time I want to look at paragraph 7, so if  
17 we could go down a little bit further please. It says:  
18 "As you know, Professor Neven has been engaged ...  
19 in his capacity as an independent expert, to produce  
20 analyses ... in follow-on damages litigation across  
21 Europe ... This engagement commenced on 30 August 2016  
22 and since then, more than 1,700 claims have been issued  
23 against DAF in 19 jurisdictions (albeit that expert  
24 evidence has not yet been filed in all of these claims).  
25 Whilst Professor Neven has not been named as an expert

1 in each of the claims, or in each jurisdiction, he would  
2 have contributed, at least at a high level, to the  
3 analysis in each jurisdiction and claim."

4 So would that high-level analysis be an example of  
5 your consultancy services then?

6 A. I do not see anything specific there in terms of what  
7 you would describe as consultancy. Again, I have been  
8 asked by DAF to consider claims in these other  
9 jurisdictions and my role is the same. My role is  
10 always to see whether there is anything specific in  
11 those claims such that I might change my position on the  
12 theories of harm and, again, with respect to these other  
13 claims, there is an issue of first specific evidence  
14 because these other claims are in different  
15 jurisdictions, in different countries and the evidence  
16 that is brought to bear on these other claims is  
17 different.

18 Q. Is there an expectation that you will in fact be the  
19 designated expert if these claims go to trial?

20 A. I do not know about that. I mean, I have not been  
21 appointed as an expert in other claims so far. I think  
22 that I have been nominated as an expert for a claim in  
23 Norway.

24 Q. Are you saying that is the only one in which you have  
25 produced a report?



1 A. No, I have produced reports in -- with respect to other  
2 claims. I have produced reports in France, I have -- we  
3 have produced a report in Norway, I have produced  
4 reports in the Netherlands and I think one in Belgium,  
5 yes.

6 Q. But it is possible, is it not, that you will act as an  
7 independent expert in more of these claims, is it not?

8 A. It is a possibility. I mean -- but at this stage,  
9 I have only been appointed as an expert in these  
10 proceedings here and, as I said, in Norway.

11 Q. But your appointment came after several years of your  
12 involvement in these proceedings, did it not?

13 A. Yes, yes. What do you mean "these proceedings"?

14 Q. Sorry, these particular claims, because the process of  
15 appointment came, I think from recollection, in 2020.

16 A. Yes.

17 Q. By then you had already given some procedural witness  
18 statements?

19 A. By 2020 I had of course done some work since it started  
20 in 2013. Now, whether it is the timing of the other  
21 claims, I do not know. I think the other claims are  
22 later than this claim.

23 Q. So this claim was brought in December 2016 and we know  
24 that even here in the UK claims are still coming in --

25 A. Yes.

1 Q. -- because, as the press reported this week, there were  
2 a whole load of new claims by supermarkets. Is that  
3 right also across these jurisdictions there are other  
4 claims still coming in?

5 A. I do not know.

6 Q. You do not know. Would it be fair to say, though, that  
7 there are claims at all levels of progress across Europe  
8 at this stage, some just starting, some moving towards  
9 trial perhaps?

10 A. Yes.

11 Q. Here in the UK you are involved in these cases, you are  
12 instructed in *Ryder Dawsongroup*, which is for trial in  
13 2023. Are you also acting in the so-called VSW claims,  
14 the household claim?

15 A. I think that this has not been decided, as far as  
16 I know.

17 Q. It has not yet been ruled upon by the court, but is it  
18 a plan that you should act in that case?

19 A. This is still being discussed.

20 Q. I see. We also have class actions waiting for  
21 certification here. Is it proposed that you will act in  
22 those if they are certified?

23 A. I think this is still under discussion. I mean, I did  
24 submit a report in reply to a report in the context of  
25 one of these claims but I do not know about the next

1 steps so ...

2 Q. I see. Now, in these claims alone, these claims alone,  
3 you have put in 13 expert reports to a total of  
4 967 pages, plus five joint statements to a total of  
5 another 150 pages, so that is a huge amount of work,  
6 is it not?

7 A. It is a lot of work indeed, yes.

8 Q. It was a lot to read them!

9 So in these other claims that you are involved in,  
10 they are also going to be a huge amount of work,  
11 are they not?

12 A. Yes, but I expect that there are some increasing  
13 returns. That is to say that a lot of the discussion is  
14 taking place in the context of these proceedings, a lot  
15 of discussion about the evidence is taking place here,  
16 and I suspect that in the other claims it is going to be  
17 more efficient, so to speak.

18 Q. Are you working more or less full-time for DAF at the  
19 moment?

20 A. No, not at all.

21 Q. You have been working for them for nine years so far.

22 A. Hmm.

23 Q. It is obvious, is it not, that there are years and years  
24 more of potentially large volumes of work for you to  
25 look forward to here, is it not?

1 A. I do not think it is clear. I mean, we will see what  
2 happens --

3 Q. We will see what happens. You are singing for your  
4 supper then, Professor Neven.

5 A. We will see what happens with these proceedings, we will  
6 see what happens, you know, whether I am fit to  
7 continue.

8 Q. If your view that it is not even plausible and if it was  
9 the overcharge is zero were to be upheld, that would  
10 probably make you quite popular with DAF, would it not?

11 A. Yes, but I think if there is a ruling by this court that  
12 the overcharge is zero, then I think that somehow the  
13 problem will be different.

14 Q. That is a good euphemism.

15 So really what I want to put to you is: are you not  
16 at all worried that this sheer length and depth of  
17 engagement might colour your judgment or give rise to  
18 confirmation bias on your part?

19 A. I think you are raising an issue which I am very well  
20 aware of. I think that when you work as an expert for  
21 a long period of time, there is always a concern about  
22 cognitive capture. I think it is true of any expert.  
23 It is also true of Commission officials. I mean, when  
24 they are working in an investigation, they are subject  
25 to cognitive capture. I am aware of the fact that this

1 is a concern and actually I became acutely aware of this  
2 when I was working in the Commission and I think that it  
3 is important to put in place procedures in order to  
4 avoid these forms of cognitive capture.

5 THE CHAIRMAN: What is the phrase you are using?

6 A. "Cognitive capture". By "cognitive capture",  
7 I essentially mean -- one of the forms of cognitive  
8 capture that was referred to is confirmation bias, and  
9 I think that is a concern, is that if you are working  
10 for too long on a particular issue, you basically start  
11 to select evidence. You basically only look for  
12 evidence that might actually confirm what you initially  
13 believed. This is very well described in psychology  
14 because, I mean, you do not want to find something that  
15 questions the validity of the judgment that you had  
16 initially. I mean, you do not want to -- I mean, the  
17 reality to reveal that your judgment initially was not  
18 sound.

19 I think it is important to be aware of it and it is  
20 important to put in place some procedures in order to  
21 control for it, to minimise it to the extent possible  
22 and I think that I have tried to do that. I try to do  
23 that generally. Actually I was very well aware, as  
24 I said, when I was at the Commission about this and  
25 I tried to control for it. You know, how do you do it

1 in practice? I think there are two ways to do it in  
2 practice -- actually three.

3 The first one is to make sure that you constantly  
4 question how your evidence -- your judgment evolves  
5 against first principles. I mean, you always need to go  
6 back to basic theory, to basic principles, to see  
7 whether the opinion that you are developing, the  
8 assessment that you are developing, makes sense against  
9 first principles.

10 The second one I think is to make sure that you  
11 have -- I would not say "competing", but you have  
12 different teams looking -- supporting you in looking at  
13 evidence and looking at theory so that there is  
14 a confrontation of evidence among the different teams.

15 I think that the third dimension, which is related  
16 to the second one, is that it is important to have very  
17 critical people in your team, so it is important to have  
18 people who will look at what you say and be very  
19 critical and it is not difficult to find such people.  
20 It is not difficult to find people who, because of  
21 career concerns, because of their own incentives, will  
22 want to criticise what you say. So I am aware of that  
23 and I think that is something which is universal, by the  
24 way, it is not only me, and I think I have tried to have  
25 safeguards against this.

1 MR WARD: Professor Neven it is a wholly exceptional level  
2 of instructions that you have had in this case, is it  
3 not, 19 jurisdictions, 1,700 claims? Have you ever  
4 encountered anything like that before?

5 A. No.

6 Q. No, and your opinion in this case is that it is not even  
7 plausible that this 14-year cartel, with the object of  
8 restricting price competition, had any effects on prices  
9 that customers paid. That is the opinion you have  
10 reached, is it not?

11 A. With respect to the UK?

12 Q. With respect to the UK.

13 A. With respect to the UK in particular, the opinion,  
14 indeed, as I have written in my report, is that it is  
15 highly unlikely.

16 Q. Yes. Well, not even plausible is what you say. Has  
17 your view ever changed on this? Has that been your view  
18 throughout?

19 A. No.

20 Q. It has never changed?

21 A. No, no, it has changed.

22 Q. It has changed?

23 A. Yes, of course. The first time I was confronted --  
24 I must admit, the first time I was confronted with DAF's  
25 narrative, I was highly sceptical. This is the sort of

1 narrative you get from firms who have been involved in  
2 coordination, so I was very sceptical and, I mean, over  
3 time, as we have -- as I have, with the team, looked at  
4 potential theories, as I have accumulated evidence, yes,  
5 I have formed the opinion, the professional opinion,  
6 that it is highly unlikely that, in the case of the UK,  
7 the infringement led to significant effect.

8 Q. One of the things that you will have heard debated in  
9 court at the beginning of this trial is why DAF carried  
10 on this cartel at all.

11 A. Yes.

12 Q. Your letter of instructions tells us nothing about that,  
13 does it, and indeed DAF's witnesses tell us nothing  
14 about that. You have said you have complied with the  
15 guidance for the instruction of experts and I can show  
16 you or I can just read you the relevant paragraph. Tell  
17 me if you would like to see it. It says:

18 "Experts should try to ensure they have access to  
19 all relevant information held by the parties [as read]."

20 So that puts you under a sort of duty to make  
21 enquiries, does it not?

22 A. Yes.

23 Q. But you have never asked DAF any questions about why it  
24 carried out this cartel --

25 A. Yes, I did.



1 Q. Oh, you did?

2 A. I did, and actually I have had sort of two answers  
3 about, you know, why this took place at all. I think  
4 the significant one is one that also appears actually in  
5 the *Scania* decision and in the *Scania* judgment and it  
6 actually also -- the same argument appears in one of the  
7 witness statements here. I think it is that of  
8 Mr Ashworth. The idea being that, in particular in the  
9 context of the German exchange, what DAF was interested  
10 in is to look at the structure of the list prices of  
11 their competitors. So they were interested in the list  
12 prices themselves and in the structure of the list  
13 prices.

14 Q. Professor Neven, this is not something we can see in  
15 your instructions. It is not something we can see in  
16 your report -- excuse me --

17 MR BEARD: No, I think the witness needs to be able to  
18 answer the question.

19 MR WARD: I thought he had.

20 A. If I can just continue?

21 Q. Sure.

22 A. I mean, this is something that makes economic sense and  
23 it is possible to develop an economic argument or an  
24 economic theory such that you might have an interest in  
25 finding out about the list prices of your competitor

1 simply in order to find out the relative competitiveness  
2 of your competitor across different types of products.  
3 That is essentially what *Scania* is also saying in its  
4 decision and what is said in the judgment.

5 I think that the economic logic is really one in  
6 which, whenever a downstream agent, whether it is  
7 a dealer or whether it is a seller, is finding out about  
8 the preferences of a customer, I mean, it has to find  
9 out about what is important for the customer, what are  
10 the dimensions of the product that are important for the  
11 customer and it also has to find out, of course, I mean,  
12 what the competitors can offer.

13 I mean, if you think about a customer that a dealer  
14 has to make an offer to, that might have, say,  
15 preferences with respect to the weight of the truck or  
16 the amount of weight that the truck can carry and  
17 preferences with respect to the size of the engines,  
18 there may be a trade-off between them. So the seller  
19 will have to find out about this trade-off but it is  
20 important in making the offer to also find out what the  
21 competitors can offer. I mean, where is it that, say,  
22 DAF is strong relative to Mercedes Benz in providing  
23 a product that really tailors to the need, the  
24 preferences, of the customer?

25 I understand that this is the logic that you --

1           actually that is the logic that was put to me, it is the  
2           logic that also is I think in Mr Ashworth's statement,  
3           and you can imagine that having information on the list  
4           prices of competitors can actually help in targeting the  
5           offers to the customer better in light of what you know  
6           about the relative competitiveness of your competitor.  
7           Indeed the list price actually conveys information about  
8           that.

9           Q. Professor Neven, I want to just distinguish between two  
10           things that are very important here. One is  
11           instructions you have had on the facts and the other is  
12           your economic analysis and the theory that you have just  
13           been explaining.

14                    Have you had instructions on the facts about why DAF  
15           entered into this cartel?

16           A. Okay, what exactly it means, "instruction on the facts"?

17           Q. Factual information from your client about why they  
18           conducted this cartel.

19           A. No.

20           Q. So what you have just been saying --

21           A. Is ex post rationalisation on the basis --

22           Q. By you?

23           A. Not only by me.

24           Q. Sorry, let me be clear about my question.

25           A. Yes.

1 Q. You said it is ex post rationalisation. Is it factual  
2 instructions from DAF about why they were doing it --

3 A. No.

4 Q. -- or is it what you think would make sense of what they  
5 were doing?

6 A. Okay. Let me be clear about what is the source of my  
7 information here. On the one hand I have had  
8 conversations with DAF in which they put forward this  
9 rationale. They said, "What we are really interested in  
10 is to find out the relative prices of competitors as  
11 revealed by the list prices". They told me that.

12 I see that in the witness statement of Mr Ashworth  
13 he is saying the same thing. Finally --

14 Q. Perhaps you can show me that, please.

15 A. -- if I look at the decision in the *Scania* case, you get  
16 the same rationale. The court even discusses it. Now,  
17 I do not know whether -- and I suppose not -- but I do  
18 not know whether DAF has argued that this was the reason  
19 for the information exchange. What I am saying is that,  
20 as an economist, I can develop an economic theory in  
21 which this makes sense.

22 THE CHAIRMAN: Have you said this in any of your reports?

23 A. No.

24 THE CHAIRMAN: You said that you have received two answers,  
25 I think, from DAF. That was one of them. What was the

1 other answer? I think you said that you received two  
2 answers on why they carried on this cartel for 14 years.  
3 A. The other answer that I had from them is that they were  
4 interested in participating in this information exchange  
5 because it was for them a way to find out about market  
6 intelligence, I mean, because the conversations in the  
7 information exchange would, for instance, give them  
8 information about the MAUT. I mean, how the market was  
9 evolving or the information about future costs. So it  
10 was essentially getting more information about the MAUT  
11 and supply conditions.

12 MR WARD: Professor Neven, if I have understood it  
13 correctly, what is emerging from your answers is that  
14 you have relied on information from DAF about why it  
15 entered into this arrangement that is nowhere in your  
16 report, is nowhere in the documents that are appended to  
17 it and is nowhere in DAF's witness evidence.

18 Can I show you the passage from Mr Ashworth I think  
19 you are referring to and you can tell me if it is the  
20 wrong one?

21 A. Yes.

22 Q. It is {D/22/31} and I think Mr Ashworth's statement is  
23 in your bundle, but I do not know which tab. Someone  
24 will tell me. Tab 14, which is probably in the second  
25 bundle.

1 A. Okay.

2 Q. At page 31 -- do you have that?

3 A. Yes.

4 Q. I think this is probably what you are talking about but  
5 you can tell me if it is not. Paragraph 112:

6 "List prices provided an overview of DAF's product  
7 offering. They created a relative internal list price  
8 positioning hierarchy, by ranking the different  
9 configurations and components ..."

10 Is that what you are thinking of?

11 A. Yes, I think so.

12 Q. Mr Ashworth told us he knew nothing at all about the  
13 cartel when he was giving evidence. So what he is not  
14 doing is telling us what it was that DAF used the  
15 information for. Would you agree? He is talking about  
16 what DAF did with its own list prices, even though we  
17 challenged it and this evidence was plainly  
18 unsupportable. But he is certainly not talking about  
19 why they entered the cartel, is he?

20 A. No, but he is pointing to the rationale for having this  
21 information exchange, which I can actually rationalise  
22 myself in the context of an economic model, which also,  
23 you know, fits with what we here understand the  
24 position.

25 MR WARD: I am sorry, if I may just pause the

1 cross-examination for a moment, but we are put in  
2 a wholly insupportable position now. Professor Neven is  
3 explaining that he has had information on this critical  
4 issue in the case, why are they in this cartel, that has  
5 never been disclosed, has not been put in witness  
6 evidence, he has not referred to in his expert report  
7 and is not referred to in the annexes to his expert  
8 report. Sir, it is frankly just insupportable as a way  
9 of conducting this litigation.

10 MR BEARD: If Mr Ward wants to make submissions in relation  
11 to these matters, I am happy to deal with that, but he  
12 has not actually asked questions of Professor Neven  
13 about the relevance of this material to the analysis  
14 that Professor Neven has carried out. Until he does  
15 that, I think it is rather premature for him to be  
16 making these sorts of submissions which are not really  
17 part of cross-examination.

18 MR WARD: No, they are certainly not part of  
19 cross-examination but it is just a matter of very great  
20 concern.

21 THE CHAIRMAN: This does seem to be part of  
22 Professor Neven's thought process in coming to his  
23 theory of harm and yet it does not appear in any of his  
24 reports.

25 MR BEARD: Obviously it is a matter for the witness, but

1 I think the witness needs to be asked about what his  
2 thought process was and how it fitted into what he was  
3 doing and that is not what has been asked yet. What has  
4 been asked is whether or not it is material -- whether  
5 he had any communications with DAF and what explanations  
6 anyone at DAF gave to him. The question has not been  
7 asked how it is that this feeds into any of his  
8 analysis. I leave Mr Ward to do that.

9 MR WARD: I am grateful for the invitation to do so and  
10 I certainly take it up, but I think we are in a -- what  
11 we have here is a rather more fundamental problem, that  
12 we suddenly find ourselves dramatically off-piste with  
13 a whole new set of facts, not just theory.  
14 Professor Neven, you know, he is entitled to elaborate  
15 his view, but can I also just, to put this in context,  
16 ask you to turn up, please, {E/61/23} because this is  
17 your supplemental report which responds to Mr Harvey,  
18 who points out that there is an obvious inference to  
19 draw from the infringement being 14 years, that it was  
20 beneficial to the participants in terms of pricing. Do  
21 you have that now, Professor Neven?

22 A. I can see it on the screen.

23 Q. Thank you. What you say in response at 5.3 is:

24 "It is entirely possible that infringing conduct was  
25 found to be useful ... without necessarily affecting



1 customers through systematically higher prices and  
2 profits."

3 This is obviously the key issue in the case. This  
4 is particularly relevant in the context of the theories  
5 put forward by Mr Harvey.

6 "As discussed above, exchanges of information on  
7 cost and [demands] ... can bring benefits in terms of  
8 better pricing strategies without leading to  
9 systematically higher prices. Exchange of information  
10 on list prices ... can be understood as conveying  
11 information on demand or cost ... [which] while useful  
12 for setting prices, does not necessarily lead to higher  
13 prices."

14 You have posited something here in your supplemental  
15 report that is hypothetical. It is entirely possible.  
16 Indeed it is hypothetical and conjectural. Yet what you  
17 are telling us today is that you had actual factual  
18 information about why DAF went into this cartel,  
19 information you are putting forward in support of your  
20 view that it had no effect on prices. That is right, is  
21 it not? I have understood correctly your evidence this  
22 afternoon?

23 A. No, I do not think so. I see it slightly differently,  
24 honestly. I mean, this paragraph here refers to the  
25 economic literature, and the economic literature is sort

1 of pointing to the fact that exchanging information  
2 about cost and demand then have sort of pro-competitive  
3 as well as anti-competitive effects, okay.

4 Q. You do not mention anywhere in here or anywhere else  
5 this factual account you have given us this afternoon  
6 which, despite Mr Beard's intervention, is evidently  
7 relevant to the question of whether or not this  
8 infringement had any effect on prices.

9 A. But, again, I am not sort of positively arguing that DAF  
10 has participated in this information exchange for this  
11 particular purpose. I am not -- it is not for me to  
12 argue this. What I am saying is that I have heard the  
13 justification for the participation in the information  
14 exchange which is echoed in the *Scania* decision and, as  
15 an economist, I can rationalise that. This is all what  
16 I am saying.

17 As you have seen, my evidence has focused on harm  
18 because what the Commission is saying is that, you know,  
19 there is a presumption that there was harm here. What  
20 I am testing is whether the Commission's decision and  
21 the finding that there was indeed an infringement of 101  
22 has led to harm. So I have focused on the Commission's  
23 finding and whether the Commission's findings were, you  
24 know, likely to have been followed by effects.

25 THE CHAIRMAN: Did you test the facts that were being put

1 before you by DAF?

2 A. No, because -- I mean, I focused my analysis on the  
3 potential for harm because this is the Commission's  
4 finding and I did not test, you know, this justification  
5 for participation in the infringement, no. I am not  
6 even sure how I would test it actually, honestly, if  
7 I were to ask how to test such a theory. All what I can  
8 do is, as an economist, to say that I can build an  
9 economic reasoning such that it would make sense.  
10 Whether, you know, I could even empirically validate it  
11 or invalidate it, I am not sure how I would do that.

12 MR WARD: Could I ask you to turn back, please, to tab 1 in  
13 the bundle in front of you? This is the {J4/354} letter  
14 from Travers Smith. Go to page 3, please, {J4/354/3},  
15 paragraph 11.

16 "... Professor Neven has not had access to any  
17 material that is relevant to the expert issues on which  
18 he is instructed to opine in the context of your  
19 clients' claims ..."

20 That is not true, is it?

21 A. Sorry, where is this?

22 Q. Paragraph 11. Do you want to read it again?

23 A. Yes.

24 Q. It is just not true, is it?

25 A. Yes, I think it is because I was asked whether there was

1 any overcharge and whether it was plausible that there  
2 was any overcharge and I did not look into possible  
3 efficiency defence for this participation in the  
4 infringement. All what I can say is that I have heard  
5 evidence that could be supported by economic theory and,  
6 you know, I really focused on the harm because this is  
7 what is at stake here.

8 Q. One of the points put in issue by Mr Harvey's report is  
9 that this cartel carried on for 14 years, that it was  
10 a -- kept going in the interest of profit and the  
11 inference is that prices rose. That is obviously  
12 a great oversimplification, but if you are sitting on  
13 information that says it was for some other reason, that  
14 is plainly relevant to the issues before the court;  
15 plainly relevant, Professor Neven.

16 A. I think I actually tend to disagree with that. I think  
17 I can test the theories of harm. You know, how do you  
18 test a theory? You are testing a theory by finding  
19 evidence that invalidates it. I mean, this is the basic  
20 approach in economics. What I did is I took the  
21 theories of harm that were put forward in the  
22 Commission's decision and considered others, but I tried  
23 whether I could invalidate those theories, looking at  
24 evidence. I did not look at, you know, trying to  
25 validate this alternative explanation for the

1 participation in the infringement because I focused on  
2 the potential harm that could arise from this  
3 infringement and tried to see whether indeed the  
4 theories of harm could be -- were consistent with the  
5 data.

6 THE CHAIRMAN: Going back to what you said about  
7 confirmation bias, surely it is important for you to  
8 consider -- assuming you come to the conclusion that the  
9 theory of harm does not work for whatever reason --

10 A. Yes.

11 THE CHAIRMAN: -- as to why the cartel carried on for  
12 14 years. You must want to satisfy in your mind, in  
13 order to test your theory, that there was a credible  
14 reason for it carrying on --

15 A. Yes.

16 THE CHAIRMAN: -- with all those participants for 14 years.

17 A. No, you are completely right that I wondered about this.  
18 I mean, why is it that this infringement lasted for so  
19 long?

20 Now, it is interesting to also look at the type of  
21 evidence that the European Commission is putting forward  
22 with respect to the infringement. I mean, what we have  
23 here is very far from a classic cartel. I mean, you  
24 know, in my experience, in particular at the European  
25 Commission, if you consider alternative infringement and

1 the type of evidence that you have in alternative  
2 infringement -- I mean, in alternative infringements  
3 typically what you would find is very strong evidence  
4 that the participants -- that they met regularly, that  
5 they exchanged commitment, that there was explicit  
6 discussion on prices, that they understood that what  
7 they were doing was unlawful, that they organised the  
8 scheme such that they would report on one another's  
9 behaviour. I mean, think, for instance, about the LCD  
10 cartel. The evidence in the LCD cartel in terms of the  
11 way in which the coordination was working is nothing to  
12 do with the type of evidence we see in the Commission's  
13 file.

14 So it is also entirely possible that they  
15 participated in this infringement -- in this information  
16 exchange, I mean, without getting much benefit in terms  
17 of anti-competitive effects, in terms of higher prices  
18 and possibly, I mean, little benefits as well in terms  
19 of, you know, improving their pricing, for instance, the  
20 way in which I discussed it earlier. I mean, this is  
21 a case in which the evidence in relation again by  
22 comparison with, you know, hardcore cartels that have  
23 been prosecuted by the Commission is quite different.

24 THE CHAIRMAN: Sorry, I should not have intervened.

25 MR WARD: No, sir, it is most welcome.

1           I make no bones about this. We think this is quite  
2           an insupportable development. This litigation has been  
3           going on for almost six years, it has been managed very  
4           carefully by the tribunal and, largely speaking, it has  
5           been an orderly process with I think in the context what  
6           one could describe as a minimal number of contested  
7           issues. We have been effectively taken by surprise  
8           today in the most remarkable way. Professor Neven  
9           confirmed this morning that he asked no questions of his  
10          client; he confirmed this afternoon he asked no  
11          questions. He confirmed what the scope was of the  
12          factual material he had. I was very careful to take him  
13          through all of that. Then we learn for the first time  
14          that there is this rationale for the cartel being  
15          advanced where it is absolutely plain and obvious it is  
16          a central issue in this case whether or not there is  
17          a rationale for this 14-year collusion other than  
18          because the participants believed it was going to  
19          increase their prices.

20          Now, we will have to look very carefully at the  
21          lengthy answers that have been given but I do not make  
22          a process point lightly. All of us wanted this trial to  
23          come on, get resolved as quickly as possible, but I do  
24          very respectfully submit that this is a simply  
25          insupportable way for DAF to proceed.

1 THE CHAIRMAN: What are you suggesting we do?

2 MR WARD: We will have to reflect, sir, but it has just put  
3 us in an extraordinarily difficult position.

4 THE CHAIRMAN: Well, you are still able to make all those  
5 submissions. You are able to say that there is no  
6 factual support for --

7 MR WARD: We shall.

8 THE CHAIRMAN: -- that this is the way the cartel operated  
9 and why they carried on with it for 14 years. You are  
10 able to say there is actually no factual evidence to  
11 support it and what Professor Neven says is neither here  
12 nor there. But I am not sure what we can really do  
13 about it at this stage.

14 MR WARD: Just that it really undermines our confidence in  
15 the level of candour that has been displayed to get us  
16 to this point frankly.

17 MR BEARD: I think those sorts of accusations Mr Ward needs  
18 to be extraordinarily careful about it.

19 MR WARD: No, no, it is just factually the case. This is  
20 new information.

21 MR BEARD: No, Mr Ward, that is not correct. Mr Ward is  
22 making accusations I think we have to be extremely  
23 cautious about here. Professor Neven has given the  
24 answers he has given frankly in relation to questions  
25 that have been asked by Mr Ward in relation to these



1 matters. Mr Ward can continue to ask questions of  
2 Professor Neven. We will deal with the matters in  
3 closing.

4 Mr Ward is confecting essentially a significant  
5 opposition to Professor Neven without actually having  
6 scrutinised the material that Professor Neven has dealt  
7 with substantively here and, in those circumstances, we  
8 do not see why there is any problem with the  
9 cross-examination continuing and submissions to be made  
10 in due course.

11 THE CHAIRMAN: Well, I am not sure that you are suggesting  
12 any other course.

13 MR WARD: Not at all.

14 THE CHAIRMAN: I think you are just laying down a few  
15 markers --

16 MR WARD: That is a very fair way of putting it, sir.

17 THE CHAIRMAN: -- which we have taken note of and no doubt  
18 we will come back to.

19 MR WARD: We shall, sir.

20 Let us move on, shall we, Professor Neven? The  
21 other thing that we knew nothing about, at least we knew  
22 nothing about before this hearing, was what DAF actually  
23 did with the cartel information it received because  
24 there is no question it received a large amount of  
25 information through the cartel, the agreements, the

1           sharing and so forth, and that is not something you  
2           address in your report either, is it?

3           A. No.

4           Q. That is not something that is mentioned in your  
5           instructions?

6           A. No.

7           Q. Is that something that you also know nothing about?

8           A. I know nothing about how this information was processed  
9           within DAF.

10          Q. Is that something you never asked about?

11          A. No.

12          Q. You never asked?

13          A. No.

14          Q. So it did not strike you as relevant how they might have  
15          used this information?

16          A. Did I ever ask? I think that in the context of a German  
17          proceeding, a question was asked about whether the  
18          information during the period of the German information  
19          exchange -- whether the information was passed on to  
20          headquarters, and I have seen the answers to that and  
21          the answer was that it was, but not systematically.

22          Q. I see. But you have not actually asked and you do not  
23          know how the information in the cartel might have been  
24          used for pricing in the UK?

25          A. What I know -- well, I know how prices were set in the

1 UK and I know from the data, you know, when list prices  
2 changed in the UK, for instance.

3 Q. Did you hear on Day 2 Mr Beard talking about the *Anic*  
4 presumption?

5 A. No.

6 Q. Let me explain what he said. You must be familiar with  
7 the *Anic* presumption from your days in the Commission.

8 A. No.

9 Q. Okay, well, we will go to it in the authorities bundle  
10 in that case. Perhaps if I read it to you, it will come  
11 back to you. This is jurisdiction of the European  
12 Court -- jurisprudence even -- that subject to the --

13 A. Oh, yes, I remember now.

14 Q. You do remember. Let me read out the formula which  
15 I thought must be familiar to you, {AU/2.7/42}:

16 "... subject to proof to the contrary, which it is  
17 for the economic operators concerned to adduce, there  
18 must be a presumption that the undertakings  
19 participating in concerting arrangements and remaining  
20 active on the market take account of the information  
21 exchanged with their competitors when determining their  
22 conduct ..."

23 You are aware of it?

24 A. I am aware of it.

25 Q. You did not refer to that presumption in your reports,

- 1            though, did you?
- 2            A.  No.  Why should I?
- 3            Q.  Let me explain why.  Mr Beard addressed this on Day 2,  
4            and this is page 48 of the transcript.  He said,  
5            {Day2/48:7}:  
6            "We accept that in relation to gross list pricing  
7            information that these matters were taken into account.  
8            We are not saying we ignored the information we received  
9            in that regard."  
10           A.  Yes, but, of course -- I mean, there is a decision by  
11           the European Commission that says that there was an  
12           infringement so --  
13           Q.  Indeed.  
14           A.  -- you know, the Commission is saying that there has  
15           been an agreement, there have been concerted practices,  
16           there has been an infringement of 101.  So, I mean, the  
17           Commission must have, you know, presumed that indeed  
18           this information was used.  
19           Q.  Indeed, and would you not agree that that is in itself  
20           relevant to the question of whether it had any effect?  
21           A.  But of course I am operating under the presumption that,  
22           you know, the Commission's decision has some merit and  
23           under the presumption that, if this information was  
24           exchanged, it was used.  
25           Q.  Well, let us also look at what else we learned last week

1           principally from Mr van Veen. Did you hear  
2           Mr van Veen's evidence?

3           A. No.

4           Q. Have you read the transcripts?

5           A. No.

6           Q. Well, let me tell you what he said and, if you need me  
7           to show you the transcripts, I will.

8                     Firstly, he told us the director of marketing and  
9           sales was involved in setting DAF's list prices; that is  
10          to say the European ones. He was involved in setting  
11          the level of margin targets. We learnt that --  
12          Mr Habets told us that the level of IKP was driven by  
13          the marketing and sales director and we know that IKP  
14          was specifically set at an artificially high level above  
15          costs, at least from 2003 or 2004, the middle of the  
16          cartel period.

17          MR BEARD: I think if these are key factual propositions,  
18          I am not sure memories on this side of the court are  
19          quite capturing what Mr Ward is saying. I will leave  
20          Mr Ward -- if he has some general follow-up questions,  
21          fine, but if he is going to be testing Professor Neven  
22          on particular findings, then I think probably the  
23          transcripts have to be gone to.

24          MR WARD: Let me see how we do and if you want to see them,  
25          Professor Neven, of course you can.

1 MR BEARD: I am concerned they are not --

2 THE CHAIRMAN: If Professor Neven is following what is going  
3 on, then I am not sure it needs --

4 MR BEARD: We will see. I think the accuracy of Mr Ward's  
5 summary may be something that we deal with in due  
6 course.

7 THE CHAIRMAN: Right, yes.

8 MR WARD: In the case of IKP in particular, you are aware,  
9 I am sure, from reading the evidence, that it was set in  
10 a way for which the aim was to not pass on cost  
11 reductions. Are you familiar with that?

12 A. I have read that, yes.

13 Q. Now, the other thing that we learned, if you were  
14 following the proceedings, is that the marketing and  
15 sales director, for a substantial part of the time, was  
16 personally involved in the cartel as were his two  
17 predecessors. Are you aware of that? Mr McDonagh?

18 A. Involved in the cartel in what sense?

19 Q. Well, personally involved. I can show you how we know  
20 that, if you like.

21 A. But what do you mean?

22 Q. Well, I will show you. This is something that DAF has  
23 told us. Can we go, please, to tab 8 of your bundle?  
24 Can we go to document {C/7/3}? These are relevant  
25 individuals who were identified as holding positions

1 both in DAF UK and as marketing and sales director. It  
2 says they attended competitor meetings at headquarters  
3 level in their capacity as marketing and sales director  
4 of the second defendant.

5 If we scroll down a little, we can see the names --  
6 not that much, please -- we can see the names,  
7 Mr van den Assem, Mr van Putten and then Mr McDonagh,  
8 who it says in particular was marketing and sales  
9 director between 2001 and 2004. In fact, we know from  
10 elsewhere that it was for longer than that.

11 The point I am making to you is that these are  
12 people who were involved in the cartel who were also  
13 involved in these mechanisms: IKP, margin targets,  
14 setting list prices. They are involved in the cartel.  
15 Would you accept what we have here is a series of tools  
16 that could be used to drive up prices?

17 A. But, again, I am not sort of disputing the fact that  
18 there is a Commission's file. I mean, there was a file  
19 on which the Commission decided that there was an  
20 infringement. Again, as an economist, what I do is that  
21 I look at the facts -- I mean, I look at the evidence in  
22 terms of the economic evidence and I look at the  
23 consistency between that evidence and potential theories  
24 of harm. I mean, I am not questioning any of this.

25 Q. No, really I am putting what I hope is a fairly short

1 point, which is you have IKP, you have margin targets,  
2 you have list prices. They are all mechanisms to drive  
3 prices higher. Would you accept that?

4 A. We have to be careful about those. We have to be  
5 careful about how these mechanisms actually operate and  
6 we have to do that in the context of a well-defined  
7 theory, but -- we can do it one by one if you want, but  
8 it is going to take some time.

9 Q. We can certainly do that. So list prices can be  
10 increased and Mr Ashworth's evidence was that that would  
11 put pressure on DAF UK to increase transaction prices.  
12 Do you accept that?

13 A. No, I think that if you are thinking about a theory of  
14 coordination or a theory of effect -- let us speak about  
15 a theory of effect --

16 Q. Can we speak about fact? I am speaking about facts at  
17 the moment.

18 A. You are pointing to a statement by one person. I am  
19 just sort of referring to a proper framework in order to  
20 think about how information exchange on list prices  
21 could affect transaction prices and, I mean, this is  
22 a reasonable theory of harm, but we have to see how to  
23 test that theory of harm, how to confront it with facts.  
24 I am not denying that it is a possible theory of harm.

25 THE CHAIRMAN: Mr Ward was simply putting to you what the



1 facts were or what he says has been established so far,  
2 so --

3 A. Yes, it is fine. I am not questioning this.

4 THE CHAIRMAN: I think you should just answer the question  
5 then.

6 A. Okay.

7 MR WARD: Shall I try again? Thank you, sir.

8 What Mr Ashworth explained was that all of these  
9 mechanisms, the list price, the IKP and the margin  
10 targets, put pressure on DAF UK to increase its  
11 transaction prices. I will show you in the transcript,  
12 if I may --

13 A. No, no, but --

14 Q. You have already seen it?

15 A. No, but I trust you.

16 Q. Thank you. We have also heard from Mr van Veen that, in  
17 the context of emission standards, list prices were set  
18 in a way to achieve desired levels of net prices.  
19 Do you know that? No? You do not care.

20 All I am suggesting to you is that these are ways in  
21 which people within DAF that knew about the cartel might  
22 have used that cartel information to push for higher  
23 prices. Do you accept that is at least plausible?

24 A. But you cannot look at these statements in isolation.

25 I mean, if you look at these statements in isolation,

1           they say what you describe they say, but in order to see  
2           whether there is a credible theory of harm, you have to  
3           look at the mechanism in a comprehensive session.

4       Q. I would really like to try and stay on the factual plane  
5           for a minute. Do you accept it is plausible at least  
6           that these mechanisms could be used to push for higher  
7           transaction prices?

8       A. What I am saying is that, in order to have a judgment on  
9           this, I need to look at the evidence comprehensively.

10      Q. Well, I have put my point on it.

11           Let me try again, putting a simple proposition to  
12           you. We have here 14 years of very serious  
13           infringement, wide and multifaceted violation of  
14           competition law. We know that all the participants had  
15           a common objective, which is the distortion of price  
16           competition. We know that from the decision. We have  
17           had no proffered explanation for it, at least until the  
18           last hour, and Mr Harvey made a very short point about  
19           this yesterday. Firms will engage in behaviour that is  
20           profitable. It is not a very large leap to conclude  
21           that they engaged in it because it was profitable in the  
22           form of putting up prices. Would you accept there is  
23           force in that? It is very simple, but there is logic to  
24           it?

25      A. But I do not accept the leap, the last leap. I do not

1           accept that, simply because it is possible to collude,  
2           that firms are able to collude. This I do not accept.

3       Q. Even though it lasted for 14 years. 14 years they  
4           carried on doing this, so whether they were acting, as  
5           it were, unilaterally in the sense of seeing how high  
6           they could put their prices in light of the knowledge of  
7           this cartel or some form of collusive outcome in terms  
8           of understanding better the transaction prices, what  
9           I am suggesting to you is that it is at the very least  
10          plausible that this could actually have a positive  
11          effect on prices.

12       A. But, again, my reports are looking at this evidence  
13          comprehensively in the context of well-defined theories  
14          of harm, confronting these theories with actual  
15          evidence, and I come to the conclusion that it is highly  
16          unlikely that this infringement led to effects in the  
17          context of the theories that I looked at.

18       Q. Let us look at your theory of harm.

19       A. Yes.

20       Q. What you say, as I understand it, is that it is  
21          implausible that gross list price collusion could have  
22          had an effect on prices essentially because of the  
23          difficulty of establishing and maintaining a focal point  
24          on transaction prices.

25       A. It is one of the pieces of evidence that I rely on and,

1           again, you have to see this from the perspective, again,  
2           of trying to find evidence that will falsify the theory.  
3           I mean, the theory is that -- the theory of the  
4           Commission is that there were discussions on list  
5           prices, there were exchanges of information on changes  
6           in list prices, intentions with respect to changes in  
7           list prices, leading to changes in transaction prices,  
8           and so, in order to falsify that theory, we need to see  
9           whether there is evidence that would be inconsistent  
10          with that theory.

11                 So it is one approach, and one approach that I am  
12          using is to falsify that theory or to attempt to falsify  
13          that theory by looking at one of the key links in that  
14          theory, which is that, when you are exchanging  
15          information about pricing intention with respect to list  
16          prices, whether this conveys information about what you  
17          intend to do with respect to transaction prices, and  
18          that is how the evidence that I have gathered with  
19          respect to the absence of pass-through between changes  
20          in list prices, in list price intentions that may have  
21          been shared, have fed or have not, as a matter of -- as  
22          you have seen, is not fed into transaction prices.

23          Q.   Professor Neven, are you involved in the proceedings in  
24                the Amsterdam District Court on behalf of DAF?

25          A.   Am I?  I do not think so, no.

1 Q. Are you aware that very similar arguments to the ones  
2 you are putting forward here were advanced there and  
3 rejected by the Amsterdam court?

4 A. I think that it is not quite right, no. I think that  
5 the arguments I am putting forward here are not the  
6 arguments that were rejected by the Amsterdam court.

7 MR BEARD: If Mr Ward is going to make the assertion that  
8 arguments in an Amsterdam court have been rejected, it  
9 is going to be important that we go to the context of  
10 actually the judgments he is referring to because those  
11 are effectively preliminary issue judgments so I think  
12 they have to be put properly to witnesses if that is  
13 what is going to be done.

14 MR WARD: I am quite happy to confirm that. Let us look at  
15 the nature of the arguments that were advanced.

16 Could we go to {AU/12.3T}, please? This is  
17 a certified translation of the Dutch judgment. Can we  
18 go to page 19, {AU/12.3T/19}? A little bit lower,  
19 please.

20 "The Truck Manufacturers have pleaded, as a defence,  
21 that it is implausible that the Infringement has led to  
22 any damage for the Claimants. The Court has chosen to  
23 deal with this question already at this stage of the  
24 proceedings. If, after all, it can be established at  
25 this stage ... that it is impossible that the

1           Infringement led to damage, that alone already means  
2           that the threshold for reference to the damage  
3           assessment procedure has not been reached and further  
4           discussion as to its content can be omitted."

5           So, as Mr Beard says, it was a form of preliminary  
6           issue.

7           Then if we look, please, at page 23,  
8           {AU/12.3T/23} -- go down a little bit more -- it says:

9           "DAF refers to Compass Lexecon's report of  
10          30 June 2020, 'Economic Analysis of the Potential  
11          Effects of the Infringement' ..."

12          So, Professor Neven, you did not have a role in this  
13          report?

14         A. I probably did.

15         Q. You probably did.

16          "... to substantiate its position that the exchange  
17          of information did not actually affect the sale prices.  
18          DAF also refers to the Oxera ... report commissioned by  
19          the Truck manufacturers [in] 2019 ..."

20          Then it says -- sorry, I need to read a bit more.

21          "... titled 'How to assess the effects of the trucks  
22          infringement' ... which shows that an exchange of  
23          information is not necessarily damaging in all  
24          circumstances, but only if ... the market ... is  
25          effectively co-ordinated. DAF argues that three

1 conditions need to be met for this to be the case:

2 "the exchange of information must enable companies  
3 to co-ordinate their joint purpose, which is the focal  
4 point condition;

5 "the exchange of information must enable companies  
6 to check whether the others are actually adhering to the  
7 co-ordinated conduct, which is the control condition;

8 "there needs to be an effective deterrent and  
9 sanction mechanism.

10 "According to DAF, none of these three conditions is  
11 met, which means that the co-ordination was  
12 ineffective."

13 That is very similar, is it not, to the argument you  
14 are advancing in these proceedings?

15 A. No. Of course there is a commonality in some of these  
16 arguments, but the -- what the court, certainly in this  
17 report, does not refer to is the particular piece of  
18 evidence that I put forward to you with respect to the  
19 lack of pass-through between changes in list prices and  
20 changes in transaction prices as interpreted in the  
21 context of a theory of coordination, so --

22 THE CHAIRMAN: Okay, but it is largely based on your report  
23 in those proceedings, what they are saying here? That  
24 was what you were saying in those proceedings?

25 A. Yes, I would have to look at what was submitted in the

1 context of those proceedings. I am not exactly sure  
2 what -- but, in any event, what the court says here does  
3 not relate to the particular arguments I was putting  
4 forward here.

5 MR WARD: So you do not accept there is a high degree of  
6 similarity between those bullet points and what you are  
7 arguing in this case?

8 A. Okay, "the exchange of information must enable companies  
9 to co-ordinate their joint purpose, which is the focal  
10 point condition", yes, I agree this is something that we  
11 are saying here.

12 "The exchange of information must enable companies  
13 to check ..."

14 Yes, this is the implementation problem. But  
15 I think that 1 and 2, there is no economist who would  
16 disagree with it and certainly Mr Harvey does not.

17 "There needs to be an effective deterrent and  
18 sanction mechanism."

19 Mr Harvey would not disagree with that either. So  
20 I think that the three statements here are common  
21 knowledge among economists.

22 Q. Then the conclusion:

23 "According to DAF, none of these three conditions is  
24 met ..."

25 Professor Neven, that is essentially the argument



1           you are advancing in this case, is it not?

2           A. With respect to the theory of coordination, I am  
3           bringing evidence specific to the UK, which indeed,  
4           I mean, shows that -- at least with respect to the first  
5           point, that it was unlikely that discussions on changes  
6           in gross list prices would lead to a focal point on  
7           transaction prices. Yes, I am saying that.

8           Q. Thank you.

9           A. I am also saying that the conditions in terms of  
10          transparency in the market are such that it is very  
11          difficult for the members of a coordination to monitor  
12          the behaviour of their competitors, so that would be  
13          evidence with respect to 2, yes.

14          Q. It is right, is it not, that the Amsterdam court  
15          rejected this argument?

16          A. Yes, I mean, the Amsterdam --

17          Q. We are going to look at it.

18          A. Can I go on?

19          MR BEARD: I am sorry, these are assertions being made that  
20          are not borne out by the text of this judgment.

21          MR WARD: I am just going to show you the judgment.

22                 Can we go now, please, to page 42, {AU/12.3T/42}?

23                 What the court actually says at 3.67 and 3.68:

24                 "Also at the hearing, the Truck manufacturers were  
25                 unable to give a convincing reply to the question about

1 the purpose of exchanging information on gross list  
2 prices. According to Truck manufacturers, it was simply  
3 out of interest in everything occurring in the market  
4 and it was thought that there was little or no harm in  
5 it. This is far removed from what the Commission wrote  
6 in its Decision about the purpose of the collusion: to  
7 distort independent price setting and the normal price  
8 movements for trucks ... It is apparent from the  
9 Decision that great transparency already existed in the  
10 truck market ... The future market conduct and the  
11 plans of Truck manufacturers in relation to changes in  
12 gross prices and gross list prices was one of the  
13 remaining uncertainties. Once again, the court points  
14 out that the Truck manufacturers -- excluding *Scania* --  
15 have acknowledged the Commission's findings. It is  
16 impossible to fathom why a Truck manufacturer would  
17 provide information about its future market conduct to  
18 its competitors, unless it expects to receive something  
19 (potentially) beneficial in return. In this case:  
20 information about the future market conduct of its  
21 competitors. This was done for the purpose of aligning  
22 market conduct, as also established by the Commission.  
23 The Commission furthermore established that the  
24 Addressees deliberately committed the Infringement ...

25 "It is furthermore obvious that the exchange of

1 information was of interest to the Truck manufacturers.  
2 The Cartel operated for several years and not a single  
3 member left the Cartel early. That also negates the  
4 argument that the Infringement had no effect and could  
5 not have inflicted harm. The court also refers in this  
6 respect to no. 81 [ie Recital 81] of the Decision in  
7 which the Commission considers that it can be assumed  
8 that the impact on the trade was noticeable in view of  
9 the market share and turnover of the Addressees ...

10 "It follows from the above that the Truck  
11 manufacturers defence ... that not a single customer  
12 incurred a loss or could have incurred a loss, which  
13 means that all claims at this stage of the proceedings  
14 must be dismissed, is invalid. The respective arguments  
15 of the parties about the (im)plausibility of loss as  
16 a result of the Infringement insofar [as] it relates to  
17 the collusion about the timing and passing of costs [of  
18 emission standards] therefore needs no further  
19 discussion."

20 So this is a preliminary issue, as Mr Beard rightly  
21 says, but it is right to say that the court has not  
22 accepted the argument that it is implausible it had an  
23 effect. Would you agree?

24 MR BEARD: I think you should read on to 369 for the  
25 conclusion.

1 MR WARD: "It has not been found that it excluded that the  
2 Infringement caused damage ... This does not alter the  
3 fact that it still needs to be assessed for each  
4 Claimant whether the threshold has been reached ... to  
5 be referred to follow-up proceedings for the  
6 determination of damages. For that to happen, it must  
7 be made plausible that a Claimant, or the ultimate  
8 Party, may have incurred a loss ... The court has not  
9 yet made a ruling on this subject ..."

10 But at this stage it is saying --

11 A. Sorry, I am not saying that it is excluded. I am saying  
12 it is highly unlikely -- on the basis of the evidence  
13 that I have, it is highly unlikely that this  
14 infringement led to an effect. I never said that it was  
15 excluded.

16 Q. So would this be --

17 A. I do not think -- with all due respect, I do not think  
18 that the court in what you quoted is responding to the  
19 arguments that I am putting forward in terms of the  
20 evidence. I mean, there was nothing specific in what  
21 you just quoted which responds to my evidence.

22 THE CHAIRMAN: I am not sure there is much point in arguing  
23 about the effect of a court judgment with this witness.

24 MR WARD: Sir, there is not. I am taking this no further.

25 It is a matter of submission.

1 THE CHAIRMAN: So we will have a ten-minute break now.

2 (3.13 pm)

3 (A short break)

4 (3.25 pm)

5 THE CHAIRMAN: Mr Ward.

6 MR WARD: Thank you.

7 Professor Neven, we started to talk about your  
8 theory of harm and you say there are two problems which  
9 stand in the way of effective price collusion: the  
10 implementation problem, which means that parties have  
11 incentives to unilaterally deviate from whatever was  
12 agreed and so therefore cheating would be a problem  
13 unless there is an effective form of monitoring, and  
14 then the agreement problem, which arises where there is  
15 a lack of precision as to what was agreed which, as you  
16 say, may lead to misunderstandings. Is that a fair  
17 enough short-form summary?

18 A. Yes, that is right. It is interesting, by the way, in  
19 this respect, that the agreement problem is also  
20 understood by the European Commission as the fundamental  
21 issue of strategic uncertainty. I mean, if you look at  
22 the guidelines -- I mean, the guidelines define  
23 strategic uncertainty in terms of this multiplicity  
24 problem -- I mean, the problem that you have several  
25 potential outcomes for coordination.

1 Q. What you say is that the focal point must concern  
2 transaction prices?

3 A. Yes.

4 Q. So even though the decision is concerned with generally  
5 collusion over list prices, as far as you are concerned,  
6 there must be collusion over a focal point on  
7 transaction prices?

8 A. That is right.

9 Q. If we look, please, now at your third report, which is  
10 {E/61/16}, you explain what you mean by "focal point".

11 A. Which tab is it?

12 Q. It is your third report. I am afraid I do not know  
13 which tab it is under. Tab 6, I am told. The white  
14 folder, Professor Neven. Your reports are in the white  
15 folder.

16 It is page 16 of the bundle numbering, page 14 if it  
17 is the internal numbering. What you say -- this is  
18 where Mr Harvey has raised concerns that there was  
19 a lack of clarity about what is meant by "focal point"  
20 and you say --

21 A. Sorry, where is this?

22 Q. I am so sorry. 3.12.

23 A. Ah, yes. Okay.

24 Q. "Mr Harvey has considered that the above implies that  
25 the focal point of coordination that I consider would

1 ... be at a granular level, given the high level of  
2 product complexity and the large number of ... truck  
3 models. However, this is not the case ... I consider  
4 conservatively whether a focal point would be plausible  
5 at an aggregate level following a generalised list price  
6 increase. I do not consider whether it would be  
7 plausible for a focal point to arise at a granular  
8 level. However, even with a focal point that is defined  
9 at an aggregate level following a generalised [price]  
10 increase, it remains the case that it is necessary to  
11 observe all relevant characteristics of the products to  
12 identify if the observed price complies with the focal  
13 point."

14 So, in other words, you need to know exactly what  
15 the truck specification is in order to see whether the  
16 focal point has been achieved. That is right, is it  
17 not?

18 A. Has been complied with, yes.

19 Q. Of course it is right to say that there is no suggestion  
20 that that is itself possible? There is no reason to  
21 think on the facts it is actually possible to verify  
22 this on an individual truck-by-truck basis, is there?

23 A. What I am saying is that, yes, it is difficult to verify  
24 this even using a sample of trucks because the  
25 transaction prices are not observed at the individual

1 level.

2 Q. What I am going to suggest to you is that, if we look at  
3 the decision, what it shows is a sustained and intensive  
4 form of collusion with the object of distorting price  
5 competition, but that demonstrates that the cartel  
6 worked in a less precise way than the kind of theory of  
7 harm you are positing because we know that Recital 27  
8 says that pricing starts from gross list prices, we know  
9 from Recital 29 that there is a very high degree of  
10 transparency, then Recital 30 tells us gross list prices  
11 were the missing piece in the puzzle and then Recital 47  
12 tells us that the participants had an ability to  
13 understand approximate net prices taken together with  
14 other forms of information.

15 A. Can I just stop you there?

16 Q. Yes.

17 A. I never fully understood this sort of particular  
18 paragraph of the Commission's decision. I never  
19 understood whether the Commission actually meant to say  
20 that you could infer ex post what the transaction prices  
21 were or whether you can infer ex ante what the  
22 transaction prices were meant to be, and the Commission  
23 does not actually say what it means there.

24 Q. Well, we can only go with what it says, which is that  
25 they were better able to calculate competitors'



1            approximate current net prices depending on the market  
2            intelligence at their disposal.

3            A. But what do you mean by "calculate"? What does the  
4            Commission mean by "calculate"?

5            Q. Did you ask your clients?

6            A. No, I never asked the client, but it is difficult to  
7            understand what is the calculation here.

8            Q. Is it not common sense, Professor Neven?

9            A. No.

10           Q. It is far from difficult to understand; "better able to  
11           calculate competitors' approximate current net prices",  
12           What is exotic in that?

13           A. What is exotic is that either you observe it or you do  
14           not, but why do you have to calculate it?

15           Q. Well, we can only go on what is said, which your clients  
16           admitted, which is by exchanging current gross prices  
17           and price lists, combined with other information  
18           gathered through market intelligence, the addressees  
19           were better able to calculate their competitors'  
20           approximate current net prices.

21           A. Yes.

22           Q. Is there anything difficult to understand in that?

23           A. Okay, the first thing is that, you know, what DAF has  
24           admitted, it is not my issue. I am an independent  
25           expert here and so --

- 1 Q. But it is quite relevant that it is admitted, is it not?
- 2 A. The calculation -- I do not understand the calculation  
3 bit because, if you observe it, you do not need to  
4 calculate and if you observe it, you observe  
5 a transaction price.
- 6 Q. Your report gives us no reason to think that you have  
7 asked your clients what kind of feedback they might have  
8 enjoyed to enable them to carry out this exercise,  
9 does it?
- 10 A. I never asked them.
- 11 Q. You never asked?
- 12 A. No.
- 13 Q. You do not think that might have been useful, to  
14 understand just what kind of understanding of net prices  
15 they might have under these admitted facts in  
16 Recital 47?
- 17 A. But I think that the position of DAF, as far as  
18 I understand, is that they do not observe the  
19 transaction prices.
- 20 Q. It is a question of what they have admitted to here  
21 though, is it not? This is what they have admitted.
- 22 A. Okay --
- 23 Q. You did not ask anyway?
- 24 A. No.
- 25 THE CHAIRMAN: Can I just ask, your theory of harm is based

1           on -- the starting point is the decision of the  
2           Commission?

3           A. Yes, of course. My theory of harm --

4           THE CHAIRMAN: So you have to understand what the Commission  
5           is saying?

6           A. Yes, and I must admit that this paragraph in the  
7           Commission's decision, I was never entirely clear what  
8           exactly it meant, so --

9           THE CHAIRMAN: Do you say that in your report?

10          MR WARD: No.

11          A. No, I do not, but I gave it the benefit of the doubt --  
12          okay? -- because I think that what the Commission means  
13          here, probably, is that the members of the information  
14          exchange were in a position to ex post measure the  
15          transaction prices. I think that is what they meant and  
16          that is how I interpreted it, but the word "calculate"  
17          is strange.

18          THE CHAIRMAN: Okay.

19          MR WARD: You certainly do not explore that in your  
20          decision. What you do is --

21          THE CHAIRMAN: Report.

22          MR WARD: -- talk about difficulties in monitoring deviation  
23          and so forth, but this is obviously a very important  
24          mechanism, is it not, by which the admitted facts are  
25          that the cartelists would understand something about net

- 1 prices as a result of the information exchange?
- 2 A. Yes, it is very important to indeed form a judgment  
3 about the extent to which members of the information  
4 exchange or the manufacturers could ex post observe the  
5 transaction prices. This is why I performed this  
6 specific exercise in my second report in which I tried  
7 to simulate this process of acquiring market  
8 intelligence, this simulation of a mystery shopping  
9 process, because it is important in order to assess the  
10 possibility of coordination. For coordination you need  
11 to be able to observe what members of the -- the other  
12 members of the infringement had done.
- 13 Q. The awkward fact here, Professor Neven, is that your  
14 clients and the other cartelists have actually admitted  
15 to something really quite important here, that they were  
16 able to obtain approximate current net prices depending  
17 on the quality of market intelligence at their disposal.  
18 That is how the cartel actually operated; yes?
- 19 A. No, I do not think so because my evidence shows that it  
20 is very hard to assess the transaction prices ex post.
- 21 Q. Well, there is your evidence and then there is what is  
22 admitted, is there not, Professor Neven? This is  
23 admitted.
- 24 A. I am a professional economist. I rely on the evidence  
25 and I rely on the theory that I can formulate in light

1 of the Commission's decision.

2 Q. Well, let us look at another aspect of the Commission  
3 decision because part of your argument is there is  
4 a lack of transparency in the market. So can we look at  
5 Recital 29? In your bundle the decision is under tab 2  
6 and it is {AU/3.9/9}, please, bottom of the page,  
7 "Transparency on the trucks market".

8 A. I do not think it is the right tab.

9 Q. Tab 2 of the blue bundles.

10 A. Oh, the blue ones.

11 Q. Sorry, it is my fault for not making that clear.

12 A. Okay.

13 Q. Page 9, Recital 29. Do you have that?

14 A. Yes, yes.

15 Q. "The truck sector is characterised by a high degree of  
16 transparency. The Addressees had access to  
17 competitively relevant data such as truck registrations  
18 through public registries. Furthermore, truck producers  
19 and their distributor companies had regular exchanges  
20 within various industry associations. Within some of  
21 these associations, data on order intake and delivery  
22 periods or stock levels was exchanged. In addition, the  
23 Addressees had access, to varying degrees, to further  
24 data through customers spontaneously presenting  
25 competitors' offers in order to negotiate prices and via

1 mystery shopping."

2 So mystery shopping is just one element there.

3 If we just turn on for a moment to page 19,  
4 {AU/3.9/19}, we can see in Recital 81 it says -- picking  
5 up the second line:

6 "The conduct is characterised by the coordination  
7 between Addressees, which were competitors, of gross  
8 prices, directly and through the exchange of planned  
9 gross price increases, the limitation and the timing of  
10 the introduction of technology complying with new  
11 emission standards and sharing other commercially  
12 sensitive information such as their order intake and  
13 delivery times."

14 Then it makes the point:

15 "Price being one of the main instruments of  
16 competition, the various arrangements and mechanisms  
17 adopted by the Addressees were ultimately aimed at  
18 restricting price competition ..."

19 If we go back now to paragraph 10, we see -- sorry,  
20 page 10, {AU/3.9/10}, Recital 30:

21 "As a result, one of the remaining uncertainties for  
22 the Addressees on the trucks market was the future  
23 market behaviour of competing truck producers and in  
24 particular their respective intentions with regard to  
25 changes to their gross prices and ... price lists."

1           So what we have therefore in Recital 30 is  
2           essentially the missing piece of the puzzle, is it not?

3       A. No, it is ... I mean what you have quoted in  
4           paragraph 81 is the legal characterisation and of course  
5           I do not dispute that. With respect to the paragraph on  
6           the transparency in the market, you know, the Commission  
7           is suggesting that the market is transparent because it  
8           is possible to observe output. You know, I have doubts  
9           about the significance of that observation because when  
10          you have a coordination with respect to prices,  
11          observing output is not a very good indicator of whether  
12          the other members of the infringement actually have  
13          deviated or not because, I mean, there are other factors  
14          that will affect the actual sales, the actual demand --  
15          the actual sales of each manufacturers besides the  
16          price. There will be random -- there will be shocks to  
17          demand, there will be shocks that are specific to each  
18          manufacturer, and so if you observe just sales, you have  
19          a very noisy -- a very imperfect way of monitoring what  
20          they do.

21          I should also add, with all due respect to the  
22          European Commission, that the European Commission took  
23          exactly the opposite view about the transparency in the  
24          market in the merger -- the attempted merger between MAN  
25          and *Scania* two years earlier, so --

1 THE CHAIRMAN: Well, we have the decision and the decision  
2 is final.

3 A. The MAN/*Scania* merger says --

4 THE CHAIRMAN: No, this decision.

5 A. Oh, this decision, yes. So what I am saying is that --  
6 I mean, there is a judgment by the Commission here about  
7 transparency which is relevant for coordination which is  
8 not borne out -- yes, okay, the Commission concludes  
9 that there is indeed transparency, but only transparency  
10 with respect to quantities, and I am not sure that this  
11 is necessarily the most relevant type of transparency in  
12 order to sustain coordination on prices.

13 The second aspect of the Commission's decision is  
14 indeed the reference to mystery shopping, which is, you  
15 know, transparency on prices potentially and, you know,  
16 this is indeed a concern and this is why this is indeed  
17 an issue and that is why we have assessed whether you  
18 could obtain reliable information on the prices of  
19 competitors from mystery shopping.

20 MR WARD: Professor Neven, if you know the order intake and  
21 the delivery time of, say, Daimler, just to use a random  
22 example of the cartelists, you would have a pretty good  
23 idea of how soft its prices would be, would you not?

24 A. I do not think so. Honestly, I do not.

25 Q. Okay, that is fine. You know the list price; you know



1           how much they are in need of business; you are better  
2           able to calculate the approximate net prices; you have  
3           been doing this for 14 years. You are in a very good  
4           position to understand how to price your own trucks, are  
5           you not?

6           A. But you are saying very different things here. The  
7           discussion that we just had so far about transparency is  
8           a discussion about whether you could ex post observe the  
9           prices of your competitors. Now, what you are saying is  
10          that ex ante, because of the information exchange, you  
11          may end up setting prices differently from, you know,  
12          the way in which you would have set them in the absence  
13          of that information, which I understand is Mr Harvey's  
14          theories of harm, and that is a different thing.

15          Q. It is an ongoing process, though, is it not? It went on  
16          for 14 years. If we look at, I think, Recital 73, the  
17          Commission says that these were contacts of a continuous  
18          nature. So you have a rolling process of collusion and  
19          selling trucks, price increases, transaction prices. It  
20          carries on for 14 years. Nobody drops out. Everyone is  
21          profit-maximising. This is showing you, is it not, that  
22          this is useful information for pricing your trucks?

23          A. Well, again, all what I can repeat is that, as an  
24          economist, I look at data, I look at relevant theories  
25          and I try to disprove these theories.

1 Q. What I am putting to you, Professor Neven, is that the  
2 decision itself signalled in very clear terms why it is  
3 plausible that this infringement did have an effect on  
4 prices. But you do not accept that?

5 A. I mean, the Commission is indeed finding an infringement  
6 of 101. I do not think that the Commission is putting  
7 forward a lot of evidence suggesting that this  
8 infringement had a lot of effect and the Commission does  
9 not have to. You also have to understand that the  
10 motivation for the Commission for taking these decisions  
11 is not determined by the probability of effect.

12 Q. Can we now turn to your report at {E/10/6}? This is  
13 your first report. This is dealing with the question of  
14 other sensitive information. Can we go to the very  
15 bottom of the page?

16 A. E/10?

17 Q. Page 6 in the bundle numbering, please.

18 A. Which bundle?

19 Q. I think your reports are in the white bundle, is what  
20 I have inferred. So this is your first report.

21 A. Yes.

22 Q. Page 6, please, of the bundle numbering, which we have  
23 on the screen. I am talking to you now about this  
24 confidential information.

25 A. Yes.

1 Q. Are we ready?

2 "I am aware that in addition to Article 1 the  
3 Decision identifies other conduct, [such as] the  
4 occasional exchange of net prices, and exchanges of  
5 information on delivery periods, order intake and  
6 country specific market forecasts. I also understand  
7 from the Claimants' Particulars of Claim that they rely  
8 on such conduct ... These further exchanges were not the  
9 focus of the Commission's Decision. In order to  
10 establish a cogent theory of harm based on such  
11 exchanges, either on their own or in combination with  
12 the other conduct considered by the Commission, it would  
13 be necessary to establish that the exchanges were  
14 sufficiently frequent and consistent to support an  
15 effective coordination. I have not seen evidence which  
16 establishes such that that is the case in relation to  
17 these further exchanges."

18 A. Hmm-hmm.

19 Q. Is that something you asked your client about, the  
20 nature and extent of these exchanges?

21 A. No.

22 Q. No. Here what we know from the decision is that there  
23 is continuous contact. We know it is a settlement  
24 decision and therefore we know that what is described is  
25 only high level and by example. Would you agree?

- 1 A. Sorry, I did not catch your question.
- 2 Q. The question is -- let me put it in just a few words.
- 3 The settlement decision is not a complete description of
- 4 the collusion, is it?
- 5 A. The settlement decision is what it is. I mean, that is
- 6 what we have in order to assess the plausibility of the
- 7 conduct, the possibility that the conduct had some
- 8 effect. We can only speculate about, you know, what is
- 9 not in the Commission's decision. Of course --
- 10 Q. You are in the lucky position that for the last nine
- 11 years you have had access to one of the cartelists and
- 12 the potential to even ask them these questions, but you
- 13 have not done so?
- 14 A. Yes, because again I am interested in what happens in
- 15 the market. I am interested in effects and I am not
- 16 necessarily interested in what people have to say --
- 17 Q. You are only interested in what is in the decision?
- 18 A. I am interested in what is in the decision, of course,
- 19 because the decision explains how the infringement has
- 20 operated and from the Commission's decision I can
- 21 develop a theory of harm and I can test it.
- 22 Q. Yes. Can we please turn up now the particulars of claim
- 23 in the Royal Mail case? I will just find out which tab
- 24 it is for you. It is not in there, I am sorry. We will
- 25 just have to have it on the screen. Can we go to

1 {B/1/23}, please? What we have here is the pleading  
2 where my clients have pleaded certain examples they  
3 found on the Commission file of exchange of commercially  
4 sensitive information. I just want to run through them  
5 with you.

6 Delivery periods, market forecasts, order intake  
7 information, stock information, production and export  
8 figures, technical information of various kinds,  
9 including options, information on warranties, labour  
10 rates, manuals, prices for spare parts, safety systems,  
11 staff training, repair and maintenance, then one that is  
12 marked as confidential for no reason I can fathom but it  
13 does not matter, information on paint colours, their  
14 names, codes and prices, music interface, Xenon  
15 headlights, dealer incentives. These are just examples,  
16 Professor Neven, but what we see from this -- would you  
17 accept? -- is about as far as it is possible to imagine  
18 from independent conduct in the market. Would you  
19 agree?

20 A. These are just examples. The concern I have is  
21 precisely these are just examples and there is no  
22 suggestion that -- I mean, first, there is no argument  
23 about why these pieces of information were useful for  
24 anything in terms of supporting collusion or anything in  
25 terms of supporting anti-competitive prices. That is

1 the first observation.

2 The second is that there is no evidence, as far as  
3 I am aware, that these exchanges of information had the  
4 regularity that was necessary in order to possibly be  
5 used in order to support a theory of harm. So we do not  
6 know, you know, what these informations were potentially  
7 useful for in terms of supporting anti-competitive  
8 effect and I do not think there is evidence that it was  
9 regular at all.

10 Q. What I am suggesting to you is that this is evidence of  
11 a culture of collusion that is really quite extreme.  
12 Far from competing, these truck companies were living in  
13 each other's pockets, were they not?

14 A. There is a culture of sharing information that is  
15 revealed by this example, but, again, it does not amount  
16 to a suggestion that this led to anti-competitive  
17 effect.

18 Q. Let us go back to the implementation problem and let us  
19 look at what you say about this in your report on  
20 {E/10/10}. So this is your first report.

21 You say -- and this is dealing with the problem of  
22 potential cheating -- you say at 3.4:

23 "An additional element is thus required to make the  
24 implementation of the agreement compatible with  
25 individual incentives. The economic literature

1           emphasises repeated interactions as a key element from  
2           which adequate incentives can emerge."

3           What we know here is two things about this cartel,  
4           is it not? Firstly, if there was cheating, the cartel  
5           was sufficiently effective that it persisted until the  
6           Commission stopped it with its dawn raids; would you  
7           agree?

8           A. But if you assume that there was an effective  
9           coordination -- but, again, what I am suggesting is the  
10          evidence I have gathered suggested there was no  
11          effective coordination.

12          Q. We also know that it is not just repeated interactions  
13          but continuous contact, even though we cannot know the  
14          details; you agree?

15          A. But repeated interaction is not a sufficient condition  
16          in order to support coordination. In order to support  
17          coordination, you need to make sure that there is no  
18          incentive to deviate. I mean, even though you are sort  
19          of competing quarter after quarter, it is entirely  
20          possible that you will compete quarter after quarter.  
21          The fact that you are continuously competing is not  
22          a sufficient condition to support coordination.

23          Q. Year after year they are exchanging all of this  
24          information, including future list price information;  
25          year after year they are gathering feedback on net

1 prices, as they have admitted in Recital 47, to the  
2 extent of the market intelligence in question.

3 What I am suggesting to you is it is at least  
4 plausible that this was sufficient feedback to keep them  
5 in the cartel and to keep them in a profit-maximising  
6 strategy of increasing their prices.

7 A. My reports are really clear. In terms of the evidence  
8 that I have gathered, I think it is unlikely that  
9 collusion on transaction prices through the exchange of  
10 pricing intention on list prices was effective; okay?  
11 I am not saying it is impossible, I am just saying that  
12 the evidence points -- I mean, I -- points you to the  
13 direction that it did not work.

14 Q. Can I just ask you to consider another form of feedback  
15 that you do not seem to have addressed in your reports?  
16 Would you agree that each manufacturer of course knows  
17 what prices they are actually able to achieve in  
18 competing against the other members of the cartel?

19 A. What do you exactly mean by this?

20 Q. Well, if you are a manufacturer trying to sell a truck  
21 and you are seeking to sell it in a market which also is  
22 occupied by the other cartelists, then the price you are  
23 actually able to win tells you important information  
24 about the prices they are offering?

25 A. So what you are saying is that the price at which you



1           are able to sell a truck is going to give you  
2           information about whether the other members of the  
3           coordination have actually implemented the focal point?

4       Q.   Yes.

5       A.   I mean, I guess that there is information there.  Yes,  
6           I think you are right that there is information there,  
7           but it is again very noisy information.

8       Q.   It is noisy information but we have got 14 years and  
9           thousands and thousands of truck sales, have we not, so  
10          if your competitors were ruthlessly undercutting you,  
11          disregarding all the cartel information and going for  
12          volume, not price, you would know?

13      A.   No, I do not think that -- honestly, I mean, the  
14          evidence that I have gathered suggested they were not  
15          actually involved in this effective coordination so the  
16          issue that you are raising about possible cheating, in  
17          my opinion, did not arise because the evidence that  
18          I have gathered suggested the way to understand the way  
19          in which this market functioned is unlikely to be  
20          effective coordination.  So I do not accept the way in  
21          which you are interpreting the evidence.

22      Q.   Let me try again.  I am really just putting to you that  
23          what we have here is sustained coordination that  
24          includes agreements and sharing of list prices.

25      A.   I think we are talking at cross-purposes here because

1 the Commission is saying that there is collusion and  
2 there is coordination, and I accept that. I mean, on  
3 the basis of what the Commission found in terms of the  
4 conduct of the firm, the Commission concluded that there  
5 was collusion and there was a concerted practice. The  
6 question I am tackling is a different one. It is the  
7 question of whether, in terms of economic analysis,  
8 there was effective coordination or not and these two  
9 statements are not incompatible. It is entirely fine  
10 for the Commission to conclude that there was an  
11 agreement or concerted practice and for economists to  
12 conclude that effective coordination did not operate.  
13 There is no contradiction between these two.

14 Q. Well, I do have a few more steps -- there are a few more  
15 propositions I was going to put to you, Professor Neven.  
16 I fully accept that is not enough on its own, but what  
17 I am suggesting is it is a pretty useful starting point.

18 A. Hmm-hmm.

19 Q. So we have the sustained coordination, we have a common  
20 objective of distorting price competition, we have  
21 Recital 47, which is telling us that there is visibility  
22 of approximate net prices, we have a mechanism of  
23 feedback in the market, you know what prices you are  
24 able to achieve, and we have firms that are seeking to  
25 profit-maximise and they are engaging in this activity

1 in order to profit-maximise. Now, there could be  
2 unilateral conduct, as Mr Harvey explained, in terms of,  
3 in a sense, pricing based on the market feedback that  
4 you are receiving or there could be multilateral conduct  
5 based on the feedback that is coming through Recital 47,  
6 but what I am suggesting to you is there is an entirely  
7 plausible theory of harm simply based on the way this  
8 cartel actually operated.

9 A. I think that we are operating with different  
10 methodologies. You are looking at the Commission's  
11 decision, you are looking at the wording and from this  
12 wording you conclude that -- the Commission -- that  
13 there was an infringement, there was an agreement, there  
14 were concerted practices. My methodology is different.  
15 I look at potential theories inspired by what the  
16 Commission is explaining and I confirm that with the  
17 facts. So these are just different ways or different  
18 approaches, different methodologies.

19 THE CHAIRMAN: Can I ask you, where you refer to the  
20 agreement, implementation of the agreement, what is the  
21 agreement that you are referring to there?

22 A. Yes, there is a thing. The Commission is of course  
23 referring to agreement and concerted practices. I mean,  
24 in my wording, the agreement would be this focal point  
25 that I describe in my report. I mean, because you are

1 exchanging -- we have conversations with the other  
2 manufacturers about your intended change in list prices,  
3 from this you might sort of infer what could be the  
4 target in terms of changes in list prices that could be  
5 different from what would happen in a competitive  
6 counterfactual; okay?

7 So what the Commission refers to as an agreement, in  
8 my economic framework it is a focal point first with  
9 respect to list prices that might translate into  
10 transaction prices, and that is what I bring to the  
11 data. I say, "Okay, if you have conversations about  
12 list prices, could this be meaningful in terms of what  
13 ultimately matters, which is a coordination on  
14 transaction prices?", so --

15 THE CHAIRMAN: I think you accepted Mr Ward's proposition  
16 that the focal point must be over transaction prices.

17 A. It has to be -- the focal point has to be about  
18 transaction prices, yes.

19 THE CHAIRMAN: So you are saying that there was some form of  
20 agreement over transaction prices?

21 A. No. Exactly what my evidence shows is that it is very  
22 unlikely that there was a focal point on transaction  
23 prices. That is the key of my evidence, is that because  
24 there is no systematic link between the changes in list  
25 prices and the changes in transaction price actually in

1 the market, it means that whatever DAF may have said to  
2 Daimler or MAN or whoever about its intention with  
3 respect to list prices was not conveying information  
4 about what they were planning to do on transaction  
5 prices. There is no consistency.

6 MR RIDYARD: I can see that ultimately what matters is  
7 whether there is an effect on transaction prices, but  
8 is it not possible that you could have a focal point on  
9 another competitive parameter that would lead to an  
10 effect on transaction prices?

11 A. Yes, I am glad you are asking this question because this  
12 is, I think, in the back of many people's approach to  
13 this case, which is to say you do not actually need to  
14 have a coordination on transaction prices. You can have  
15 a coordination on another parameter that is relevant for  
16 competition, and of course this other parameter would be  
17 list prices; okay? So people would say, "Okay, as long  
18 as we coordinate on list prices, because we know that  
19 eventually somehow list prices would translate into  
20 transaction price, this is good enough", and I think  
21 that this is fundamentally misleading. It is  
22 fundamentally wrong to have this approach because there  
23 is always the possibility for the manufacturers to undo,  
24 through the rebates, through the setting of the  
25 transaction price, whatever they may have agreed upon

1 with respect to these other parameters of competition.

2 So, I mean, to put it in very stark terms, the  
3 theory that you are putting to me is a theory that was  
4 referred to in the Dutch proceeding as -- very Dutch --  
5 as sort of "The tide that lifts all boats"; okay? You  
6 are talking about the list prices and this will  
7 eventually lift all the boats. This will eventually  
8 lead to an elevation in the transaction prices and  
9 I think this is wrong. This is wrong simply because, if  
10 you agree on list prices, you can always undo that by  
11 changing the rebates; you can always undo that by  
12 changing the internal guidelines with respect to  
13 pricing; you can always have the possibility to deviate.  
14 So this analogy, that simply agreeing on another  
15 parameter of competition, I think is deeply misleading.

16 MR WARD: Well, Professor Neven, what I am putting to you is  
17 there is just a broad economic logic in the idea that  
18 this kind of mechanism enables participants to raise  
19 their prices without needing the highly granular  
20 transaction information that you say is essential.

21 A. What mechanism are you referring to? Are you referring  
22 to collusion or are you referring to Mr Harvey's theory?

23 Q. It could be either. There is obviously collusion at the  
24 level of list prices and so forth but it could be  
25 unilateral, in the sense that the participant in the

1           cartel can see what -- gets the cartel information, sees  
2           what prices are achievable and concludes it can raise  
3           its price in the atmosphere of softened competition.

4           Do you accept that is possible?

5           A. I mean, softened competition, this is Mr Harvey, this is  
6           unilateral; okay?

7           Q. Yes, that is unilateral.

8           A. So let us stick to collusion for a second and then we  
9           can deal with softening.

10          Q. Well, perhaps we can deal with them both.

11          A. With respect to collusion, I think that -- of course it  
12          is entirely possible to have a focal point on changes in  
13          list prices that would translate into transaction prices  
14          that would be at the aggregate level. You do not have  
15          to agree that I am going to increase prices by 2% above  
16          what I would otherwise do with respect to LF and sort  
17          of 3% with respect to XF and 5% with respect to CF. You  
18          do not need to do that. You might simply agree to have  
19          general list prices for all trucks, that instead of  
20          being, you know, 2%, might be 3% or 4%, so it can be  
21          generalised.

22                 Indeed, in confronting this theory with evidence,  
23          I look at those type of price increase. I look at the  
24          price increases -- the announcement of price increases  
25          that were most likely to lead to useful information in

1 terms of changes in transaction prices because they were  
2 generalised. There was no need to have a detailed  
3 discussion about the particular implementation of the  
4 changes in the list prices. So indeed I think that the  
5 most plausible mechanism in terms of collusion would be  
6 one that involves generalised increase in list prices,  
7 and that is why the evidence that I have gathered is  
8 conservative, because I have focused on what is most  
9 likely to have been useful.

10 Q. Well, the unilateral mechanism that Mr Harvey is  
11 proposing, cartelists get all the cartel information,  
12 cartelists get the benefit of the information from  
13 Recital 47, cartelists sell product in the market and  
14 see what prices they can achieve, cartelists charge  
15 more money; plausible?

16 A. Yes, the problem I -- the concern that I have with  
17 respect to unilateral theories, which are not collusion  
18 theory by the way so it is not sort of literally  
19 a concerted practice or a collusion, but okay, that is  
20 a fine point in terms of economics -- the unilateral  
21 theories, they can go either way. I mean, it could very  
22 well be that, because you are receiving information  
23 from, say, a competitor in the context of the  
24 information exchange, it actually leads you to have  
25 a lower price than you would otherwise have been.



1           Again, here, let us refer to theory. I mean, the  
2           economic theory is fairly ambivalent about this and  
3           economic theory is basically saying that exchanging  
4           information in the context of a unilateral effect, as  
5           described by Mr Harvey, can go both ways. I mean,  
6           sometimes it can lead to higher prices, sometimes it can  
7           lead to lower prices.

8           Q. So let us just test that. We have got this cartel  
9           running for 14 years and year in, year out, transaction  
10          after transaction, the cartelists are essentially  
11          seeking the same work; in other words, it might be in  
12          a tender or there might just be a customer who is  
13          looking at different offers from different  
14          manufacturers. If, say, Iveco was ruthlessly  
15          undercutting the other cartelists, in other words going  
16          for the low price option, not the high price option,  
17          would that not be obvious to the cartelists over time?

18          A. But again you are putting yourself -- the assumption of  
19          your reasoning is collusion again and --

20          Q. I am testing the unilateral option here for a minute.

21          A. But, no, because you are referring to collusion. You  
22          are referring to deviation. Deviation is, again, with  
23          reference to an agreement or with respect to what I have  
24          described as a focal point for coordination --

25          Q. Professor Neven --

1 A. -- this -- you know, this idea of deviation is actually  
2 conceptually sound.

3 Q. -- take it from me, I am trying to discuss with you the  
4 so-called unilateral option.

5 A. Okay.

6 Q. I will run through it again. Collusion, Recital 47 --

7 A. Let us agree that it is not collusion.

8 Q. There is collusion on list prices. That we just cannot  
9 get away from in this case. When I talk about  
10 collusion, I am talking about the collusion that is  
11 found in the decision which is binding on your clients.

12 A. Okay, but, again, this is a methodological issue. As  
13 economists, collusion is what was discussed this morning  
14 in terms of supporting the prices that are above the  
15 competitive level through a mechanism of repeated  
16 interaction. That is what we call "collusion"; okay?

17 Q. What word would you prefer me to use as shorthand for  
18 the undoubted infringement in the decision over pricing  
19 and gross list prices? Just tell me a word that you  
20 would prefer for that.

21 A. No, okay, in order to understand one another, I think  
22 that if you are referring to unilateral effect --  
23 I mean, let us not call it "collusion" and let us not  
24 refer to economic effects that have to do with  
25 collusion.

- 1 Q. Perhaps we are having a debate about semantics, but  
2 I will try again --
- 3 A. It is not semantics.
- 4 Q. I will try again and explain what I am trying to put to  
5 you.
- 6 A. Okay.
- 7 Q. The European Commission decision contains a major  
8 infringement of Article 101. We will call it the  
9 "infringement". The participant in the infringement  
10 gets information from that. The participant in the  
11 infringement gets the benefit of Recital 47 because  
12 after all they have all admitted it. The participant in  
13 the infringement sells its trucks on the market. The  
14 participant in the infringement gets valuable feedback  
15 about what prices it is being able to achieve. So far  
16 so good, I hope. Okay, that is what I am putting to  
17 you.
- 18 You suggest, "Well, that person might choose to, as  
19 it were, go low. They have got all this information,  
20 they will undercut all their other manufacturers". No,  
21 that was not what you were putting to me?
- 22 A. No, again --
- 23 Q. Oh, I just totally misunderstood.
- 24 A. So I think you need to interpret the facts in light of  
25 a particular framework. What I have done is I have

1 taken the Commission's decision, which refers to  
2 collusion and concerted practices, and I have, I mean,  
3 taken these words seriously, I have considered a theory  
4 of coordination and I have tested it. Now, if you are  
5 saying that there is another theory which is that simply  
6 because they exchanged information and this led them to  
7 price differently, in the absence of a mechanism of  
8 collusion that would support these higher prices, okay,  
9 we can discuss that.

10 Q. Let me just keep going and see. What I am suggesting to  
11 you is this manufacturer -- we will call them Iveco just  
12 to put something concrete on it -- is in a position to  
13 price, knowing what the cartel prices are and knowing  
14 what is supported in the market. I am suggesting to you  
15 that is likely to lead to higher prices.

16 A. But what I am saying is that your reasoning is again  
17 a reasoning of collusion because -- sorry, let me  
18 just -- because it is important. What you are saying is  
19 that Iveco price knowing what the focal point is. No.  
20 That is a theory of collusion. If you were in the  
21 theory of Mr Harvey, what you should ask me is, "Is  
22 Iveco going to price differently given the information  
23 that it got in some of this information exchange about  
24 the level of orders, about the technical characteristics  
25 of the trucks that were sold by DAF, about, you know,

1           whatever other pieces of information they exchanged?"

2       Q.   But, Professor Neven, you are side-stepping the obvious,  
3           which is that that information included list price  
4           information.  It is not just about order intake.  There  
5           is list prices.  It is the elephant in the room; no?

6       A.   But, okay, so what -- okay.  Let us define the  
7           conceptual framework.  I mean, either you are saying  
8           that list prices were used in order to support  
9           a coordination, a collusion.  That is the Commission's  
10          story and that is the story that I --

11       THE CHAIRMAN:  Can I just be clear?  When you are referring  
12          to coordination or collusion --

13       A.   It is the same thing.

14       THE CHAIRMAN:  It is the same thing, okay.  You are saying  
15          that that is effectively a focal point over transaction  
16          prices?

17       A.   Exactly.

18       THE CHAIRMAN:  Yes.

19       A.   Yes.

20       THE CHAIRMAN:  So it assumes some sort of agreement between  
21          the cartelists --

22       A.   Yes.

23       THE CHAIRMAN:  -- over transaction prices?

24       A.   Yes, and what my evidence shows is that it is very  
25          unlikely --

1 THE CHAIRMAN: Yes, and I understand you say it is unlikely  
2 to have arisen.

3 A. That is right.

4 THE CHAIRMAN: We do not know whether there was such a focal  
5 point, do we, on the facts, as a matter of fact?

6 A. No, we cannot tell.

7 THE CHAIRMAN: So you are providing a theory that will  
8 potentially prove why such a factual scenario could not  
9 exist?

10 A. No, I am falsifying the theory so I am providing  
11 evidence suggesting that the theory does not work.

12 THE CHAIRMAN: Right. But who is putting forward that  
13 theory?

14 A. Oh, the Commission. I mean, the Commission is saying  
15 that there is coordination in this market through  
16 discussions on list prices that leads to transaction  
17 prices.

18 THE CHAIRMAN: Yes, but they are not saying there was  
19 coordination to the extent of there being a focal point  
20 over transaction prices.

21 A. Oh, they say something worse -- not worse, something  
22 stronger. They say there was an agreement.

23 THE CHAIRMAN: An agreement to share information?

24 A. No, they say there was an agreement on list prices and  
25 so, as I explained before, I mean, what the Commission

1           refers to as an "agreement" is what as economists we  
2           refer to as a "focal point" because you cannot just  
3           agree on increasing prices; okay? You cannot sort of  
4           enforce an agreement to increase list prices. So there  
5           needs to be an understanding about the members of the  
6           coordination, about what they want to achieve. They  
7           cannot go to court and say, "Look, we agreed to increase  
8           prices by 2%", so it cannot be an enforceable agreement  
9           so it has to be an understanding.

10           What I am saying is that reaching an understanding  
11           on increases in gross prices, in list prices that would  
12           lead to an understanding with respect to the increase in  
13           transaction prices is inconsistent with the facts that  
14           I have found. That is why --

15       THE CHAIRMAN: Well, you are not here to find the facts,  
16           are you?

17       A. Well, I am here in --

18       THE CHAIRMAN: (Overspeaking - inaudible) base your theory  
19           on the facts.

20       A. Exactly. So I was sort of using the Commission's  
21           decision, I am sort of developing the theory that the  
22           Commission is referring to and I am trying to see  
23           whether this theory is borne out by the actual market  
24           behaviour.

25       MR WARD: Sir, this is a bit of -- there is some mismatch of

1           understanding going on here. I have been trying to put  
2           to Professor Neven that there are plausible theories of  
3           harm that do not involve a focal point on transaction  
4           prices. I need to be sure I have at least put my case  
5           sufficiently on that, so may I just try one more time or  
6           are you satisfied -- is it clear enough to the tribunal  
7           that I have put it? He is obviously not going to accept  
8           it and I understand that, but I do not want to be told  
9           later by Mr Beard that I did not put my case.

10        THE CHAIRMAN: I think there was a certain amount of  
11           confusion as to what he meant by "collusion".

12        MR WARD: That did not help, that did not help.

13        MR RIDYARD: What about the question that Professor Neven  
14           suggested that you should have asked him? I know this  
15           is a slightly unusual way of doing it, but is it worth  
16           giving it a try?

17           He said what you should have asked him was, as  
18           a result of the information they had from the illegal  
19           activity, would that mean that prices were higher than  
20           they would have been had they not had that illegal  
21           activity and that information?

22        MR WARD: Well, I thought I was putting that, I confess,  
23           albeit that I was doing it in more steps than that.

24        MR RIDYARD: I think the thing that caused offence to  
25           Professor Neven was when you mentioned the words



1 "collusion" and "coordination".

2 MR WARD: Innocently thinking it was common ground that  
3 there was indeed collusion in the findings of the  
4 Commission, so that possibly is where the problem set  
5 in.

6 That is indeed the question I am trying to put to  
7 you, Professor Neven, and it is on the basis that there  
8 is no focal point but that the manufacturer who has the  
9 information from the cartel and the information in the  
10 marketplace about what prices it is going to achieve is  
11 able to sustain higher prices.

12 A. Can I refer back to the question that was raised this  
13 morning by Mr Ridyard about the distinction between  
14 unilateral effect and coordinated effect; okay?

15 Coordinated effects relate indeed to collusion,  
16 relate to coordination, relates to this idea that you  
17 are trying to support an outcome in the market that is  
18 above the competitive outcome; okay? In terms of what  
19 Mr Ridyard asked this morning, this can indeed arise as  
20 an equilibrium, using words that again you have used  
21 this morning, as an equilibrium in the repeated game.

22 Now, there is another story, which is I think the  
23 story of Mr Harvey, which is saying that you can have  
24 unilateral effect. So you can have a shift in  
25 equilibrium -- okay? -- because of the information that

1           was exchanged, which does not require coordination,  
2           which does not require, you know, deterrence of  
3           deviation or anything else, but just the fact that  
4           because they talked, because they exchanged information,  
5           this sort of static, one-shot way of competing between  
6           firms has been affected. That is what he is saying,  
7           I think, and these are in economic terms two very  
8           different stories. That is why I think that -- sorry.

9       MR RIDYARD: I think what Mr Ward is asking you is: have you  
10           evaluated the second story?

11       A. Exactly, and that is exactly the question that indeed  
12           I want to answer to.

13           The second story is a theory that I have -- or is  
14           a possibility that I have only considered from the  
15           perspective of economic principles. I have said, you  
16           know, "Is it that I have economic principle, economic  
17           theories and evidence from other cases in general that  
18           could support this?", and what I conclude, reviewing the  
19           existing body of evidence, is that you have theories  
20           suggesting that it could go one way or suggesting -- or  
21           going the other way. You have theories that are  
22           suggesting that the information that you are getting is  
23           actually valuable in order for you to price more  
24           efficiently, so that -- I mean, a benefit for the firm  
25           in the sense that they are pricing more efficiently

1 without necessarily having an anti-competitive effect.  
2 There are other theories that say that, for some types  
3 of information that is shared, it actually leads to  
4 higher prices and, unless there is a specific theory  
5 that is put forward, it is hard to decide.

6 Now, what I have also said is that -- or what I have  
7 also done is to look at the one specific theory that is  
8 a theory of unilateral effect that has been referred to  
9 in this case, which is the Harrington theory -- okay? --  
10 because that -- Harrington is not collusion.  
11 Harrington, as we discussed this morning, is a theory of  
12 unilateral effect and I have explained in my reports  
13 that I do not think that the Harrington theory is  
14 reliable for theoretical reasons as well as reason of  
15 fit with the facts of this case.

16 If you then ask me could I have done more in order  
17 to try to put this unilateral effects theory to the  
18 facts, I mean, to confront it with facts, I think it is  
19 very hard to do, honestly. I think it is very hard to  
20 do unless you have something specific, and since I was  
21 not confronted with any specific unilateral effects  
22 theory, besides the idea that they were talking and  
23 because they were talking this would affect the pricing,  
24 it is very difficult to confront that. It is very  
25 difficult to try to assess these theories -- this sort

1           of general idea of unilateral effects, to confront it  
2           with facts.

3       MR WARD: In your answer there somewhere, Professor Neven,  
4           you said that under these kind of unilateral effects the  
5           prices could be higher or could be lower. So does that  
6           entail that you accept it is at least a possibility that  
7           the prices would be higher?

8       A. Of course.

9       MR WARD: Sir, can I just speak about time, if I may? It is  
10          4.15 now. We are scheduled for half a day tomorrow.  
11          I have to confess things are going rather more slowly  
12          than I had hoped and I am wondering about whether there  
13          is any scope for indulgence from the tribunal for  
14          tomorrow, possibly even running slightly past lunch if  
15          I obviously give you my best endeavours to avoid that  
16          happening.

17       THE CHAIRMAN: If we carried on a bit later today and start  
18          early tomorrow, would you be able to finish by lunch  
19          because I think we do have to finish by lunch.

20       MR WARD: If I have to, of course I will, so thank you very  
21          much for the additional time.

22                 Let us see how we do.

23       MR BEARD: That is absolutely fine.

24       THE CHAIRMAN: Can we carry on until 4.45?

25       MR WARD: Thank you, sir.

1 THE CHAIRMAN: It may be it is a little unfair on  
2 Professor Neven to --

3 MR BEARD: Well, I am slightly concerned about the position  
4 in relation to Professor Neven. I mean tomorrow, if we  
5 are going to start at 10.00, I think we should  
6 anticipate that we should have perhaps two short breaks  
7 during the course of the morning rather than just one in  
8 the middle.

9 MR WARD: Of course.

10 MR BEARD: I do not imagine Mr Ward has any difficulty with  
11 that. I think -- Professor Neven has been in the box  
12 since 2.05, obviously we had a break, but --

13 THE CHAIRMAN: Do you need a break, Professor Neven? You  
14 would like a break?

15 A. I think I can carry on until 4.45.

16 MR BEARD: There we are.

17 THE CHAIRMAN: Maybe we should start, if this is convenient  
18 for everyone, at 9.30 tomorrow and have the two breaks  
19 that you suggest. Is that okay?

20 MR WARD: Yes, thank you.

21 THE CHAIRMAN: Is that okay with you, Professor Neven? I am  
22 sure you would prefer to get shot of this by lunchtime  
23 tomorrow.

24 A. Indeed.

25 THE CHAIRMAN: Okay. Let us do that then.

1 MR WARD: Thank you, sir. I will obviously consider  
2 overnight about how quickly I can take things.

3 THE CHAIRMAN: Understood. Thank you.

4 MR WARD: We have been talking mostly about transparency and  
5 you have pointed to a number of other market features  
6 that you say made focal point collusion more difficult.  
7 My overarching point is that none of that prevents the  
8 cartel being useful for pricing, as you will have  
9 appreciated. But I would like to look at a couple of  
10 those examples, if I may, from your report.

11 Could we go now back to your first report under  
12 tab 10? This is in your white bundle, I believe.  
13 Page 21, paragraph 4.17, {E/10/21}.

14 What you say is -- this is about the number of  
15 competitors in the market and you say:

16 "The more participants there are in a given market,  
17 the more difficult it is to:

18 "reach a common understanding on a focal point ...

19 "prevent participants from deviating ...

20 "ensure that a deviator is punished ..."

21 Here, of course, we have five or six if you include  
22 *Scania*, and your point is it is difficult to get them to  
23 adhere to a focal point. Then you say at 4.18:

24 "Theoretical studies have highlighted the difficulty  
25 of reaching a common understanding ... when

1 explicit negotiations are allowed because of a free  
2 rider problem ..."

3 Professor Neven, instead of relying on theoretical  
4 studies for this, did you think to ask your client if  
5 this free rider problem was in fact a problem in  
6 reality?

7 A. No.

8 Q. Is not the obvious inference again, from the fact that  
9 this cartel continued unabated, that in fact it was not  
10 a problem?

11 A. But, again, I am trying to assess here whether the  
12 conditions are conducive to coordination, and I think  
13 that the position of DAF, as far as I understand it, is  
14 that there was no coordination.

15 Q. I beg your pardon, Professor Neven?

16 A. As far as I understand it, the position of DAF is that  
17 there was no coordination.

18 Q. No coordination? None in the decision that they  
19 admitted to?

20 A. I mean no effective coordination in economic terms. Let  
21 us put it --

22 Q. So the position is as a matter of economics there was no  
23 effect?

24 A. Yes.

25 Q. Well, that is your position, is it not?

1 A. That is my position.

2 THE CHAIRMAN: You are saying you understand that is DAF's  
3 position, what, as a matter of fact?

4 A. Well, I mean, what I understand is that they do not  
5 disagree with my conclusion that there was no effective  
6 coordination, yes.

7 THE CHAIRMAN: I am sure that is ...

8 MR WARD: Is this from your memorandum that you got from  
9 DAF, explaining why it thought there was no effect on  
10 competition, the one you talked about this morning?

11 A. Which memorandum?

12 Q. Right back this morning you told us all about  
13 a memorandum you got -- a narrative, sorry. The word  
14 you used was a "narrative document", which you said told  
15 you "what they thought about the conduct and why they  
16 thought it was not anti-competitive".

17 A. There is no document, no.

18 Q. Well, a narrative. I am just reading from the  
19 transcript. You described it as a "narrative". Is that  
20 where this comes from?

21 A. No. I think that the narrative that I got from DAF at  
22 the very beginning, which I was quite sceptical about,  
23 as I told you, is that indeed there was no role  
24 whatsoever for list prices in setting transaction  
25 prices. That was essentially their narrative, so that



1 coordination on list prices could not have had any  
2 effect in the market because list prices did not play  
3 any role.

4 Q. Are you aware of the evidence that we heard earlier in  
5 the week that explained how in fact list prices did play  
6 a role?

7 A. Yes, but I think they do honestly.

8 Q. You think they do?

9 A. I think they do, of course. Why would you have list  
10 prices if there was no role for them to play? What I am  
11 saying is that my evidence is showing that exchanging  
12 information on anticipated changes in list prices cannot  
13 have led to collusion but of course list prices are  
14 useful for something.

15 Q. So you exchange -- let us explore that a little, if we  
16 may. We know there is an infringement in relation to  
17 list prices, future list prices, among other things. We  
18 know DAF took the information into account. Mr Beard  
19 explained that on Day 2. You now accept that the list  
20 prices actually had an effect on transaction prices,  
21 I think is what I just heard you say --

22 A. Ah, okay, I am glad you are asking the question  
23 because --

24 THE CHAIRMAN: I did not hear the question.

25 A. The question -- okay, maybe you want to repeat it.

1 MR WARD: I must admit I thought I was just saying back to  
2 you what you had said to me just five minutes ago, but  
3 I am a bit behind in the real-time transcript so ...

4 Sorry, I seem to be going in the wrong direction for  
5 some reason.

6 THE CHAIRMAN: What question did you --

7 A. Okay, the question I was going to answer is -- or the  
8 question I thought was asked to me is the question as  
9 whether, I mean, I had admitted that list prices had an  
10 effect on transaction prices and so that this cartel  
11 must have had an effect. I mean, I am glad he is asking  
12 that question because indeed I think that list prices  
13 are useful for something. I mean -- and I think that in  
14 a competitive environment, I mean, list prices are to  
15 some extent translated into transaction prices. I think  
16 if list prices are going up, to some extent, in  
17 a competitive environment, they are going to be  
18 translated into transaction prices, but this does not  
19 imply that an agreement on list prices will lead to  
20 changes in transaction prices.

21 So what is happening in a competitive environment,  
22 which I think is -- you know, makes a lot of sense, you  
23 know, list prices might be useful for something.

24 I mean, if you are increasing list prices in  
25 a competitive environment, it will lead to changes in

1 transaction prices. But I think that this observation  
2 is not sufficient, does not imply that members of an  
3 information exchange can agree on changes in list prices  
4 in order to change the transaction prices. Why?  
5 Because they can always deviate. So it is not because  
6 it happens in a competitive environment that you can  
7 assume that you can manipulate this link between list  
8 price and transaction price in order to sustain higher  
9 transaction prices.

10 I am just putting forward -- I am basically dealing  
11 with the argument of "the tide that lifts all boats"  
12 here in a different way, but fundamentally it is the  
13 same idea. It is the idea that you cannot sort of  
14 manipulate this link between transaction prices and list  
15 prices that you have in a competitive environment in  
16 order to support prices that are in excess of the  
17 competitive outcome.

18 MR WARD: Let me try a bit of simple building with Lego  
19 bricks, if you do not mind. You have told us you think  
20 that the list prices are useful for something. You have  
21 told us they were translated into transaction prices.  
22 Mr Beard has told us that the gross list price  
23 information from the cartel was indeed taken into  
24 account. Would you not accept it is at least plausible  
25 that through that mechanism the cartel influence the

- 1 list prices, the list prices influence the transaction  
2 prices and the transaction prices were actually higher?
- 3 A. But, as I said, my evidence is not consistent with that.  
4 You remember the graphs that was put forward yesterday  
5 with respect to the pass-through.
- 6 Q. We are going to come to that tomorrow.
- 7 A. You see that this pass-through is not at all consistent  
8 over time. You also see, by the way, that on average  
9 the pass-through is close to zero.
- 10 Q. So you are saying that although the list prices are  
11 translated into transaction prices --
- 12 A. In a competitive environment.
- 13 Q. In a competitive -- not in the cartel environment then?
- 14 A. I think that using the list prices in order to affect  
15 transaction prices in a coordinated mechanism, at least  
16 according to my evidence, does not work.
- 17 Q. So in your world it is actually less likely that the  
18 list price had an effect on transaction prices in the  
19 cartel than in the competitive environment?
- 20 A. Of course.
- 21 Q. It is actually less likely?
- 22 A. Of course.
- 23 Q. So all of that collusion in fact blunts the probability  
24 that there is an effect?
- 25 A. No, it is not about whether there is an effect. What

1 I am saying is the link between list prices and  
2 transaction prices that you have in a competitive  
3 environment is not a link that you would see in  
4 a coordinated outcome because firms would deviate.

5 Q. Is it not at least plausible, at least plausible, that  
6 in fact the firms receiving this information, adjusting  
7 their list prices, translating them into transaction  
8 prices, would in fact charge more money?

9 A. I mean, it is precisely because the Commission puts it  
10 forward as a reasonable theory of harm that it has to be  
11 brought to the fact. I mean, I am not denying that  
12 there is a potentially plausible theory of harm. What  
13 I am saying is that the evidence that I have gathered  
14 suggests that it is highly unlikely that it worked  
15 effectively.

16 Q. All right. Well, I have put my case on that.

17 Can we look at market share, another parameter that  
18 you say serves to defeat effective collusion. Where we  
19 can go for this is in fact Mr Harvey's report, which  
20 repeats your table, to save us some time, and it is  
21 {E/28/29}. I am so sorry, I want to start at page 26,  
22 {E/28/26}. This figure 2 is taken from your report.

23 A. Yes, that is right.

24 Q. You will see that one of the points Mr Harvey makes is  
25 that this is one particular year, 2005, and if we look

1 on the next page, page {E/28/27}, the differences in  
2 market share in the UK do not look quite so dramatic, do  
3 they? Sorry, this is a table from 1997 to 2010. You  
4 have in fact chosen 2005, one of the years for which DAF  
5 had the highest market share. Would you agree?

6 A. Yes, I think so. 30%, right? Yes.

7 Q. Yes. Any particular reason you chose that year?

8 A. No.

9 Q. Okay. Then can we go to page 29 --

10 A. I am not sure --

11 MR BEARD: Sorry, I am not sure -- can Professor Neven  
12 actually see the screen?

13 A. Not very well.

14 MR BEARD: Would it be possible to draw the blinds a little  
15 bit. Sorry to interrupt. (Pause)

16 MR WARD: There is a hard copy at tab 6 of your paper  
17 bundle, if you would prefer, so that is the blue bundle,  
18 tab 6, or are you happy now with the screen?

19 A. Okay.

20 Q. Do you want to look at those again or was that --

21 A. Yes, please, because I am not sure that I followed what  
22 you wanted to say.

23 Q. So we were on page 26, {E/28/26}, which is your graph  
24 that you rely on to show asymmetry in market share.

25 A. Yes.

1 Q. It is from 2005. I was showing you figure 4 on the next  
2 page, {E/28/27}, where Mr Harvey has shown the UK market  
3 shares from 1997 to 2010. What I was asking you was:  
4 was there any particular reason you chose the year  
5 2005 --

6 A. No.

7 Q. -- because we can see that DAF has a particularly high  
8 market share that year, can we not?

9 A. So what? What is important is to look at the disparity  
10 in market shares. You know, what is important for the  
11 argument of coordination is that the market shares are  
12 different and, because the market shares are different,  
13 there was a presumption that reaching an understanding  
14 about a focal point is going to be more difficult  
15 because of the asymmetry. So you cannot just focus on  
16 one firm. You look at the asymmetries. Having said  
17 this, if you look at 1997, which is figure 3 in  
18 Mr Harvey's report, there is less asymmetry in 1997 than  
19 in 2005.

20 Q. At what point is the threshold where this asymmetry  
21 becomes a problem?

22 A. I think here I agree with Mr Harvey. I think that it is  
23 very difficult to have a definite judgment about the  
24 level of asymmetry at which this is really relevant.

25 I mean, what we know is that for coordination --

1 I mean asymmetry makes coordination more difficult.  
2 What we see is that these asymmetries are significant.  
3 What is the threshold? Honestly, I do not think that  
4 there is any threshold from economic theory. I mean,  
5 okay, you can build models, but I would not rely on them  
6 in order to inform my judgment necessarily on this.

7 Q. Can I ask you now about a different topic? We have been  
8 talking about pricing and Mr Beard said BT and  
9 Royal Mail pricing might raise some different  
10 considerations and I wanted to just explore that with  
11 you for a moment because we know that they are buying  
12 trucks in a competitive tender, are they not?

13 A. Yes.

14 Q. We also know that most of the other bidders are also in  
15 the cartel, do we not?

16 A. Hmm-hmm.

17 Q. So would you accept it is at least plausible that the  
18 other bids are also informed by the cartel?

19 A. Where do you mean exactly?

20 Q. All of the bidders -- well, there are some small players  
21 in the market that are not in the cartel, but most of  
22 the other bidders are in the cartel, therefore they have  
23 access to all of the information that the cartel  
24 provides: the gross list prices, Recital 47, all the  
25 rest of it.



1 A. Okay.

2 Q. What I am suggesting to you is, when BT and Royal Mail  
3 are bidding -- sorry, not bidding -- letting a contract,  
4 they are about as far away as one can imagine from the  
5 kind of independent bidding that one would hope to  
6 achieve in a competitive tendering exercise. Do you  
7 accept that?

8 A. Okay, you are again -- the assumption of your question  
9 is that there was effective coordination, which is  
10 something that I have difficulty with. I mean, I do not  
11 think there was effective coordination.

12 Q. I understand.

13 A. I can still, you know, adopt your assumption. Let us  
14 assume that there was effective coordination, I think it  
15 is less likely that there was effective coordination for  
16 particular tenders like those of Royal Mail and BT. My  
17 reason for saying this is again economic theory.  
18 I mean, economic theory is saying that whenever there  
19 are large bids, large chunks in demands that are being  
20 up for tender, the incentive to deviate will be  
21 stronger, so that even under your assumption that there  
22 was effective coordination, I would say that there is at  
23 least one argument from economic theory that it is less  
24 likely to have arisen in the case of tenders.

25 Q. Do you agree it is at least plausible that when you have

1 a whole series of bidders with access to this cartel  
2 information who were involved in this breadth and depth  
3 of coordination, that they might be emboldened to put in  
4 higher bids than would otherwise be the case?

5 A. Okay, you keep asking the same question. I think that  
6 maybe we should clarify what you mean by "at least  
7 plausible". I think that what I have said is that the  
8 evidence that I have gathered shows that it is highly  
9 unlikely that there was effective coordination. If you  
10 are asking me whether it is possible, yes, of course it  
11 is possible, but I think it is highly unlikely.

12 Q. So would you accept that we cannot rule out the fact --

13 A. No, we cannot.

14 Q. -- that the prices that they paid might have been lower  
15 in the absence of the cartel?

16 A. No, I do not think we can rule it out, no.

17 THE CHAIRMAN: When you say it is possible, do you mean it  
18 is plausible?

19 A. Okay, we are back to the distinction that was drawn by  
20 Mr Harvey between "possible" and "plausible". You know,  
21 what do I mean when I say it is "highly unlikely"? What  
22 I say is that the evidence that I have gathered -- none  
23 of the evidence that I have gathered is consistent with  
24 effective coordination working. At the same time we  
25 have the Commission's decision that says that, you know,

1           there was coordination and concerted practice, so  
2           I cannot rule it out. But the evidence that I have,  
3           I mean, suggests that it is highly unlikely. We could  
4           formulate it in terms of probability. I mean, what is  
5           the probability that there was effective coordination?  
6           I mean, I think this probability is small. We should  
7           also define what we mean by "possible" and "plausible".  
8           I think that this probability is small.

9           THE CHAIRMAN: The coordination that you are talking about  
10           is different to the coordination as found by the  
11           Commission?

12          A. No, I do not think so. I think -- okay, again, we are  
13           back to the sort of distinction between the coordination  
14           in legal terms and the coordination in economic terms.  
15           The Commission is finding an infringement of 101, is  
16           qualifying this infringement in terms of collusion and  
17           concerted practice; okay? That is the Commission's  
18           test. This is the legal approach of the Commission that  
19           I am not denying.

20          THE CHAIRMAN: About exchange of information --

21          A. The Commission is saying this works through an exchange  
22           of information on list prices --

23          THE CHAIRMAN: To net prices.

24          A. -- to net prices. I am saying, "Okay, that is what the  
25           Commission says. The Commission qualifies that in legal

1 terms". I accept that but I look at whether, in  
2 economic terms, this is -- this has worked effectively,  
3 and I come to the conclusion that in the context of the  
4 Commission's theory, that I fully accept, in the context  
5 of this idea that there could have been coordination on  
6 transaction prices through discussion on list prices,  
7 I think that it is very unlikely to have been effective.

8 So there is no contradiction between -- and I am not  
9 disputing the Commission's decision. The Commission's  
10 decision is what it is. They have a decision that there  
11 is an infringement. They put forward the mechanism.  
12 I bring this mechanism to the data and I say, "Okay, the  
13 data is not consistent with it".

14 MR WARD: Sir, it is actually 4.40 and my next topic is  
15 quite a substantial one. I do not see any benefit to  
16 either the tribunal or the witness to embark on it now,  
17 even though I do not want to look a gift horse in the  
18 mouth of five extra minutes.

19 THE CHAIRMAN: I think we have to a certain extent delayed  
20 your cross-examination by our intervention.

21 MR WARD: Not at all.

22 THE CHAIRMAN: We will start then at 9.30 tomorrow.

23 Professor Neven, I am sure you are aware that you must  
24 not discuss any of your evidence or anything about the  
25 case with anyone overnight.

1 A. I do know.

2 THE CHAIRMAN: We will resume at 9.30 tomorrow.

3 (4.39 pm)

4 (The hearing adjourned until  
5 Thursday, 19 May 2022 at 9.30 am)

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