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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

Thursday 19 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**

A P P E A R A N C E S

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)

Thursday, 19 May 2022

(9.30 am)

THE CHAIRMAN: Good morning.

PROFESSOR DAMIEN NEVEN (continued)

THE CHAIRMAN: Good morning, Professor Neven. You are still under oath.

MR WARD: Just before we begin, to mention that there is a very short piece of cross-examination I will need to do in closed session. It is towards the end, it is only about ten minutes. I cannot think of a way to avoid it, unfortunately, but the rest of it will be open.

THE CHAIRMAN: Okay.

Cross-examination by MR WARD (continued)

MR WARD: Good morning, Professor Neven. Can we start, please, with the economic model of Professor Harrington. Now, there are various versions of this paper in the documents before the court but we will look at the one Mr Beard showed Mr Harvey, which is a relatively early version from March 2020, and it is tab 23, which will be the second of the blue folders, and for Opus it is {I4/289}.

Just for the tribunal, possibly principally for Mr Ridyard, there is an up-to-date version of this which is {I4/251.1}, which I am in fact going to go to briefly later, but it is a slightly more developed version of

1 the same thesis.

2 Now, Professor Neven, on Tuesday it sounded a bit as
3 if Mr Beard might be advancing the case that, unless the
4 claimants could fall precisely within the terms of this
5 model, Professor Harrington's model, there was no basis
6 for any theory of harm that could apply in this case.

7 Is that your view?

8 A. I think that what he said is that this model was a model
9 that was developing a theory of harm in
10 a non-coordinated environment and that alternative
11 models were ambivalent with respect to -- were unclear
12 with respect to the existence of harm, so he suggested
13 that this was the only model currently in the literature
14 which could lead to the possibility of harm, yes.

15 Q. That is your view, is it? You are just paraphrasing
16 Mr Beard's submission?

17 A. Could I think of other models, non-coordinated models --
18 having to do in particular with the exchange of list
19 prices, non-coordinated, yes, probably.

20 Q. This model does not address agreements at all, does it?
21 It is just information exchange.

22 A. Yes, one of the issues with this model is indeed how the
23 parties would -- the members of the information exchange
24 would actually identify the sort of high prices. You
25 remember in the description that was made by Mr Beard

1 there is a sort of low price and a high price, list
2 prices, that are possible choices of the firms. One of
3 the missing links or one of the missing piece of this
4 model is to identify the high and the low level. They
5 are just assumed to exist in the model.

6 There may be an issue about whether identifying this
7 high and low price, list prices, might actually require
8 something more than the information exchange --

9 Q. It does not address agreements, does it, the model? It
10 is just list prices -- it is just price exchange?

11 A. It is solely an exchange, yes. What I am trying to
12 say -- I think I was maybe misunderstood. What I am
13 trying to say, there is a missing element in that model
14 which is how the firms, the members of the information
15 exchange, would actually identify what is a high list
16 price and what is a low list price. This might require
17 some form of communication and, again, we are back to
18 a situation in which they would need to talk and
19 identify what is a focal point -- I mean, what is the
20 high price that might be the level of prices that might
21 be part of this equilibrium.

22 Q. We are going to come on to this, but what the model
23 posits is simply that there are incentives to raise the
24 prices that will be shared. That is the simple
25 intuition of the model, is it not?

1 A. The simple intuition of the model is that, if you know
2 you are going to share the list prices, then, in
3 addition to the competitive equilibrium, there is for
4 some range of parameters another equilibrium in which
5 the members of the information exchange maintain high
6 list prices.

7 Q. If you do not mind, what we will do is come to that in
8 a minute. I was hoping to just establish two short
9 points. I think we have established one. It does not
10 address agreements and of course it does not address the
11 other elements of this particular cartel beyond list
12 price information exchange. That is right, is it not?

13 A. What are you -- I am not sure I understand your
14 question.

15 Q. Let me try again, then I will move on. The model is
16 about list price information exchange only --

17 A. Yes.

18 Q. -- not about agreements and not about the other
19 relevance of the cartel in this case?

20 A. No, it is about list price.

21 Q. Good. Okay. We got there.

22 A. Exchanges, yes.

23 Q. Thank you. It is right to say, is it not, that it is
24 a stylised formal model?

25 A. Yes.

1 Q. So it cannot even attempt to capture all features of
2 reality, of course?

3 A. Like all models, yes.

4 Q. Would you accept it could still be useful or informative
5 even if it is an imperfect fit to the facts of this
6 case?

7 A. I mean, that depends very much on whether the
8 assumptions on which the model rely are key or not in
9 relation to the factual circumstances in which you would
10 like to apply the model.

11 Q. Yes. Okay. Well, let us look at what
12 Professor Harrington says on page 4, please, {I4/289/4}.
13 We can look at the central paragraph, which begins:
14 "The way those two features are encompassed ..."
15 Sorry, I am going to go back to the two features in
16 a moment, but there is a reason for starting here.
17 "... are encompassed in a formal model is stylised
18 ..."
19 Then Professor Harrington's view is:
20 "... the insight it yields is intuitive and robust
21 ..."
22 If we go to the very bottom of that paragraph, there
23 is an important point here I want to see if you agree
24 with. He says that an appealing feature of a model is
25 that "it is not dependent on a particular modeling of

1 ... internal pricing [processes]", so it is not highly
2 specific about how pricing processes take place, is it?

3 A. Yes, but its one weakness actually is that precisely if
4 you are faced with internal pricing processes that have
5 particular features, I mean, the model will fail.

6 Q. We will look again at how he deals with that in
7 a moment, if we may.

8 So let us look at these distinctive features which
9 are on page 3, {I4/289/3}, the last paragraph of page 3,
10 please. He says:

11 "In order to be able to draw ... general policy
12 conclusions, it is important that the theory of harm is
13 robust and relies on some fundamental forces. Towards
14 that end, a parsimonious model is developed which has
15 two distinctive features which I believe are ubiquitous
16 and compelling."

17 I want to look at those features and discuss them in
18 the context of this case.

19 A. Hmm-hmm.

20 Q. "The first feature is that firms (or, more specifically,
21 their executives) are not sharing transaction prices.
22 They are sharing prices which may ultimately affect the
23 prices that consumers pay but are not necessarily the
24 final prices that will be put before consumers."

25 He says in the context of the *Trucks* case

1 "manufacturers shared list prices, and list prices would
2 be expected to affect dealer prices which would then
3 affect the prices paid by final purchasers".

4 We are going to dwell on that in a moment but let us
5 just see the second feature as well, just so we have
6 them in mind. We can pick it up about eight lines down,
7 {I4/289/4}:

8 "The second feature is that the executives who are
9 sharing prices may be able to influence transaction
10 prices but do not have full control over them."

11 I want to look at those two features with you
12 separately.

13 So let us start with the first one, which is that
14 the executives -- I do not want to paraphrase it -- are
15 sharing prices which may ultimately affect the prices
16 that consumers pay. Now, yesterday afternoon you said
17 that -- you accepted that list prices had an effect on
18 transaction prices, so are we now agreed that this
19 condition is made out on the facts of this case?

20 A. As I said yesterday, I think that it is reasonable to
21 assume that list prices has an impact -- have an impact
22 on transaction prices in general, but I also said that
23 you have to be careful about the circumstances in which
24 you make that inference or you use that link, and, as
25 I said yesterday, this is a link that is not one that

1 you can rely on in a context of a model of coordination.

2 Q. So you do not think it is a good enough purpose to meet
3 Professor Harrington's requirements?

4 A. What I am saying is that Professor Harrington is putting
5 forward the proposition that there was a link between
6 list prices and transaction prices in general and
7 I think that in a competitive environment you would
8 expect to have one.

9 Q. So -- sorry to ask because if the answer is "No", I will
10 need to do some more work -- do you accept that this
11 condition is made out for the purpose of considering the
12 application of Professor Harrington's model in this
13 case?

14 A. I think that it is actually an assumption of
15 Professor Harrington's model. I mean,
16 Professor Harrington is assuming that, if you change
17 list prices, there will be a follow-on effect on
18 transaction prices, and I think that this is one of the
19 features of Professor Harrington's model which I think
20 is inappropriate in the circumstances of this case, and
21 I will explain that later.

22 Q. So is that a "No" then, that you do not accept this
23 condition is made out?

24 A. I think that --

25 Q. Well, it is "Yes" or "No", Professor Neven.

1 A. No, it is not. I mean, it is in the context of this
2 model -- I think that in the context of this model --
3 okay, this is an assumption of the model which I think
4 is inappropriate in the context of this particular case,
5 yes.

6 MR RIDYARD: Sorry to interrupt. A quick clarification
7 there, Professor Neven. You said that you do not think
8 this link between list prices and transaction prices is
9 one you can rely on in the context of coordination --
10 and I understand you may make that argument -- but this
11 Harrington model is not a model of co-ordination so
12 is it a link that could be used in the Harrington model
13 even if not in the context of coordination?

14 A. Exactly. I am glad you are asking that question because
15 I think that the problem that I pointed to yesterday
16 with respect to a coordination model is also a problem
17 that arises in the context of this unilateral effects
18 Harrington model. That is to say that, in the context
19 of this model, there is this very strong assumption that
20 the headquarters, the executives, cannot affect the
21 transaction prices beyond the determination of the list
22 prices, and I think that is incorrect, and that is
23 incorrect because of the mandate structure of DAF. That
24 is to say that after DAF has established the list
25 prices, DAF still has the ability to affect the

1 transaction prices through the mandate structure. So
2 I think that this particular assumption that is made by
3 Professor Harrington does not fit with the internal
4 organisation of DAF.

5 MR WARD: If we may, we are going to come on to that in
6 a minute.

7 MR RIDYARD: Okay, sorry.

8 MR WARD: No, thank you very much, Mr Ridyard. It is
9 genuinely helpful.

10 I am going to just put to you that this condition
11 plainly is made out on the facts, not least your own
12 concession of yesterday, but also the witness evidence
13 from Mr Ashworth, which made clear that list prices were
14 used to put pressure on DAF UK to increase transaction
15 prices. If I may, having put my case, I will move on.

16 Then the second feature which I think you were just
17 beginning to address is in the first paragraph of
18 page 4:

19 "The second feature is that the executives who are
20 sharing prices may be able to influence transaction
21 prices but do not have full control over them."

22 To help us understand the point here, how this works
23 in the model, if we look at the end of the second
24 paragraph, four lines from the bottom, it says:

25 "Though the structure is stylized, in that it

1 subsumes the internal pricing [processes] through an
2 adjustment cost for price ..."

3 So it treats these internal pricing processes as
4 a cost. But what matters, therefore, is in a sense
5 whether the executives' level of control would incur
6 a cost, does it not? That is how the model works?

7 A. I think that is the point at which we have to become
8 a bit more precise about this model. If you look at the
9 formulation of the model, I mean, formally what this
10 model has is a sharing of list prices, so there is
11 a first stage in which the firms are setting the list
12 prices, then they exchange them, I mean, in the version
13 of the model with an information exchange, and then they
14 can change the list price. Then in that model, whenever
15 you have determined the list price, there is
16 a transaction price that follows mechanically; okay? So
17 in the context of that model, there is only one channel
18 through which the manufacturers can affect the
19 transaction prices, is through the determination of the
20 list prices. Now -- and that is what the model says,
21 literally.

22 Now, Professor Harrington is giving a narrative for
23 the interpretation of this model that goes a little bit
24 beyond what the model says. He says that -- he
25 basically defines as ways to affect the transaction

1 prices not only the list prices but also the internal
2 controls, so the way in which internally through, for
3 example, mechanisms like the mandate structure the
4 manufacturers could affect the transaction prices.

5 I think that this is an extension, an
6 over-interpretation, of his model which is inadequate.
7 In his model there is only one mechanism and this
8 mechanism is list prices. I mean, you fix list price,
9 you exchange information on list price, you have the
10 opportunity to change the list prices again and, after
11 that, the transaction price falls; okay?

12 Now -- and he says, okay, it does not matter whether
13 it is list price or whether it is something else, an
14 internal mechanism to affect the transaction prices, but
15 I think that this extension is an over-interpretation of
16 the model and I think what is key in the case of -- in
17 the application of the model to this case is that there
18 are two mechanisms in which potentially the transaction
19 prices could be affected. There is the list prices that
20 are determined that could potentially affect the
21 transaction prices and then, after list prices have been
22 determined, there is the application, there is the
23 functioning, the implementation of the mandate
24 structure, such that DAF, after it has set the list
25 price, still has the opportunity to affect the

1 transaction price through a second mechanism. So

2 I think that --

3 MR RIDYARD: Now you are giving evidence on how DAF

4 operates.

5 A. Yes, that is right.

6 MR RIDYARD: Okay.

7 A. But I am relating it to the model of

8 Professor Harrington. I think that what I am trying to

9 explain is that the model of Professor Harrington is

10 inapplicable because in the model -- in this respect --

11 because in the model of Professor Harrington there is

12 only one channel. In reality there are two. In reality

13 there are the list prices and then there is the

14 operation of the mandate structure. In this

15 interpretation of his model, Professor Harrington is

16 trying to conflate these two, but the fact that there

17 are two is actually important in order to show that the

18 intuition of Professor Harrington's model is

19 inapplicable.

20 THE CHAIRMAN: I thought that Professor Harrington was

21 identifying those two features --

22 A. No.

23 THE CHAIRMAN: -- of his model.

24 A. Yes, but in his model there is only one. That is the

25 thing. It is that he has an interpretation of his

1 model --

2 THE CHAIRMAN: So he has interpreted his own model
3 incorrectly?

4 A. He has over-extended the interpretation of his model,
5 yes.

6 MR WARD: Professor Neven, it is a stylised model, we are
7 agreed. What Professor Harrington is saying is that
8 what matters is that there is partial control by
9 executives because that is what gives the rationale to
10 them going in with higher, not lower, prices; agreed?

11 A. I mean, the fact that there is a cost in changing the
12 variable that will affect the list prices is indeed one
13 of the key elements of this model.

14 Q. Can we agree that in the case of DAF the colluding
15 executives do not have full control over transaction
16 prices? Just agree with that please --

17 A. There is no collusion here, by the way.

18 Q. I know you do not like that word. The executives
19 involved in the cartel --

20 A. Yes.

21 Q. -- they do not have full control over the level of
22 transaction prices, do they? There is a mandate system
23 and to some extent they can control them, but local
24 sales units and dealers will do deals; do we agree?

25 A. Yes, I think that they do not have full control, yes.

1 Q. Good. Even if those mechanisms are wider than the
2 formal way the model works, even so, what we have is
3 a cost of moving from prices and that the intuition that
4 this will affect the choices of executives holds?

5 A. No.

6 Q. You do not agree?

7 A. Can I just explain why this argument is incorrect?

8 I mean, assume that -- okay, take the model of
9 Professor Harrington. Instead of labelling list
10 prices -- I mean, consider the second mechanism through
11 which the executive can affect the transaction prices,
12 which is the way in which they modulate the internal
13 structure -- okay? -- and then relabel this model,
14 forget about list prices. So what
15 Professor Harrington's model would say is that there
16 is -- initially the executives are setting a mandate
17 structure, the way in which they would affect the
18 transaction prices. They share that with the other
19 members of the information exchange and then they change
20 the mandate structure again. But clearly this is not
21 what is happening and this highlights the fact that we
22 have two mechanisms here, two ways in which you can
23 affect the transaction prices.

24 I mean, you have the list price on the one hand and
25 you have the operation of the mandate structure on the

1 other. I think the fact that you have two is important
2 in order to show that what Professor Harrington
3 describes as an equilibrium may not actually be an
4 equilibrium.

5 Q. Professor Neven, they are both mechanisms by which
6 executives have partial control and they are both
7 mechanisms that incur a cost, are they not?

8 A. I think that I would expect both to incur a cost --

9 Q. Good.

10 A. -- yes, but -- okay.

11 Q. In the case of the list prices themselves, particularly
12 the list prices, if DAF was to decide to change them
13 after the exchange of information had taken place,
14 would you accept there would be costs to that?

15 A. I would accept that there would be cost, yes. I think
16 that there are costs in changing these mechanisms all
17 affecting the transaction prices, yes.

18 Q. So if they have been promulgated, then they would have
19 to re-promulgate them, if you like.

20 A. Have to ...?

21 Q. Sorry. If they were already sent out to the
22 subsidiaries and so forth, they would have to start
23 again, have another round of price-setting and send it
24 out again?

25 A. Yes, but that is where I think there is a distinction

1 between list prices as a way to affect the transaction
2 prices and the operation of the mandate structure
3 because -- and it is indeed the criticism that I have
4 with respect to the application of Harrington's model or
5 one of the criticisms, and it is the fact that this
6 second mechanism, I mean, which is the operation of the
7 mandate structure, is a mechanism that I would not
8 expect to be very costly because all what you have to do
9 is to exercise discretion.

10 I mean, that is to say that if you want to reduce
11 transaction prices, you just have to be more lenient in
12 the way in which you are allowing prices that do not
13 meet the requirement in terms of margins. So this
14 second process, unlike possibly the first one --

15 THE CHAIRMAN: Professor Neven, I think we are slightly
16 straying from the questions. It would help, I think, if
17 we are going to make progress, if you could stick to
18 answering the questions.

19 MR WARD: Thank you, sir.

20 I will try to keep this short. Changing the list
21 prices incurs a cost?

22 A. I would expect so, yes.

23 Q. Would you agree that changing the mandate structure
24 would also incur a cost?

25 A. That is what I was explaining, that I do not think that

1 the cost of changing the mandate structure -- it is
2 actually not a cost of changing the mandate structure,
3 it is a change in the way in which you implement the
4 mandate structure.

5 Q. Any of those things, if you start with the existing
6 mandate structure and you either change it or you
7 intervene in a way that you would not have otherwise
8 intervened, you have incurred a cost, have you not?

9 A. I think that the cost of implementing the mandate
10 structure differently is minimum.

11 Q. Is there any evidence for that, Professor Neven?

12 A. Because it is just the exercise of discretion.

13 Q. Well, it is an exercise of discretion on a system that
14 is hard-wired through the whole organisation. It is
15 obviously the case that there would be significant
16 management time involved in recalibrating the mandate
17 structure and then promulgating a newly adjusted mandate
18 structure through the whole company, is it not?

19 A. Sorry, no. What I am saying that you operate it --

20 Q. You think that is free?

21 A. No. I think when you operate it differently, it is just
22 that you agree on some deals that otherwise you would
23 not have agreed upon. That is it.

24 Q. You do not accept that any of that comes at a cost?

25 A. I think that I expect this cost to be small.

1 Q. Okay. Well, let us now look at what was called
2 yesterday the "Goldilocks point", which is the range
3 between sufficient cost and cheap talk. I would like
4 now to look at the most recent version of the Harrington
5 paper which says a little bit more about this. This is
6 in your bundle at tab 15 and for the electronic bundle
7 it is {I4/251.1}.

8 If we could please look at page 5, {I4/251.1/5},
9 this is where Professor Harrington discusses what one
10 might call the "Goldilocks zone". We want to look at
11 the second paragraph, please, "The main finding ...".
12 Do you have that, Professor Neven?

13 A. Yes.

14 Q. "The main finding is that a private information exchange
15 of prices by competitors is harmful to consumers when
16 the cost of adjusting price is neither too small nor too
17 large which can be interpreted as the colluding
18 executives having some but not full control over the
19 full-time price. The intuition is as follows. When
20 executives privately share prices, they are given the
21 opportunity to effectively change the prices they will
22 be offering to consumers before consumers have an
23 opportunity to transact. However, this sharing of
24 prices would be of no consequence when it is near
25 costless ... In that case, the information exchange is

1 basically cheap talk so each executive would simply set
2 the final price to maximise profits regardless of what
3 was learned about rivals' prices from the information
4 exchange. Sharing of prices would also have no effect
5 when it is very costly to change prices. For example,
6 suppose executives share list prices and, after sharing
7 them, each executive is either unable to change its list
8 price or finds it very difficult to intervene in the
9 process determining the discounts ... Again, the
10 information exchange would have no effect."

11 So this language of "near costless" versus "very
12 costly" implies that the so-called Goldilocks zone could
13 be very wide, does it not?

14 A. I do not think we should infer too much from this
15 language. I think that the range for which you have the
16 second equilibrium is defined by the conditions that you
17 have on page -- that is the conditions that were
18 discussed yesterday. That is really what you need to
19 look into in order to assess the width of that interval.

20 Q. But they do not quantify the width of that interval, do
21 they?

22 A. No, they do not, but you can actually have a sense about
23 them if you look at the expressions.

24 The first one, I suppose -- it is the expression in
25 question 2, actually, in this paper, and you see that --

1 THE CHAIRMAN: What page are you on?

2 A. It is page {I4/251.1/11}. That is page 11 of the paper.

3 So look at -- the first part of that equation, which
4 is the left-hand side of that equation 2, you see that
5 this cost has to be larger than the difference between
6 the profit that the firm gets if it is charging the low
7 price when its competitor is charging the high price
8 relative to the profit that it is making when it is
9 charging the high price and the competitor is charging
10 the high price. So this is what is normally referred to
11 as the "deviation profit" and if the products are very
12 close substitutes, this is going to be huge.

13 I mean, if you are looking at a model of competition
14 in which the products are very close substitutes,
15 I mean, it is essentially taking the entire profit in
16 the market. That would be the difference. It is the
17 difference between half the profit in the market and the
18 whole profit in the market. So, you know, this is
19 a very significant bound(?).

20 Similarly, if you are looking at the second
21 expression, you see that the cost has -- I mean, the
22 cost has to be less than the difference in profit
23 between the profit that you are making if you are both
24 sharing the low -- stating, sorry, the low list prices
25 and the profit that you obtain if you have the high one

1 and your competitor has the low one, I mean -- and that
2 is also a significant constraint. So it may very well
3 be that this range is actually quite small, just looking
4 at the expression.

5 Q. It might be small, but it might be large?

6 A. Well, looking at the expression, in particular looking
7 at how large it has to be in order to satisfy the
8 left-hand side of the equation, it has to be quite
9 large.

10 Q. Well, I will at least put to you that it is at least
11 plausible that it could be satisfied in this case on the
12 basis of the information we have.

13 A. I think that what I observe is that -- at least in the
14 data that I have that DAF is changing list prices
15 frequently. Not all list prices in the context of
16 general list prices, which typically occurs only once
17 a year, but every quarter DAF is changing list prices
18 for a subset of specifications. So this is the only
19 information I can rely on in order to assess the
20 significance of the cost of changing list prices. But
21 on the basis of the fact that they do it every
22 quarter -- I mean, there was a graph in my first report
23 which shows every quarter the proportion of basic
24 specifications for which list prices are changed and you
25 see every quarter they change it for a significant

1 proportion.

2 Q. Well, I think your answer is you do not know; is that
3 fair?

4 A. I have expressed it, you know, I think that they are
5 small in relation to what I observed with respect to how
6 frequently they are changing list prices. This is the
7 only information I have.

8 Q. Let us talk about another factor in the model which is
9 the so-called z factor.

10 A. Yes.

11 Q. This arises because, as you say in your second report,
12 in applying the model, there could be a low price
13 equilibrium or a high price equilibrium. Now, before we
14 look at the z factor, let us look at what else we know
15 about this case. We know that almost the entire market
16 engaged in a 14-year cartel, taking huge legal risks.
17 We know the object of the cartel was the restriction in
18 pricing competition and all of the arrangements were
19 pursuant to that common aim. We also know that the
20 Commission found there were no indications that the
21 conduct gave rise to any benefits or promoted technical
22 or economic progress. Would you accept it simply is not
23 plausible that, in those circumstances, there was a low
24 price equilibrium which would in fact serve to defeat
25 the purpose of the cartel?

- 1 A. No, I think that I want to assess the likelihood of
2 a low price equilibrium in the context of the
3 application of this model and, in particular, what you
4 have to look into are the arguments that can be put
5 forward to explain why the high price equilibrium would
6 be selected.
- 7 Q. So the intuition that it is unlikely that the cartelists
8 would settle on a low price equilibrium that defeated
9 the object of the cartel carries no weight with you?
- 10 A. But, again, I mean, your argument is based on the idea
11 that this cartel was -- or this coordination, this
12 infringement, was effective. What we are trying to do
13 here is whether we have a model in which we could
14 explain the effectiveness.
- 15 Q. I am sorry if I was not clear. I am testing whether, if
16 indeed there was an equilibrium arising in the way
17 Professor Harrington models, it would have been low or
18 high, and my suggestion to you is that it is very hard
19 to understand why the cartelists would have settled on
20 a low price equilibrium.
- 21 A. But, as I have explained to you, I do not think the
22 model of Professor Harrington is applicable.
- 23 Q. I understand. We are in the world where the model
24 applies, if we are talking about the z factor.
- 25 A. This is a hypothetical in which the model would apply --

- 1 Q. Yes.
- 2 A. -- so in the hypothetical in which the model would
3 apply, I suppose that -- yes, I suppose that you would
4 expect it.
- 5 Q. Good. Under Professor Harrington's model, you end up
6 with the higher equilibrium if both firms decided to
7 share prices and incurred a cost in choosing to share
8 prices, and that is the so-called z factor?
- 9 A. Yes.
- 10 Q. Would you agree that there was such a cost in this
11 case -- that there was a cost of collusion?
- 12 A. Yes, I suppose that, to the extent that they understood
13 that what they were doing was unlawful, to assume that
14 there is a cost in sharing list prices, I mean, would
15 lead to a cost, yes, the anticipation of the procedures
16 like the one we have here.
- 17 Q. Even without that, even without that, the very fact of
18 going along and doing it, going to meetings, exchanging
19 all this information, that incurs a cost as well, does
20 it not?
- 21 A. Yes, I think that the way in which Professor Harrington
22 describes it is more in terms of the potential cost of
23 having an infringement decision and having to pay a fine
24 and potentially being sued for damages. I think that is
25 the way he describes it. I think that in terms of the

1 order of magnitude, yes, I think that is probably the
2 more significant cost.

3 Q. They are both costs, are they not?

4 A. Yes.

5 Q. Thank you. Just one final point on Harrington. I want
6 to just ask you about the Stuttgart proceedings in 2021
7 and 2022 where Professor Harrington's evidence was
8 considered. Were you personally involved in those
9 proceedings?

10 A. No.

11 Q. No. Thank you.

12 A. Can I add one thing about the cost?

13 Q. Yes.

14 A. This was not discussed yesterday but I think it is
15 important, and it is one of the weakness of
16 Professor Harrington's model, this little k. I mean, in
17 order to show that the high price equilibrium is going
18 to be selective, Professor Harrington uses a forward
19 induction argument, and the forward induction argument
20 is essentially to say, "I will assume that the other
21 members of the information exchange, when they do
22 something, it is on the basis that they have acted
23 rationally in the past", and that is -- this argument is
24 necessary in order to say, "Well, if they have exchanged
25 information, I will anticipate that the only rational

1 reason for having exchanged the information is to select
2 the high price equilibrium". So that is
3 a forward-looking argument. It is basically saying that
4 the only rational reasons for having shared the
5 information would be to select this high price
6 equilibrium. That is the first part of the argument.

7 The second part of the argument is that the sharing
8 information is, in the words of Professor Harrington --
9 is a weakly dominant strategy, in the sense that you
10 have weakly dominant strategy when whatever the other
11 player, the other participant, is doing, you are not
12 worse off sharing information. Clearly, if the other
13 one is sharing information, then you are better off also
14 sharing information because this might lead, according
15 to this forward-looking argument, to the high price
16 equilibrium.

17 The second part is more tricky because, if the other
18 one does not share the information, for the argument of
19 Professor Harrington to go through, it has to be the
20 case that, as a response to that, sharing information
21 does not lead to a cost, and that is where the
22 assumption of k is very important. What
23 Professor Harrington assumes is that you are incurring
24 this cost only if both firms share information.

25 So to go back to the second leg of the argument with

1 respect to weak dominance, so you assume that the other
2 firm is not sharing information. For the argument of
3 Professor Harrington to go through, it has to be the
4 case that sharing information for you does not lead to
5 a cost, but if unilaterally sharing information leads to
6 a cost, the whole reasoning of Professor Harrington
7 falls through and --

8 THE CHAIRMAN: But we know that all the parties were sharing
9 information.

10 A. But here we are looking at the application of the model,
11 and what I am saying is that, for this reasoning of
12 Professor Harrington to go through, it is necessary that
13 the potential cost that is imposed on you from sharing
14 information is a cost that is only incurred if both
15 firms share information. In cases in which you would
16 unilaterally share information, his model falls through,
17 so it basically hinges on that. As discussed yesterday,
18 I think that there are good reasons to anticipate that
19 in the European environment context, unilaterally
20 sharing information is actually costly.

21 MR WARD: Professor Neven, the decision, the binding
22 decision, establishes that this was not unilateral.
23 There was sharing by all the cartelists. They all
24 admitted it.

25 A. Yes, but that is not what we are discussing here. Here

1 we are discussing the application of the Harrington
2 model. What I am saying is that --

3 Q. It is the factual premise, Professor Neven.

4 A. No, no, the Harrington model will not work if you relax
5 this assumption. That is to say that, if you relax the
6 assumption that a unilateral exchange of information
7 does not lead to a cost, his model falls through.

8 Q. But we are not concerned with the unilateral exchange,
9 are we?

10 A. But we are concerned about the application of the
11 Harrington model.

12 Q. Let us move on to another topic, if we may. Emission
13 standards and plausibility. Let us start by looking at
14 this from the manufacturers' point of view. New
15 emission standards are imposed by legislation repeatedly
16 through the cartel period, are they not?

17 A. Yes.

18 Q. You would accept that they can carry very large costs?

19 A. Yes.

20 Q. As you pointed out in your own report, DAF customers did
21 not place a value on mere compliance with an emission
22 standard and therefore you have got a problem of how to
23 get customers to pay for them. Would you accept?

24 A. I think that -- I mean, there is indeed mixed evidence
25 about this, but there is evidence suggesting that

1 customers were not sort of willing to pay for the
2 additional costs associated with meeting the emission
3 standards, at least in the UK.

4 Q. One of the few things you and Mr Harvey agree on is that
5 customers did end up paying more for trucks with
6 improved emission standards.

7 A. Yes.

8 Q. Indeed, when we look at the MI period, for which we have
9 cost data for individual trucks, we can see that on your
10 model, just as Mr Harvey's, there was an increase in
11 price over and above the additional costs for these
12 models with new emission standards.

13 A. That is correct.

14 Q. Yes. So, in effect, customers are not only swallowing
15 the additional cost increase but they are also paying
16 a higher margin as well?

17 A. Yes, they are paying a premium, yes.

18 Q. Now, of course, what we do know --

19 MR RIDYARD: Sorry, they are paying a higher margin,
20 are they not?

21 A. Yes. I mean, they are getting -- I just actually was
22 trying to make sure that the statement was correct in
23 terms of the interpretation of the econometric model.
24 So what is happening is that indeed in the MLO cost
25 there is going to be the cost associated with meeting

1 the emission standard that will lead to a higher price
2 and, on the top of it, there is indeed the premium so
3 indeed there is a higher margin, yes. That is correct.

4 MR RIDYARD: Yes, there is a higher margin.

5 MR WARD: Of course, what we are talking about here is these
6 new emission standards took place in the context of the
7 infringement and your clients have admitted to collusion
8 in respect of those new emission technologies, as you
9 know, and that collusion had various different elements.
10 There were specific agreements in relation to pricing
11 and then there was more imprecise language of the
12 Commission, such as "discussions took place concerning
13 the price and modalities of the introduction of Euro 4
14 compliant trucks". You will have seen from the
15 pleadings that we have pleaded a whole series of
16 examples about how this collusion actually took place,
17 including agreements about both price and introduction
18 of Euro 4.

19 Now, of course, what we know from the decision is
20 that all of this conduct followed the single economic
21 aim of distortion of independent price-setting, and that
22 included the emission standards conduct in the decision;
23 yes?

24 A. Yes.

25 Q. It is all part of the same conduct, aimed at distorting

1 price competition, and of course the emissions premia
2 are themselves part of the list pricing, are they not?

3 A. The emission premia are part ...?

4 Q. Sorry. Yes, so the additional charge for the new
5 emission standard is itself a feature of the list price?

6 A. Yes, they will appear in the list price -- sorry, this
7 is not the premia they will end up paying --

8 Q. The list price, though? The list price?

9 A. There is a list price mark-up of course associated with
10 the ...

11 Q. Now, were you able to hear or read the transcript of
12 Mr van Veen's evidence dealing with how this actually
13 happened, how this was done?

14 A. No.

15 Q. Let me show you a little bit of what actually happened
16 because it is important. We discussed with Mr van Veen
17 a document which you have at tab 20, which is at
18 {I1/417}. If we go to the next page, {I1/417/2}, this
19 is a memo which deals with pricing of new Euro 4 models.
20 What we can see is a whole series of prices, including
21 in the table both "Nett" and "List" prices. I want to
22 just show you that what this document also shows is, if
23 we go to the last page, {I1/417/4}, competitor pricing,
24 which is marked as "Competitor List Pricing", was
25 actually taken into account. You can see that.

1 What Mr van Veen explained is that the list
2 prices -- if we go back to page 2, please, {I1/417/2} --
3 in the table -- he explained that the list price
4 column -- you can see "Discount", "Nett" and the list
5 price -- he explained that the list prices were set by
6 reference to the net prices that they wanted to achieve.

7 So what we can see here is competitor information
8 being used, list prices being set by reference to the
9 net prices being achieved, and would you not accept,
10 therefore, that collusion over list prices is quite
11 likely to prove influential on these prices?

12 A. But are you saying that it is actually working the other
13 way around? You are saying that they had aspirations
14 with respect to net and they set up the list as
15 a function of the net? They set up the list --

16 Q. They set the list in order to achieve the net price they
17 wanted, so it is an example of list prices influencing
18 net prices.

19 A. Aspirations with respect to ...

20 Q. Exactly, depending on the discount expected they would
21 have to give.

22 THE CHAIRMAN: Is that actually -- was that actually his
23 evidence?

24 MR WARD: It was. We will go to it. We will go to it,
25 Mr Beard can sit down.

1 MR BEARD: Thank you, Mr Ward.

2 MR WARD: I was just hoping to make up some time, but we
3 will go to it. It is Day 7, page 74, {Day7/74}. If we
4 can split the screen and keep that document open, it
5 would be quite useful actually. Thank you, perfect.

6 So I discussed with Mr van Veen the top row of that
7 table, where you see discount 36, net 4.000 and list
8 6.250. Do you see that Professor Neven?

9 A. Yes.

10 Q. Then if we look from line 4, {Day7/74:4}:

11 "... take the first example, you want 4,000 increase
12 for LF 45 and to achieve that what you are doing is
13 increasing the list price by 6,250 but anticipating
14 a discount against the list price of 36%?"

15 Mr van Veen said:

16 "Yes, that is approximately how it worked. The 36%
17 would then be -- and I do not know exactly for this
18 memo, but would, for example, be the average discount
19 that we saw over the past few months or a year ... every
20 separate sales transaction had a separate discount. For
21 that model we would then just estimate what the average
22 discount has been and we would use that as a sort of
23 recalculating -- calculating back to a list price."

24 So, in other words, they want a net price, they know
25 how much discount they are likely to have to give based

1 on data and they set the list price so it is discounted
2 down to the level of the net that they are aiming to
3 achieve.

4 MR BEARD: I am sorry, I am going to intervene here. That
5 is misleading. If you go on down, it says,
6 {Day7/74:18}:

7 "So what is happening here, then, is that the list
8 price is being increased in order to achieve the net
9 price increase that you are aiming to obtain?"

10 Which is the proposition that Mr Ward has just put
11 as evidence to Professor Neven, and the answer is:

12 "Yes. The causality, however, is not quite that."

13 Then there is a further explanation. It is frankly
14 misleading to stop at that point.

15 MR WARD: I do not accept that at all because, if you carry
16 on reading the whole explanation, which I am happy to do
17 and put to Professor Neven, {Day7/74:21}:

18 "The aim was really to get to a 4,000 euro net
19 average price -- transaction price increase and that
20 was, in practice, steered by the target margin and the
21 approvals. However, we needed to have a list price
22 because our system was populated with list prices, so
23 that is how we calculated it back."

24 Then I said --

25 A. Sorry, can I just move the screen?

1 Q. I am so sorry, Professor Neven.

2 A. I do not see this document moving.

3 Q. I am so sorry. Yes, can you just keep going down? Can
4 we go to the next page?

5 THE CHAIRMAN: I think we have got it.

6 A. Yes, okay.

7 MR WARD: I am so sorry. Can we just go a bit further down?
8 Sorry, I am now lost.

9 THE CHAIRMAN: In answer to my questions, he is saying the
10 4,000 comes first. You start with the net price
11 increase.

12 MR WARD: Yes, but I wanted to show you the bit above that.
13 He says, {Day7/74:25}:
14 "We needed to have a list price because our system
15 was populated with list prices, so that is how we
16 calculated it back.
17 "Question: So you increase the list price,
18 anticipating a discount of 36 ... to get the price you
19 actually wanted, which is 4,000?"
20 He says, {Day7/75:6}:
21 "On average that is correct."

22 MR BEARD: I am sorry, it is just not what Mr Ward has put
23 to the witness.

24 THE CHAIRMAN: Do you want to put your question again to the
25 witness?

1 MR WARD: I will put my question in a way that I hope will
2 not offend Mr Beard. I certainly was not seeking to
3 distort Mr van Veen's evidence. All I am saying is that
4 the list prices are adjusted in order to generate the
5 level of discount that they actually wanted to
6 achieve -- net price.

7 MR BEARD: Sorry, this just is not -- I mean, I am not going
8 to try and stop Mr Ward putting these questions, but
9 this is not a fair take on the evidence. It is because
10 it is going back to all the average discounting issues
11 that Mr van Veen was talking about.

12 MR WARD: I am quite happy to move on from this, in fact.
13 It is a contextual point and we can deal with it later
14 in submissions.

15 THE CHAIRMAN: It is not for this witness to deal with
16 whatever the facts were.

17 MR WARD: No, indeed. It is probably not necessary to deal
18 with this so I will move on, if I may. I am again very
19 conscious of time this morning.

20 THE CHAIRMAN: Yes.

21 MR WARD: But let us look at the reasons why you say that
22 the collusion over these list prices would -- these
23 emission standard prices would have been ineffectual.
24 The first is you say it would be too difficult to
25 monitor the individual element of the cost, so your

1 argument is you would not be able to identify the
2 specific cost element reflected in the individual
3 transaction prices of particular trucks. So, on your
4 view, that would be necessary so there could be a focal
5 point on emission standards costs or even prices?

6 A. But you need to be able to check whether your
7 competitors have indeed implemented the understanding
8 about the extent to which you will pass on the cost
9 associated with meeting the emission standards, yes.

10 Q. Would you accept as at least a starting point that the
11 fact that they carried on doing this for 14 years
12 suggests that they actually found it helpful?

13 A. Well, they did it four times; right? I mean, according
14 to what you suggested, they would do it for 3, 4, 5.
15 Three times.

16 Q. So they obviously found it helpful for something, did
17 they not?

18 A. Again, what I am saying is that I think that it is
19 unlikely that they have been effectively coordinating on
20 passing on the costs associated with emission standards
21 because of these problems of actually identifying
22 whether the competitors were doing it or not.

23 Q. Let us look at what they did know. Firstly, we know
24 that these emission standards had a potentially large
25 impact on costs and prices; yes?

- 1 A. Yes.
- 2 Q. We in fact can see that from the table we were just
3 looking at. We know that the cartelists exchanged the
4 list prices which would have included this element; yes?
- 5 A. I do not know whether they actually exchanged the list
6 prices in particular that were including the changes
7 associated with the emission standard. I do not know
8 whether they did that.
- 9 Q. They exchanged list prices on the different Euro
10 emission standards of the trucks.
- 11 A. Did they specifically exchange the list prices that were
12 specifying the increment in list price associated with
13 emission standards?
- 14 Q. That I cannot tell you --
- 15 A. I do not know.
- 16 Q. -- but they exchanged list prices for each emission
17 standard.
- 18 A. I was not -- okay, I thought that there was no evidence
19 on whether they actually exchanged the specific list
20 prices that would represent the increment associated
21 with meeting the emission standards, but --
- 22 Q. Well, you can see from the document that we were just
23 looking at, the column "List", there is actually a list
24 price that is associated with the emission standard.
- 25 A. For DAF?

1 Q. Then on the next page, if we go to page 3, {I4/417/3} --
2 sorry, the final page of that document, {I4/417/4} --
3 they also have competitor pricing, which is list prices
4 for emission standard trucks.

5 A. So these are list prices, are they?

6 Q. Well, that is what it says. Someone has written in the
7 word "List".

8 A. Okay.

9 Q. We also know that they are able to calculate approximate
10 net prices, as Recital 47 tells us, depending on the
11 market intelligence available. They also know what
12 prices they are getting in the market more generally;
13 yes? We talked about that yesterday. It is a useful
14 piece of feedback for them.

15 Mr van Veen's evidence, which I can show you, is
16 that they also had a look at what he said was public
17 domain margin information as a benchmark of performance.
18 Would you like to see that or is that familiar to you?

19 A. I can imagine that they are looking at the aggregate
20 margins of their competitors which are in the public
21 domain. I think that that would be natural for them to
22 do that.

23 Q. So that is going to tell you something, is it not, at
24 least at a general level, about whether costs are being
25 passed on?

1 A. But that is the problem, is that it is too general to be
2 interesting.

3 Q. I am sure you will agree with me that the decision
4 itself is not exhaustive of all of the details of every
5 form of information exchange or occasion of information
6 exchange that took place.

7 A. [No verbal response]

8 Q. It is also the case that your clients have emphasised
9 that some information was in the public domain about
10 this. Can I show you a document -- I am afraid it is
11 not in your clip, but it is a short document. It is
12 {I1/442.2}, and this is a press release or, rather,
13 a press article that was provided by your solicitors,
14 your clients' solicitors, "Commercial Motor Archive".
15 It says:

16 "The true cost of Euro-4 is revealed."

17 The article says:

18 "Euro-4 trucks are set to cost Operators in average
19 of £2,650 per truck more than their Euro-3 equivalents.
20 The increase was highlighted at a Society of Operations
21 Engineers conference last week which aimed to debunk
22 some of the myths surrounding the new emissions
23 standards.

24 "MAN sales and marketing director Dave Cussans
25 quoted an extra £2,250 for a 7.5-tonner, £2,750 for

1 an 18-tonner and £3,000 for a tractor ...

2 "And Phil Moon, the product marketing manager at DAF
3 ... confirmed that its chassis price would be about
4 8-10% higher for Euro-4 ..."

5 So we know there is collusion because that is in the
6 Commission decision but there is also this public domain
7 information which is relied on by your clients. So
8 really what I am putting to you is that there is a range
9 of ways that would have helped tell the cartelists
10 whether their collusion was actually effective enough to
11 keep going and carrying on even without a detailed
12 breakdown of the price.

13 A. The only way to check whether the competitors have
14 deviated or not is actually to look at the prices,
15 I mean the prices that were charged for the trucks with
16 new emission standards, and to be able to understand --
17 to break down these prices in the various relevant
18 components. That is the only way to check whether there
19 was compliance.

20 Q. Well, that may be the case on your theory of harm, but
21 what I am putting to you, Professor Neven, is that you
22 are being excessively demanding and what we see again is
23 a cartel that, in practice, rolled on merrily for
24 14 years, the participants obviously got benefit from it
25 and it is not hard to see why they were getting enough

1 information to get comfort that the whole thing was not
2 an empty exercise. Would you accept that?

3 A. Okay, I am sort of working in the -- with the
4 disciplines of my own field and, I mean, in my own
5 field, in order to have evidence that you can support
6 coordination, you need to be able to monitor, and this
7 required monitoring of prices and the ability in this
8 particular case to break down the different components
9 of the price.

10 Q. In the case of Mr Harvey's unilateral theory of harm,
11 would you accept that monitoring is not needed?

12 A. Okay, which version?

13 Q. Well, I thought we had spent quite a lot of time talking
14 about this yesterday.

15 A. Actually it is interesting that if you -- okay, think
16 about the unilateral effects theory associated with the
17 sharing of information that is valuable about demand.
18 This may lead to different prices from the prices that
19 you would have charged otherwise, either lower prices or
20 higher prices. I suppose that it may be valuable for
21 the members of the information exchange to check ex post
22 whether the information that they received in the
23 context of the information exchange was accurate or not.
24 I do not know how you would actually do that in
25 practice, though, because you are receiving information,

1 say, from a competitor about what they anticipate demand
2 will be or what they anticipate how cost will change.
3 How do you check whether what they told you was accurate
4 or not?

5 Q. Do you accept that the fact that they were achieving
6 higher margins, just as you and Mr Harvey have
7 identified, was itself a signal that this was all
8 working?

9 A. Well, as we are going to discuss next week, I mean, my
10 evidence is that the overcharge estimates are bundled
11 around zero, and this is why, you know, this discussion
12 is important. I mean, our overcharge estimate is that
13 it is bundled around zero. Sometimes you get positive,
14 sometimes you get negative, and I find this evidence on
15 the overcharge consistent with the assessment of the
16 likelihood that coordination was effective or not.

17 Q. Let me try the question again, though. We know,
18 according to your modelling, that there were higher
19 margins on these Euro emission trucks.

20 A. Oh, with respect to Euro emission trucks in particular?

21 Q. Yes.

22 A. Yes, yes, sorry.

23 Q. Yes, you discount them from the model for reasons we are
24 going to debate next week, but ultimately what that
25 shows --

- 1 A. Sorry, I misunderstood you.
- 2 Q. -- is that cartelists understand they are achieving
3 higher margin on those trucks. Is that not useful
4 feedback to them that this collusion is working?
- 5 A. Clearly, with respect to the introduction of trucks with
6 new emission standard, the margins are higher, but as we
7 are going to discuss next week, the question is whether
8 the margins are higher because of a potential
9 coordination or because of increased cost that you can
10 control for in the second part of the infringement or
11 because these trucks were introduced with advanced
12 features at the same time, for which a higher premium
13 could be obtained.
- 14 Q. The costs are controlled out, though, are they not? We
15 are talking about the MI period.
- 16 A. In the MI period, yes.
- 17 Q. Which is the only period for which Mr Harvey advocates
18 an emissions premium that is attributable to the
19 infringement?
- 20 A. For which he computes it, yes.
- 21 Q. Of course what we are dealing with here, in any event,
22 is just plausibility, is it not, whether it is plausible
23 that there was an effect? What I am putting to you is
24 it is at the very least plausible.
- 25 A. Yes. I mean, I have used language suggesting that it

1 was highly unlikely. I mean, whether that leaves
2 a probability that is sufficient in order to be
3 qualified as plausible is really not for me to assess.
4 You know, I think that the main issue with respect to
5 the pass-on of costs associated with emission standard
6 is indeed the issue of observation, but I have never
7 said that it was impossible and, you know, what the
8 probability that it actually operate is, it is certainly
9 non-zero.

10 THE CHAIRMAN: Sorry, I was going to suggest having our
11 first break.

12 MR WARD: If I could just ask one more question which
13 relates to this while we are just dealing with
14 monitoring.

15 On timing, monitoring of timing of implementation of
16 emission standards, you make the point in your report
17 that the cartelists could not have monitored this
18 ex ante because, of course, they do not know until the
19 truck appears, but would you accept that they would be
20 able to tell ex post whether what they had been told had
21 been actually borne out?

22 A. Of course, because they know when the trucks were
23 introduced.

24 Q. The repeated nature of these new emission standards
25 would have created the opportunity to build some

1 confidence in this regard, would it not?

2 A. There is repetition, but it is a small number of
3 repetitions because it is, you know, 3, 4, 5, so it is
4 only three.

5 Q. It is in the context of a much wider cartel with a vast
6 number of repetitions and reiterations of collusion;
7 would you not accept?

8 A. Yes, but it is a different mechanism.

9 MR WARD: Sir, that is a convenient moment, if it is for
10 you.

11 MR BEARD: I am sorry, I do not want to put down too many
12 markers, but there were various questions there
13 asserting contentions about levels of margins. We will
14 no doubt come back to it next week, but we are not aware
15 of the basis for Mr Ward's various assertions about all
16 cartelists' margins and so on, but I am sure we will
17 deal with that in due course.

18 MR WARD: Sorry, I am quite happy to make that clear. That
19 is a legitimate clarification. We have got DAF's
20 margins that I am talking about here and for DAF at
21 least we know this.

22 MR BEARD: If he is actually talking just about DAF, that is
23 fine, we will deal with it next week. That is helpful.

24 THE CHAIRMAN: We will deal with it next week. I think it
25 is important to stick to the particular issue we are

1 looking at this week.

2 MR WARD: Indeed, but I am quite happy to make that
3 clarification.

4 MR BEARD: Thank you. I am grateful.

5 (10.32 am)

6 (A short break)

7 (10.43 am)

8 MR WARD: Could we go to your second report,
9 Professor Neven, please, on page 19, and that is
10 {E/34/19}. It is probably your white bundle, I am
11 guessing.

12 A. Yes.

13 Q. Do you have that, page 19?

14 A. Yes.

15 Q. This is where you talk about coordination in respect of
16 timing of emission standards, and of course my clients'
17 primary concern is about costs, not timing, but, as we
18 see, it is all part and parcel of the same collusion and
19 I want to just examine what you say here. You say at
20 4.4:

21 "Indeed, their patterns of behaviour do not appear
22 to be consistent with effective coordination. If the
23 Infringement had led to successful coordination in
24 delaying the introduction of Euro-emission standards,
25 all Truck Manufacturers would presumably have introduced

1 the new emissions standard compliant trucks at the same
2 time and, presumably at the legal deadline.... "

3 This did not happen, is what you say, and you say
4 that by reference to table 1 which was supplied to you
5 by your solicitors.

6 A. That is correct.

7 Q. Yes. I just want to unpack slightly what you are saying
8 here. You say that the collusion would presumably have
9 had to be introduced at the new -- presumably have
10 introduced the new emission standards compliant trucks
11 at the same time and presumably at the legal deadline,
12 but would you accept from me that something a bit less
13 specific than that could be still useful? So, for
14 example, collusion that exchange planned not to
15 introduce the trucks before a certain date, for example,
16 might be useful even if it is not a specific agreement
17 to introduce them at the legal deadline?

18 A. Yes, there could have been agreement on a different date
19 than the legal deadline, but if indeed they benefit from
20 delaying, why not delaying to the end? But --

21 Q. Never mind about delaying, but just understanding what
22 the plans were of your fellow cartelists, would that not
23 be useful?

24 A. Having a focal point on when to introduce the truck with
25 new emission standard, I mean, that is the whole idea.

1 The question is what is the -- what are the features of
2 this focal point and --

3 Q. I am asking a rather more practical, slightly more down
4 to earth question.

5 A. Okay.

6 Q. If you know what the plans are of your competitors,
7 whether they are the same or different as yours, whether
8 they are to launch on the last possible day, whatever it
9 may be, that is useful to you, is it not?

10 A. Oh, so we are back to our theory of unilateral, so you
11 get more information --

12 Q. I am in a much simpler world where I am just asking
13 a practical question about --

14 A. I think knowing about when your competitor is going to
15 introduce trucks with the new emission standard is
16 strategically useful, clearly.

17 Q. Yes, and that might be true even if the collusion itself
18 did not change the date on which they were planning to
19 introduce the trucks?

20 A. Even if the collusion --

21 Q. So if they are simply telling you what they are planning
22 to do anyway, that is still useful, is it not?

23 A. Yes, it is useful to know what they are planning to do.

24 Q. Because you are all going out in the market, trying to
25 either maintain or increase your margins, and knowing

1 when they are going to be in that market with you is
2 going to be useful, is it not?

3 A. It is strategically useful, yes.

4 THE CHAIRMAN: Would it not also be pretty odd if they all
5 introduced their emission standard compliant trucks on
6 the same day? To the outside world, that would look
7 rather coordinated, would it not?

8 A. That certainly would be leaving a trace of coordination.

9 THE CHAIRMAN: Yes.

10 A. So ...

11 MR WARD: If we look again at your report. You have
12 footnote 45, please, at the bottom of that page,
13 {E/34/19}. You say:

14 "Any other arrangements would presumably have
15 involved complex negotiations and some form of
16 compensations across manufacturers."

17 Is that not entirely far-fetched, Professor Neven?

18 A. I think the issue is that, if they were to agree on
19 a pattern of introduction which is more complex than all
20 introducing the trucks at the same time, there will be
21 trade-offs. I mean some manufacturers may, in the
22 context of this focal point, introduce trucks earlier
23 than they would like, others later than they would like,
24 and this will involve, I mean, indeed a trade-off for
25 all manufacturers, which would make the coordination

1 difficult.

2 Q. Well, it is far-fetched and there is no trace of
3 anything like that in the decision, is there?

4 A. No.

5 Q. Let us turn to a new topic now, which is the role of the
6 econometric analysis and the theory of harm.

7 A. Okay.

8 Q. I hope it is common ground that the econometric analysis
9 works by controlling for the factors that are unrelated
10 to the infringement and then seeking to identify if
11 there is a difference in prices between the infringement
12 and the non-infringement periods.

13 A. Yes.

14 Q. In broad terms, you and Mr Harvey have controlled for
15 almost the same things. There are some slight
16 differences, so you control for seasonality and you have
17 different demand controls, but in broad terms you have
18 identified the same things?

19 A. But we have a very different strategy when it comes to
20 the exchange rate and --

21 Q. Absolutely. There is lots to disagree about but there
22 is at least a core of agreement there.

23 Now, it is just useful perhaps just to look at what
24 you said about this in your first report, which is --
25 I think I have got the wrong reference. Just bear with

1 me while I check. It is your first report,
2 Professor Neven, and I think it is page 10 -- no, it is
3 {E/11}. It is your first overcharge report. I am so
4 sorry. That is why I was confused by my own reference.
5 It is {E/11/10}, your first overcharge report.

6 A. Which bundle is that?

7 Q. I am sorry, you do not have a hard copy, I am afraid,
8 but I am just going to show you one short paragraph on
9 the screen and I am sure someone will hand it to you if
10 you want it. Oh, it is. It is in tab 5 of the blue
11 bundle, I am told.

12 A. Yes, thank you.

13 Q. Page 9 -- page 10, sorry, of the bundle numbering. You
14 say at 2.3, "... methodology":

15 "The analysis is conducted using multivariate
16 regression techniques to estimate a statistical model
17 which allows for the identification and quantification
18 of the difference in invoice prices between the
19 infringement and non-infringement periods which may have
20 resulted from the infringement. If the model is
21 correctly specified and high-quality data is used in the
22 estimation, this approach will yield reliable estimates
23 of the potential price effect related to the
24 infringement."

25 Of course in your case the answer is there is not

1 one and in Mr Harvey's case he says there is one,
2 a price effect related to the infringement.

3 So would you agree that this kind of overcharge
4 analysis that you have pointed to here is potentially
5 useful and informative on the question of causation,
6 from an econometric -- economic point of view?

7 MR BEARD: I had misunderstood. I thought overcharge was
8 something we were coming on to.

9 MR WARD: We are, but I am talking now actually about
10 something which is relevant to the empirical analysis
11 which I am about to start asking questions about.

12 THE CHAIRMAN: On the theory of harm?

13 MR WARD: Yes, so it is actually context for the empirical
14 analysis which I want to ask about. I cannot see why
15 Mr Beard can possibly object.

16 MR BEARD: I was curious, given we are in the wrong report.

17 THE CHAIRMAN: Do you think that is an appropriate question
18 for the expert?

19 MR WARD: I am asking from the point of view of an
20 economist. Obviously the question of causation is
21 ultimately for the tribunal, but I want to ask him, as
22 an economist, whether he would regard it as informative
23 of causation.

24 MR BEARD: I am slightly concerned. I thought the whole
25 arrangement was that, in relation to overcharge and that

1 report, the process was going to be that there would be
2 concurrent evidence and cross-examination subsequently.
3 These questions are going precisely to cross-examination
4 on the overcharge report.

5 MR WARD: Actually they are really not, but ...

6 THE CHAIRMAN: I think you should carry on.

7 MR WARD: Thank you, sir. You will see -- I hope Mr Beard
8 will feel better when he sees where I am going with
9 this.

10 MR BEARD: I am looking forward to it.

11 THE CHAIRMAN: We all are.

12 MR WARD: I am sure he will have his own questions on this
13 topic next week. I actually recall, when we agreed this
14 arrangement, I did warn specifically I might want to
15 talk a little bit about the overcharge.

16 THE CHAIRMAN: Carry on.

17 MR WARD: Thank you, sir.

18 So let me try the question again, Professor Neven.
19 It has probably got lost in the mists of time.

20 I was simply asking you whether, in itself, the
21 regression analysis is at least potentially informative
22 of the question of causation.

23 A. Well, the regression analysis is giving you
24 a correlation.

25 Q. Yes.

1 A. Okay? It is a correlation that is contingent on all the
2 factors that you have controlled for. I think that, in
3 order to establish or to inform a discussion of
4 causality from the observation of a correlation, you
5 need additional information --

6 Q. Yes.

7 A. Sorry, if I can just finish because it is an important
8 issue.

9 Q. Yes.

10 A. You need to have additional information, like the
11 discussion that we have had in the last few days, about
12 the plausibility of the mechanism.

13 I also think that the robustness analysis that you
14 undertake on an econometric model and the way in which
15 you, in particular, test the robustness of your
16 identification strategy and the way in which you can
17 satisfy yourself that there is no issue with omitted
18 variable informs causality -- yes, I think it does.

19 So I do not think that, you know, information on
20 causality, besides the correlation, is only extraneous,
21 is only exogenous to the econometric analysis. Some of
22 it comes from the sensitivity and from, you know,
23 satisfying yourself that the identification strategy is
24 appropriate.

25 Q. If you had a well-specified econometric model,

1 a well-specified econometric model, which showed
2 a statistically significant overcharge and a credible
3 theory of harm as to how it arose, would you accept that
4 that would be a basis on which you might, as an
5 economist, infer causation?

6 A. I think that if I had an econometric model in which
7 I was confident about the identification strategy of the
8 overcharge and if I had a theory of harm that was
9 validated by the data that supports the estimates of the
10 infringement, I think it would be useful for causality,
11 even though, as you pointed out, causality is not an
12 issue for economists. It is really an issue for this
13 court.

14 Q. Well, those answers save me a lot of time, and what
15 I actually wanted to come to was what the role was of
16 your -- what we have called your "empirical plausibility
17 analysis", which is what I am now going to come on to.

18 If we go now to your plausibility report, please,
19 which is under tab 10, and we go to page 6,
20 paragraph 2.4, {E/10/6}.

21 A. So which ...?

22 Q. This will be in your white bundle.

23 A. Yes, which page?

24 Q. It is {E/10/6}, paragraph 2.4.

25 A. Yes.

1 Q. What you say is:

2 "My assessment of the plausibility of effects
3 stemming from the infringement with respect to list
4 prices is a useful complement to the econometric
5 analysis of effects that is presented in the
6 'Econometric Analysis [model]' ... Indeed, there may be
7 a concern about causality when identifying effects in
8 the context of an econometric estimation. Even if
9 a robust conditional correlation can be estimated ...
10 whether higher prices could be thought of as 'caused'
11 ... can be usefully informed by additional evidence.

12 Part of that evidence is of course the theory of
13 harm that we have been talking about.

14 A. Hmm.

15 Q. But you also say:

16 "This is particularly the case when the effect of
17 the fringe that is estimated empirically is clustered
18 around zero and/or when its statistical significance may
19 depend on technical assumptions. An assessment of
20 plausibility requires both the formulation of a theory
21 of effects and an empirical validation ... in the
22 particular circumstances of the case."

23 So I think what you are saying is the empirical
24 analysis that you did, you saw it as appropriate given
25 that you had reached this zero overcharge. Is that

1 a fair read of what you are saying?

2 A. I am sorry, I do not understand the question.

3 Q. I am trying to understand your paragraph. What I think
4 you are saying -- and this is what I am asking you -- is
5 that the extra empirical analysis we are going to look
6 at in a moment -- not the overcharge, but the analysis
7 that you compare the transaction and list prices -- was
8 motivated by the fact that you had found a zero
9 overcharge. That appears to be the reason.

10 A. No, I think it is a misreading of that paragraph.
11 I think that, in general, when you undertake an
12 econometric analysis estimating the overcharge, as
13 I said, even though the model may be robust and the
14 identification may be appropriate, I mean, you want to
15 see whether the estimate of the overcharge that you
16 have, which is only a correlation, can be interpreted in
17 terms of causality, and you always need to do that. So
18 you always need to look at the underlying theory of harm
19 and the evidence which validates or invalidates that
20 theory of harm.

21 What I am saying, of course, also in that paragraph,
22 is that in the context of the results of my econometric
23 analysis, my overcharge in which I find that there is an
24 infringement effects which is bundled around zero, you
25 know, it is particularly important to make sure that --

1 I mean, the theory of harm that has been put forward by
2 the Commission in particular is not supported by data,
3 so that there is no conflict between my econometric
4 analysis and the assessment of the mechanisms that could
5 have led to harm according to the Commission's decision.

6 MR RIDYARD: Mr Ward, is your question about the sequencing
7 of these operations?

8 MR WARD: It was not intentionally about the sequencing.
9 What I am really trying to establish is that, as
10 Professor Neven has accepted, from an economic
11 perspective, if you had a robust model and a plausible
12 theory of harm, that might entitle you to make some
13 inferences about causation.

14 MR RIDYARD: Yes.

15 MR WARD: I am trying to understand that the reason here he
16 has done this additional piece of work is because he has
17 found that the overcharge appears to be zero and
18 therefore wanted to carry out an additional economic
19 stage to try and establish whether -- an additional
20 empirical stage -- I am sorry -- to try and establish
21 whether that appeared to be plausible.

22 MR RIDYARD: That does sound to me like a sequencing thing.
23 You are saying you do the econometrics, you find the
24 answer is zero and then you think, "Can I explain that
25 in terms of the lack of the relationship between the

1 list prices and net prices?".

2 A. So it is an answer to the sequencing question. I mean

3 there was no sequencing. I think that there was no

4 sequencing. I did not --

5 MR RIDYARD: There must have been a sequence.

6 A. It was taken -- undertaken at the same time, so it is

7 not as if, you know, I first did the econometric

8 analysis, found that the results were clustered around

9 zero and then looked at the theory of harm. Actually

10 this was simultaneous.

11 THE CHAIRMAN: Can I just ask a question about sequencing

12 then? So before you came to your theory of harm,

13 did you do the econometric analysis?

14 A. No.

15 THE CHAIRMAN: So you first came to the theory of harm --

16 A. I first looked at the Commission's decision and looked

17 at what could be the theory of harm and see what could

18 be the evidence to validate it or invalidate it, and

19 then soon in the process I started to do the econometric

20 analysis.

21 THE CHAIRMAN: So that came after you developed your theory?

22 A. I would say it is simultaneous, but literally I started

23 with the theory of harm.

24 MR WARD: Let us look now, if we may, at the empirical

25 analysis by which we mean the non-econometric analysis.

1 Can we look at page 13 of your first plausibility
2 report? That is {E/10/13}, bottom of the page.

3 A. Yes.

4 Q. What you say is:

5 "Whether changes in list prices translated into
6 predictable changes in transaction prices can however be
7 assessed empirically. This is the exercise that
8 I perform in Section 5. I find that there is no
9 systematic pass-through of the changes in list prices to
10 transaction prices. It follows that as far, as DAF is
11 concerned, the conversations on intentions with respect
12 to changes in list prices ..." --

13 THE CHAIRMAN: I think it goes over the page.

14 MR WARD: Yes.

15 THE CHAIRMAN: We have not --

16 MR WARD: Sorry. Could you turn the page, please?

17 Thank you, sir. Sorry, {E/10/14}.

18 "I find that there is no systematic pass-through of
19 the changes in list prices into transaction prices. It
20 follows that, as far as DAF is concerned, the
21 conversations on intentions with respect to changes in
22 list prices were not meaningful in terms of developing
23 a focal point on transaction prices."

24 So this analysis is there for its relevance for your
25 focal point analysis, is it not?

- 1 A. Yes.
- 2 Q. Of course we have heard already that Mr Harvey does not
3 accept that that is necessary. What you have looked at
4 here is DAF's prices.
- 5 A. Yes.
- 6 Q. So it is not going to tell us anything about what DAF
7 could learn from any other member of the cartel?
- 8 A. No.
- 9 Q. What you have done, as we will come on to discuss in
10 detail in a moment, you have compared DAF's list prices
11 for truck chassis with transaction prices that you
12 generated for truck chassis?
- 13 A. So, more precisely, I looked at the chassis component in
14 the list price and changes in the chassis component at
15 a well-defined unit of analysis, which is the basic
16 specification, and then, indeed, I imputed a transaction
17 price for the chassis component, you are right.
- 18 Q. We will look at the detail of that in a minute, but let
19 us see if, at the outset, we can agree two limitations
20 on this model. Firstly, this tells us nothing at all
21 about the counterfactual price, does it?
- 22 A. No, absolutely nothing. I think Mr Harvey was right.
23 I mean, this is not an analysis of the counterfactual.
24 It is not claiming to be.
- 25 Q. Also, secondly, in this analysis, you have not tried to

1 control for any of the factors that might affect the
2 level -- the other factors that might affect the level
3 of transaction prices, such as demand or costs or any of
4 those other things that are in the overcharge analysis?

5 A. No, I have not.

6 Q. So it is just a straight comparison of list and
7 transaction prices. So there could be a lot of reasons
8 why the list and transaction prices differ in the way
9 that you identify?

10 A. There could be reasons, yes.

11 Q. If we can turn now to page 40, please, of this report,
12 {E/10/40}. This is confidential so please do not put it
13 up on the public screen, but I do not need to read out
14 anything confidential here. So it is page 40. Is the
15 tribunal able to see this without it coming up on the
16 screen?

17 THE CHAIRMAN: Yes. This is part of his report --

18 MR WARD: Yes.

19 THE CHAIRMAN: -- the confidential version?

20 MR WARD: It is figure 6, so we are going to need the
21 confidential version of this report.

22 THE CHAIRMAN: So what is the reference?

23 MR WARD: {E/IC10/40}. Do you have that?

24 THE CHAIRMAN: I do. Figure 6 is that?

25 MR WARD: So we have figure 6, which is an illustration with

1 a blue line for average list price and a red line for
2 average transaction price. Without reading out anything
3 that is, for some reason, marked as confidential, we see
4 dramatic divergence there. That is in the AS400 period,
5 the earlier period. Then on figure 7 we have another
6 one, which is again a very substantial divergence,
7 albeit that the shapes of the lines are rather
8 different. As I understand it, these two figures are
9 particular trucks?

10 A. Yes.

11 Q. Was there any particular reason you chose those
12 particular trucks?

13 A. No, it was just as an illustration. These are basic
14 specifications.

15 Q. I am sure you were here or you will have heard that
16 Mr Ashworth gave evidence that when list prices rose,
17 DAF UK normally expected to obtain half the increase in
18 transaction prices.

19 A. Yes.

20 Q. It was not just a hope, but that was his experience.
21 Now, that is in the transcript -- Mr Beard is grumbling,
22 but I am quite happy to go to it.

23 THE CHAIRMAN: I remember it.

24 MR WARD: The judge remembers it. Thank you, sir.

25 What we have then is the following identified in

1 DAF's evidence: the cartel information is received,
2 gross list price information of the other manufacturers
3 is taken into account, gross list prices are then
4 increased and, as a result, Mr Ashworth says that
5 transaction prices go up by roughly half the amount. He
6 also says that amount stayed constant over time
7 essentially.

8 You have read Mr Ashworth's witness statement,
9 I think?

10 A. Yes.

11 Q. So you will know that he worked at DAF for 48 years --

12 A. Yes.

13 Q. -- starting as an apprentice mechanic and ending up as
14 managing director. He went through promotion after
15 promotion during that time in sales. He also said --
16 and I will just quote this verbatim from the transcript,
17 {Day8/30:18}:

18 "DAF NV was placing big demands on DAF UK to get
19 high prices ..."

20 Mr Beard can check that. It is Day 8, page 30,
21 line 18. I put it to him that, among other things,
22 there was pressure on him to achieve higher prices to
23 keep central management happy, and he said, {Day8/31:1}:

24 "I would not say it is pressure but it was part of
25 the job."

1 That is Day 8, page 30, line 20.

2 But according to your analysis, he was actually
3 a complete failure in this regard, was he not?

4 A. Well, certainly the analysis that I have undertaken is
5 in conflict with his expectations.

6 Q. Well, not just his expectation but his years and years
7 of professional experience.

8 A. That is correct. I mean, the data is not supporting his
9 expectations or the way in which -- or his experience.

10 Q. Does that not itself give you pause for concern as to
11 the accuracy of your analysis?

12 A. Not necessarily actually because -- let us be careful
13 here. What we are doing in the context of this exercise
14 is to focus on the generalised price increase and there
15 is possibility of a way to, I guess, reconcile the
16 experience of Mr Ashworth and our evidence here, to the
17 extent that maybe his evidence is or his experience is
18 informed by specific changes in list prices that are not
19 a generalised increase in list prices.

20 But, clearly, I mean, if his experience is informed
21 with respect to generalised increase in list prices,
22 then there is a conflict. I mean, the data shows that
23 when it comes to the generalised increase in list
24 prices, there was no pass-through clause to point 5 and
25 it certainly was not regularly over time.

- 1 Q. So he was getting it wrong -- his bosses who promoted
2 him got it wrong and your data shows it is really the
3 opposite position?
- 4 A. Okay, my data is showing something different from what
5 he says and I offer a way to reconcile it.
- 6 Q. Let us have a look at some of the details of how you got
7 there. Now, one of the points you have emphasised in
8 your evidence, particularly on theory of harm, is the
9 wide variety of truck specifications and options because
10 that is a key factor in your argument that monitoring of
11 transaction prices is difficult.
- 12 A. Hmm.
- 13 Q. I think you accept that the presence of options can have
14 a big effect on the actual transaction price. Do you
15 mind just saying "Yes" for the transcript, rather than
16 nod? It would be helpful.
- 17 A. Yes.
- 18 Q. Thank you.
- 19 In fact Mr Ashworth's evidence is that for BT and
20 Royal Mail it was about 20% of the truck. That is in
21 his witness statement at paragraph 47.
- 22 A. Okay.
- 23 Q. You can take that from me.
- 24 Now, what you have done to try and avoid the effect
25 of the options is focus on the chassis price of the

1 truck, so you are comparing the list price of the
2 chassis with a transaction price that you derive for the
3 chassis?

4 A. That is right, yes.

5 Q. But the exercise we are engaged in here ultimately is
6 trying to decide if there is a sufficient relationship
7 between the list and transaction prices on the whole
8 truck, are we not?

9 A. But we need -- precisely because the option may be
10 changing over time, in order to avoid composition
11 effects, you need to focus on one particular element,
12 and that is why we focus on the chassis component of the
13 truck at the level of basic specifications. So all the
14 trucks for which we are undertaking a comparison between
15 changes in list prices and changes in transaction prices
16 have the same list price for the chassis component, so
17 they are comparable. We are comparing apples with
18 oranges and we are comparing with respect to one
19 specific common element in all of those trucks.

20 Q. The point I was putting to you -- I understand that and
21 we are going to come to that in a moment -- but the
22 point I was putting to you is what you are actually
23 measuring is not in fact the trucks that people actually
24 bought.

25 A. I am using data on the trucks that people actually

1 bought so I am using that as a source of information
2 and, in order to avoid composition errors, I focus on
3 the common characteristics of these trucks.

4 Q. What customers actually bought was a whole truck,
5 though, was it not?

6 A. But it could not make any sense to make a comparison of
7 the --

8 Q. No, no, I do not disagree.

9 A. Okay. So for the purpose of exercise that I am doing
10 here, I need to isolate the analysis and I need to make
11 sure that I am comparing apples with oranges, that I am
12 looking at an element --

13 THE CHAIRMAN: You want to be comparing apples with apples.

14 A. Sorry, I am comparing apples with apples, I meant to
15 say. Sorry. I am very sorry. Yes.

16 MR WARD: This is essentially a hypothetical price, though,
17 is it not, in the sense that there is not a price?

18 A. There is -- of course, there is no price for the chassis
19 component. That is why I make an assumption, I mean,
20 and I -- in order to -- I have observations about the
21 transaction price for the whole truck actually
22 purchased, the price that is actually paid. To infer
23 the transaction price for the chassis component,
24 I multiply the transaction price for the truck by the
25 ratio. This is the share of the list price that is

1 accounted for by the chassis component.

2 Q. Can I stop you there, Professor Neven, because this is
3 part of what is actually marked as "Confidential" in
4 this.

5 A. Oh, sorry.

6 Q. No, that is quite all right. Some of this methodology
7 is marked as "Confidential" in this report even though
8 I confess it is completely unclear to me why it is.

9 MR BEARD: I think it is actually intended only to be the
10 numbers, so if Mr Ward is going to be questioned on the
11 methodology and Professor Neven is going to be answering
12 on methodology, I apologise that it is --

13 MR WARD: Okay, so I will try to keep in mind not to mention
14 any specific numbers.

15 MR BEARD: Yes, if Mr Ward does need to refer to numbers, if
16 he wants to stylise them, then that might be --

17 MR WARD: That is really helpful, thank you, because I do
18 not want to have to ask to close the session obviously.

19 Thank you. We can now pick this up expressly. So,
20 as you have said, the methodology is actually explained
21 in a footnote which is on page 38, footnote 102, in the
22 confidential version, so perhaps again we will not put
23 this up on the screen.

24 You say, if I can pick it up in the fourth line,
25 {E/IC10/38}:

1 "The data available to me on transaction prices are
2 not broken down by component. Therefore, the data does
3 not contain information on which part of the total
4 transaction price corresponds to the chassis component
5 and which ... corresponds to the optional component."

6 That is what you have just explained. So what you
7 do is derive a transaction price of the chassis by
8 calculating the ratio of the list price of the chassis
9 to the list price of the entire truck and multiplying
10 the transaction price corresponding to the entire truck
11 by this ratio. I think that is what you were just
12 saying when I --

13 A. Exactly, as I was explaining.

14 Q. -- when I raised the flag, the confidentiality flag.

15 A. Importantly I do that at the truck level. I do that for
16 every single truck.

17 Q. So what you are doing essentially is assuming within the
18 transaction price that this single price can be
19 apportioned in the same way as the list price?

20 A. That is correct, and I undertake some sensitivity
21 analysis with respect to that.

22 Q. We can talk about that too. But the customer has
23 actually negotiated a price on the whole truck, have
24 they not?

25 A. True.

- 1 Q. Would you accept that your analysis does not take
2 account of the possibility that DAF may in effect be
3 doing better out of the options than it is out of the
4 rest of the truck?
- 5 A. That is the purpose of my sensitivity analysis because
6 in my sensitivity analysis what I do is I look at
7 a different set of basic specifications according to the
8 significance of the options and I try to see whether the
9 same absence of a relationship between changes in list
10 prices and changes in transaction prices is found for
11 trucks for basic specification that have a different
12 share of options.
- 13 Q. Well, as I understand it, Professor Neven -- perhaps
14 I have got this wrong -- the sensitivity, which we can
15 see -- at page 50, paragraph 5.35, you explain it -- the
16 sensitivity involves looking at the ratio between the
17 DLP options on the total DLP price, dealer list price,
18 I assume, or DAF list price -- I am sorry -- and you
19 consider the pass-through rates associated with
20 different value shares of options for that truck. Is
21 that not it?
- 22 A. So what I do is I split the sample of the basic
23 specifications according to the significance of the
24 options. I mean, so basically I look at the bottom half
25 and the upper half of the sample depending on -- let me

1 just finish -- depending on the significance of the
2 chassis component in the overall list price.

3 Q. So, in other words, for a particular truck model, the
4 chassis component and then the number of available
5 options for that chassis; is that what you mean?

6 A. Well, according to transactions, again. So, you know,
7 this is not sort of in the abstract. I mean, this
8 separation between the bottom and the top part of the
9 sample is based on the actual observation. So
10 I basically -- for instance, with respect to the bottom,
11 I focus on these basic specification for which there
12 were a few options.

13 Q. The point I am making, which I do not think your
14 sensitivity addresses, is that it does not allow for the
15 possibility that, in effect, in the transaction price,
16 DAF is making a disproportionate share of its return on
17 the options as compared to the chassis.

18 A. If it was the case, it would show up in the differences
19 between the two -- the top and the bottom samples.
20 I mean, if your assumption was correct, that indeed
21 there was a greater margin that was made on those trucks
22 that had sort of more options, then the pass-through
23 would be significantly different in the top and the
24 bottom part.

25 Q. Well, let us look at the other components in the

1 analysis, and the next one is the list prices. If we
2 turn to page 38, please, {E/IC10/38}, paragraph 5.16,
3 you say --

4 A. Which? Sorry.

5 Q. 5.16 on page 38. You say:

6 "I calculate ..."

7 You focus on the list prices for each of the chassis
8 component for each basic specification.

9 "I calculate the average transaction price across
10 trucks associated with the same basic specification and
11 at the same level of the chassis component."

12 But then if we go back to paragraph 5.7, please,
13 {E/IC10/33} -- this is yellow, but again I do not need
14 to read any numbers -- you say, in respect of the AS400
15 period, where we see particularly dramatic
16 differences -- you say in the fifth line:

17 "... the AS/400 does not contain information about
18 the 'commercial specification' ..."

19 A. Yes.

20 Q. So instead it contains list prices at the transaction
21 level --

22 A. At the level of the model, yes. So basically -- it is
23 basically only the definition of what is a basic
24 specification that changes from the MI period to the
25 AS400 because for the AS400 I both have a commercial

1 specification code and a model code and I define the
2 basic specification as the combination between them. In
3 the AS400 period, I do not have the commercial
4 specification so I define the basic specification
5 differently at the level of the model code. So it is
6 less disaggregated inevitably.

7 Q. It is less disaggregated.

8 A. Yes.

9 Q. So if we then look at the list price increases you
10 consider at paragraph 5.9 on page 34, {E/1C10/34}, you
11 say:

12 "DAF's transaction data does not specifically record
13 changes in list price ..."

14 So therefore you say:

15 "It is ... necessary to infer the changes in list
16 price to any given basic specification from the data on
17 individual transactions."

18 A. Yes, that is right.

19 Q. Then what you say below is that you have tried to match
20 that up with the --

21 A. PBIs [sic].

22 Q. With the ...?

23 A. With the PBIs [sic].

24 Q. Yes. Sorry. Let me just make sure I have got the right
25 footnote here.

- 1 A. The product bulletin.
- 2 Q. Yes. But when we look at -- if we then move on to
3 page 37, {E/IC10/37}, this is your table of the various
4 list price increases that you have considered. Again
5 I do not need to read any numbers. You have got three
6 colours, you have got generalised --
- 7 A. Which one?
- 8 THE CHAIRMAN: Is this figure 5?
- 9 MR WARD: Figure 5, yes.
- 10 A. Figure 5, yes.
- 11 Q. You have three coloured bars here. You have the
12 generalised ones which you consider, you have the pale
13 green ones which are partial, which you also consider
14 I think for the AS400 period, and then you have got a
15 whole load of dark blue ones called "Generic".
- 16 A. Yes.
- 17 Q. The dark blue ones are ones -- I think, if I am right in
18 understanding, that they are -- at least for the AS400
19 period these are ones for which you have no PIB?
- 20 A. For the AS400 I have no PIB, and you see in the bottom
21 that I have defined for the AS400 period the partial one
22 as those that have a share in excess of 40%.
- 23 Q. Right. So we do have a gap in the data here for quite
24 a few of these?
- 25 A. Sorry?

- 1 Q. You have a gap in the data here.
- 2 A. Oh, the AS400 --
- 3 Q. Yes.
- 4 A. -- is clearly not as good as the MI data.
- 5 Q. That is where we see particularly dramatic results,
6 is it not, when we look at your outcome?
- 7 A. Why do you say that?
- 8 Q. Well, because when we saw from the beginning that the
9 results are -- we will see if we turn on to page 42,
10 which is your dispersion graph, that particularly large
11 divergences from the pass-through rate are shown in that
12 AS400 period.
- 13 A. Yes. Why do you think that is due to the data?
- 14 Q. I am just suggesting that we obviously have a data issue
15 here and that these extremely anomalous looking results,
16 are they not?
- 17 A. Yes, but why is it that the particular issue that we
18 have with the data in the AS400 period would induce
19 a bias, and this is what I am not following in your
20 argument.
- 21 Q. I am not even making that argument. I am just pointing
22 to the fact we have anomalous results and I am pointing
23 to the fact that we have looked at various steps you
24 have made in the data.
- 25 A. Okay, so the only difference between the AS400 and the

1 MI is that the level of aggregation is different. Is it
2 that the level of aggregation would introduce downward
3 buyers? Okay, I do not see why, but ...

4 Q. Let us look now at what you say at 5.12 about your --
5 what you have been able to do here. You say at 5.12(a),
6 {E/1C10/35}:

7 "I observe a large number of variations in the list
8 prices. Each quarter, I find a group of basic
9 specifications for which the list price changes. These
10 changes may reflect, inter alia, changes in the
11 technical implementation of existing features, new
12 features, changes in costs and other business
13 considerations."

14 Then you say in the footnote, {E/1C10/36}:

15 "My analysis does not consider what drives the
16 change in list prices, except [one exception]."

17 So it is right to say that you have not been able to
18 isolate the changes which might be attributable to the
19 infringement?

20 A. But what I know is that all the generalised change in
21 list prices, I mean, were actually discussed as part of
22 the -- I mean, that is in the Commission's evidence. If
23 you are looking at the generalised increase in list
24 prices that I have identified, I mean, they are all --
25 except for one, I think, they are all referred to in the

1 Commission's file -- not file, in the Commission's
2 decision, which means that, you know, by looking on
3 generalised increase in list prices, I am really focused
4 on what the Commission has been uncovering in its
5 evidence and has been interpreting.

6 Q. Well -- although you have also included the partial list
7 prices, have you not?

8 A. I have also included partial list prices, yes.

9 Q. We know that -- what Mr Ashworth has said is that
10 generalised list prices, changes were made about once
11 a year.

12 A. Yes.

13 Q. So quite a lot of the price changes that you have
14 included might actually be nothing at all to do with the
15 infringement?

16 A. I think that it is -- I think my expectation that many
17 of the changes in list prices that we observe in
18 figure 5, in particular what I refer to as the "generic
19 ones", have nothing to do with the infringement,
20 possibly. I mean, they are changes in list prices
21 implemented by DAF for the reasons that I mentioned in
22 paragraph 2.12 [sic], {E/IC10/35}:

23 "... changes in the technical implementation of
24 existing features, new features, changes in costs and
25 other business considerations."

- 1 Q. They may have nothing to do with infringement?
- 2 A. Well, I think they are probably a little to do with the
3 infringement, but I am not focusing on those, as I said.
4 I am focusing on the general increases in list prices
5 that were referred to by actually -- they are also
6 referred to by the Commission.
- 7 Q. What you say in 5.14, page 38, {E/IC10/38}, is that you
8 take -- page 38:
- 9 "... I take a conservative approach, and I focus on
10 all generalised and partial list price changes ..."
- 11 So it is not just the generalised ones and it is not
12 really conservative, is it, if in fact you have included
13 these changes which may have nothing at all to do with
14 the infringement?
- 15 A. No. I mean, you can actually easily interpret the
16 graphs by just looking at the generalised increase in
17 list prices that concern all trucks if you wish to and
18 you do not get to a different conclusion.
- 19 Q. Well, that is not the analysis which we are looking at
20 here.
- 21 A. But you just look at the graph, you just look at
22 a different set of points, because you have an
23 identification of those changes in list prices that were
24 truly generalised, that were referred to in the
25 Commission's decision, and if you focus on those, for

1 instance, in figure 8, I mean, you will get the same
2 conclusion.

3 Q. Now, there is just one other aspect of this that
4 I wanted to explore with you, where you say you have
5 focused on all generalised and partial list price
6 changes. Can we go to page 79, please, into the annex,
7 {E/IC10/79}? At the top of the page, (c) -- there is
8 still some confidential material on this page so please
9 do not ...

10 A. Yes.

11 Q. Page 79, top of the page, you say (c):

12 "Note that very small price changes (less than 0.5%)
13 are discarded from the analysis, as the possibility that
14 they may be due to data entry errors cannot be
15 excluded."

16 So even though you have excluded those, it means
17 that you have included price changes that may be as
18 small as 0.5%.

19 A. I excluded less than 0.5%, yes.

20 Q. So if these are very small, if there are very small
21 price increases, they could have quite a significant
22 effect, could they not, on your analysis? Sorry, I have
23 put this the wrong way round. Let me show you what you
24 said at 5.17. This is on page 38, {E/IC10/38}. You
25 say:

1 "The pass-through rate ... is calculated as the
2 ratio between the percentage change in the average
3 transaction price and the percentage change in list
4 prices."

5 A. Yes.

6 Q. So if you are talking about a price increase of, say,
7 half a per cent, if you had a list price increase of
8 half a per cent and the price of the chassis fell by
9 half a per cent, that would show in your analysis as
10 minus 100%, would it not?

11 A. No, because I exclude all of those.

12 Q. No, I am talking about the ones just over the threshold
13 that you have included, as you excluded below 0.5, so
14 call it 0.6, if you like.

15 A. Ah, but of course all the generalised price increases
16 are much in excess of 0.5. They are of the order of 2%
17 to 3% so --

18 Q. Indeed. We have also discussed that you have included
19 all the partial list price changes.

20 A. Yes, because, as I said, you can select in the graph
21 those that relate to the generalised price increases and
22 you get the same conclusion. Of course, I could not
23 tell you what is the distribution of list price changes
24 for the partial ones. I do not know that by heart.

25 I do not remember. But, I mean, the data points that we

1 exclude with this are actually quite -- okay, I do not
2 think they constrained the part -- but I cannot tell you
3 because I do not remember the distribution by heart.

4 Q. Okay. Can we go now, please, to page 75, {E/IC10/75}?
5 This is about currency. It is not our usual currency
6 topic.

7 At A.29 you say:

8 " In the MI Data, each recorded transaction contains
9 information on the list prices set by DAF and the
10 invoice prices ..."

11 A. Sorry, I am not getting it. Which paragraph is it?

12 Q. A.29, page 75.

13 A. Yes, sorry.

14 Q. Thank you. I will start again.

15 " In the MI Data, each recorded transaction contains
16 information on the list prices set by DAF and the
17 invoice prices paid by DAF's direct customer ... The
18 list price of the truck ... is divided by components,
19 and each component, notably the chassis, options,
20 [et cetera] is recorded in a distinct data field and is
21 available at the truck level. The list prices ... in
22 the MI data are set in Euros. I convert the list prices
23 into pound sterling ... using DAF's internal exchange
24 rate (the 'Budget Rate')."

25 A. Yes.

- 1 Q. Did you hear what Mr Ashworth said about this when he
2 gave evidence?
- 3 A. Yes, I did.
- 4 Q. So I will remind you, although Mr Beard no doubt will
5 tell me I have got this wrong -- and we can go to the
6 transcript -- what he said about it was that the list
7 price DAF worked from was converted by a fixed rate that
8 he could only ever remember changing once. Do you
9 recall that?
- 10 A. I recall that, but this is in conflict with the data.
- 11 Q. Well --
- 12 A. I mean, because, you know, what I find in the data is
13 that the list prices and the -- actually all the prices
14 and the transaction prices -- were expressed in pounds
15 using the budget rate. So Mr Ashworth is drawing
16 a distinction between the budget rate and the rate that
17 was used in order to express the list prices. He is
18 drawing a distinction and, in reality, in the data,
19 there is not any.
- 20 Q. So you think he is just mistaken about that?
- 21 A. I think that -- honestly he is managing director. I do
22 not think a managing director knows necessarily about
23 the details of the exchange rate that I used in the OMS.
- 24 Q. He is pretty clear, is he not, that this is how it was
25 done?

1 A. Well, what I can tell you is that the OMS, which is the
2 database they were using, shows no difference.

3 Q. Just give me a moment. (Pause)

4 Let us look now, please, at your second empirical
5 analysis, which is the mystery shopping exercise. This
6 is in your second report, {E/34/10}.

7 A. So which bundle is it?

8 Q. Probably a white bundle.

9 A. Yes.

10 Q. Your reply report on theory of harm.

11 A. It is 6, yes.

12 Q. This is the mystery shopping exercise. Now, what you
13 did here -- this was discussed with Mr Harvey yesterday
14 and this is picking up I think on the fact that within
15 the Commission decision is a mention of mystery
16 shopping.

17 A. Yes.

18 Q. Although we do not know what it involved, we do not know
19 who carried it out --

20 THE CHAIRMAN: Sorry, where are we? Is this a confidential
21 one?

22 MR WARD: No. This can go to the non-confidential version.

23 THE CHAIRMAN: Okay.

24 MR WARD: Thank you, and it is {E/34/10}.

25 I just pick this up again. The Commission decision

1 talks about mystery shopping as one of a very wide range
2 of sources of information that were available to the
3 cartelists and it does not tell us who carried it out or
4 what it looked like. If you would not mind just saying
5 "Yes"?

6 A. Yes.

7 Q. Thank you. What you have done here is you have taken
8 a sample of DAF transaction prices and compared the
9 average discount to the overall average?

10 A. No, no, what I do is that I take a sample of 50 trucks
11 and I compute what would be the predicted discount on
12 the basis of that sample and --

13 Q. Yes.

14 A. -- I do 100 different random draws in order to be
15 conservative, in order to have results that are
16 dependent on a particular random draw.

17 Q. Again what we are doing here is looking only at DAF's
18 pricing?

19 A. Yes.

20 Q. This particular mechanism that you have adopted here is
21 not one that is identified in the Commission as
22 a particular -- in the Commission's decision as
23 a particular form of information available to the
24 cartelists?

25 A. But this is mystery shopping. I think this is the best

- 1 modelling of mystery shopping that I could think of.
- 2 Q. It is just a stylised model adopted by you?
- 3 A. I think it is an actual interpretation of what mystery
4 shopping is all about. I mean, when you do mystery
5 shopping, you are trying to get information about
6 particular transactions, and I have assumed that this
7 hypothetical mystery shopper not only knows about the
8 list price of the particular transactions that he is
9 observing but also knows about the transaction price.
10 Do you not think that this is a sensible way of ...?
- 11 Q. Well, if we look at the results, what we see is -- if we
12 look at figure 1, the left-hand scale is the percentage
13 average discount --
- 14 A. Yes.
- 15 Q. -- running from 32 to 48 and the cross is the average
16 actual discount --
- 17 A. Yes, that is right.
- 18 Q. -- and the P5-P95 is the range of anticipated discounts.
- 19 A. Yes, from my 100 different random draws, so I basically
20 look at, you know, the random draws that fit within the
21 top 95 and sort of the 5/25.
- 22 Q. I may have mentioned once or twice that this cartel ran
23 for 14 years and --
- 24 A. Yes.
- 25 Q. -- the cartelists will have been, of course, gathering

1 information from a range of sources --

2 A. Yes.

3 Q. -- through that period --

4 A. I have got that, yes.

5 Q. -- of the kind that the decision talks about.

6 The point I want to put to you is just that,
7 overall, what this shows is actually a reasonably
8 reliable form of prediction. So if we look at 1997, for
9 example, {E/34/11}, the red cross is at 36 and the green
10 bar is from 33 to 35. What I am suggesting to you, if
11 we enter this world where we use this model, is that
12 year on year this would have given valuable information
13 about the level of list prices -- the level -- the
14 overall level of list prices.

15 A. Transaction prices, you mean?

16 Q. Sorry, I meant transaction prices --

17 A. Transaction prices, yes.

18 Q. -- by reference to the actual list prices.

19 A. But, I mean, the scaling of course is misleading here
20 because, you know, everyone knows that --

21 Q. It is your table.

22 A. Everyone knows that the discounts are in the order of
23 30% to 40% so it is more interesting to look at the next
24 page, and the next page actually looks at the average
25 difference in discount in percentage points because, you

1 know, everyone knows that, you know, it has to be in
2 between 34 and 40; okay? So that is common knowledge.
3 The question is whether it is 34 or 36.

4 Q. How does everyone know that, Professor Neven? That is
5 a breezy assumption that you have just made by waving
6 your arm in the air.

7 A. Okay, fine. What I can say is that, I mean, it is
8 common knowledge that the average discounts are very
9 high for all manufacturers and what matters for your
10 ability to predict is to look at the difference between
11 the type of errors that you are making, on the one hand,
12 with the change that you are trying to capture through
13 the instrument that you are implementing. That is why
14 I think a reasonable way of assessing the accuracy of
15 the prediction is to look at the average error in
16 relation to the average change in list price. The
17 average change in list price during these episodes of
18 general price increase is 2% to 3%. The average error
19 you are making by doing this mystery shopping exercise
20 is of the same order of magnitude.

21 Q. What I am putting to you is simply this: if we are
22 looking at this mystery shopping exercise, which is
23 itself essentially generated by you, it still shows
24 a reasonably high level of accuracy of prediction that
25 would be useful information?

1 A. I disagree with that for the reason I just explained, is
2 that, you know, the average error is equal to the
3 average change that you are trying to measure.

4 Q. I want to now -- it is my final topic which will be
5 mercifully brief. I want to turn back to something we
6 talked about yesterday and develop it a little further.

7 THE CHAIRMAN: You said there was something where we needed
8 to go into private. Have we done that?

9 MR WARD: We have. Mr Beard's helpful indication made the
10 yellow vanish.

11 THE CHAIRMAN: Okay. That was the thing.

12 MR WARD: I think I am probably only another ten minutes.

13 THE CHAIRMAN: Okay. Good.

14 MR WARD: Maybe we should have a break now. I am very happy
15 to continue.

16 THE CHAIRMAN: I think we should carry on.

17 MR WARD: Thank you.

18 THE CHAIRMAN: Are you okay to carry on, Professor Neven, or
19 would you like a break?

20 A. No, it is fine.

21 MR WARD: Can we go, please, to your supplemental report,
22 which is {E/61/23}? We touched on this paragraph very
23 briefly yesterday, but I do want to develop a few more
24 points on it with you.

25 A. Yes.

1 Q. You will remember this.

2 A. Yes.

3 Q. You say:

4 "... Mr Harvey draws inferences from the observation
5 that the infringement lasted for fourteen years [there
6 it is again]. He finds that because the infringement
7 lasted for so long, it is plausible that it has had
8 anti-competitive effects (as in the absence of effects,
9 the practices would have been discontinued)."

10 I am sure if Mr Harvey were here, he would say there
11 was a bit more to his argument than that. Let us carry
12 on:

13 "However, there is a limit to this inference. It is
14 entirely possible [you say] that infringing conduct was
15 found to be useful by the manufacturers without
16 necessarily affecting customers through systematically
17 higher prices and profits. This is particularly
18 relevant in the context of the theories put forward by
19 Mr Harvey. As discussed above, exchanges of information
20 on cost and demand conditions (which could be seen as
21 'commercially sensitive') can bring benefits in terms of
22 better pricing strategies without leading to
23 systematically higher prices. Exchange of information
24 on list prices (outside a framework of coordination) can
25 be understood as conveying information on demand or cost

1 and the exchange of such information, while useful for
2 setting prices, does not necessarily lead to higher
3 prices."

4 A. Yes.

5 Q. So this is couched in terms of what might hypothetically
6 be happening and what you are saying is it is possible
7 that the cartel could be useful without necessarily
8 affecting prices. Is that a fair characterisation?

9 A. Yes.

10 Q. What you seem to be saying is that the cartel could have
11 had indirect benefits, essentially, in terms of
12 conveying information on demand and cost conditions?

13 A. That is what indeed the economic literature is
14 suggesting, is that, you know, at these information
15 exchanges and, for instance, information on list prices
16 can convey information about the anticipation of demand
17 by the members of the information exchange or can convey
18 information about expected changes in cost.

19 Q. So what you are saying, I think, is that this edifice of
20 exchange of list prices would be for the purpose of
21 somehow inferring information about cost movements or
22 demand movements?

23 A. Yes, obtaining a better estimate of demand movement or
24 cost movement.

25 Q. Can we turn, please, to the decision which is in your

1 blue bundle under tab 1, I think. Is it 1 or 2? It
2 is 2. I am so sorry, it is 2. Can we turn up, please,
3 page -- this is {AU/3.9}.

4 A. So it is the blue one?

5 Q. The blue one, tab 2.

6 A. Yes.

7 Q. {AU/3.9/9}. Thank you. If we are thinking about demand
8 movements, firstly, it says -- this is talking about --
9 Recital 29, the high degree of transparency in the truck
10 sector, and it says:

11 "Within some of these associations [halfway down],
12 data on order intake and delivery periods or stock
13 levels was exchanged."

14 Then if we go on to Recital 81, {AU/3.9/19}, again
15 it talks about, six lines down:

16 "... exchange of ... commercially sensitive
17 information such as ... order intake and delivery
18 times."

19 So the cartelists did not need to infer that kind of
20 demand information from the list prices, did they,
21 because they had actual sharing of that particular kind
22 of information?

23 A. Well, that is the way you describe it. I think that,
24 you know, they, of course --

25 Q. Well, it is just binding findings.

1 A. No, what the decision says here, that they shared
2 information actually occasionally about order intake and
3 delivery times. I mean, this conveys information
4 about -- indeed about demand, but it may very well be
5 that there was additional information in list prices,
6 so -- we know so little about this that, you know, this
7 is possible that there was independent information.

8 Q. It is a peculiarly oblique strategy, is it not, if what
9 you want is information about demand, to actually
10 exchange systematically list prices and reach agreements
11 on list prices? How are agreements on list prices going
12 to help you understand the level of demand?

13 A. Yes, but, as I explain, you know, my evidence shows that
14 there was no effective coordination on list prices that
15 would feed into transaction prices.

16 Q. What I am really suggesting to you is a slightly
17 different point, which is that this rationale that you
18 are positing here hypothetically, with respect, does not
19 make sense of why it is that there would have been this
20 vast-scale collusion that was centred around list prices
21 themselves.

22 A. Well, I think that -- I mean, the court of -- the
23 general court is actually saying the same thing as you.
24 The common thing about Scania's suggestion that they
25 were doing this information exchange because it gave

1 them information about relative prices, what the general
2 court is saying, "Yes, they could be -- you know, this
3 could be a rationale, this could be a reason", but at
4 the same time it does not explain why they were sharing
5 information with respect to intention on changes in list
6 prices. That is entirely clear. I mean, it does not
7 explain that.

8 Q. We will make submissions about Scania in closing. I am
9 not going to get drawn into debating the law with
10 Professor Neven.

11 But what I am really suggesting to you is that the
12 obvious inference is not that this information helped
13 them to understand cost and demand conditions but that
14 they were actually interested in the list prices
15 themselves and they were interested in them because it
16 enabled them to have their own higher prices.

17 A. But, as I said, I mean, the fact that they were sharing
18 information on the intention with respect to changes in
19 list prices, I mean, it is a concern independently of
20 this rationale. I mean, they -- in particular the
21 rationale that Scania is referring to, Scania is
22 referring about relative prices and say they are
23 interested in relative prices. It does not explain why
24 they would necessarily need to exchange information on
25 expected changes in list prices. Now, to refer more

1 particularly to your point here, of course information
2 about your expected changes in list prices is more
3 likely to convey information about your expectation on
4 demand than information sharing with respect to the list
5 prices themselves, with respect to the structure of list
6 prices, so there are two separate arguments here.

7 I mean, there is the Scania argument saying that
8 they are interested in the relative list prices and the
9 court of -- the general court is saying, "Well, it does
10 not explain why you are sharing information with respect
11 to intention in changes in list prices", and what I am
12 saying is that, in addition to that, with respect to
13 changes in list prices or your intention with respect to
14 changes in list prices, it is more likely to convey
15 information about demand. I mean, because it is
16 a change in the list prices, it might convey information
17 about how you expect demand to evolve. But, again,
18 I mean, this is speculation on my part, honestly.

19 I mean --

20 Q. It is speculation.

21 A. It is speculation. How do we know exactly how they
22 interpreted this? But, you know --

23 Q. I mean, if you are interested in demand, why not just
24 collude on demand measures?

25 A. But, you know, this is the speculation that is behind

1 these models of unilateral effects because these models
2 of unilateral effects, they say, "Okay ..." -- I mean,
3 you get more information, more information on demand,
4 more information on cost. It can go up sometimes, it
5 can go down sometimes. This is the type of speculation
6 that you have in these models.

7 Q. If you are interested in demand and you are interested
8 in costs, why would you reach agreements on gross list
9 prices? Agreements. Not just information exchange, but
10 agreements.

11 A. Yes, but as I said, we have been sort of talking at
12 cross-purposes for two days. What the Commission, you
13 know, characterises legally as an agreement on the one
14 hand and what I look at in terms of economic analysis,
15 whether there was effective coordination, effective
16 coordination around a focal point, which is the
17 economist's equivalent of an agreement.

18 MR RIDYARD: I think we understand what your argument is on
19 coordination not being, you know, effective, but that
20 does not really answer the question of why -- do you
21 have any explanation of why they exchange information on
22 list prices changes, and your answer is because that
23 would help them to understand -- that is the best way to
24 help them understand demand?

25 A. I -- look, I mean, I can only offer that as a possible

1 explanation.

2 MR RIDYARD: But this whole session is about plausibility.

3 Do you think that is a plausible explanation of why they
4 exchange information about future list price increases?

5 A. Honestly I don't think so.

6 MR RIDYARD: No.

7 A. If you ask me, I do not think that information about
8 changes in list prices would be key in order to
9 anticipate demand. I think that, you know, we do not
10 have a lot of evidence in order to show that this was
11 the case and I do not think this was key.

12 THE CHAIRMAN: So therefore you cannot come up with an
13 explanation for why they would have done this for
14 14 years?

15 A. I can come up with an explanation as to why they
16 exchanged the list prices because I think that, you
17 know, it conveyed some information about the relative
18 competitiveness of competitors across the whole range so
19 this I find an interesting explanation. Now, why you
20 really need to exchange information about your intention
21 with respect to changes in list prices in order to
22 obtain more information about demand, I do not think
23 this is very credible line of reasoning.

24 MR WARD: Professor Neven, is there not just an elephant in
25 the room at this point? They were exchanging

1 information on list prices because they were interested
2 in prices and they were interested in prices because
3 they wanted to put their prices up. Is it not just
4 really as simple as that, despite all these contortions?

5 A. No, it is not contortions. Again, I am looking at the
6 evidence, I am looking at data and I am saying that, you
7 know, even though I cannot explain -- I cannot tell you
8 why -- I cannot have a very good explanation as to why
9 they found it necessary to exchange information on the
10 intentions with respect to changes in list prices, what
11 I can show you, however, is that the fact that they did
12 did not lead to effective coordination. I think it is
13 fair.

14 Q. Well, yesterday you did give a different account for the
15 rationale and I want to make clear, before asking any
16 questions on this, that we absolutely reserve our
17 position as to both its admissibility and its weight,
18 but that will all be a matter for closing. If you allow
19 me, I will just ask a couple of questions about it in
20 any event because what you said yesterday is that you
21 have been told the cartel information was useful and
22 I am going to quote verbatim two things you said,
23 {Day10/115/10}, "to find out the relative position of
24 competitors", and, {Day10/116/8}, "how the market was
25 evolving or the information about future costs". The

1 transcript references are page 115, line 10, and 116,
2 line 8. But these are again highly abstract kind of
3 considerations of the kind that you were hypothesising
4 in your report that we looked at a moment ago.

5 A. I have provided sort of two explanations, one in terms
6 of getting information about demand and cost and, as
7 I just explained, I am not convinced that you need to
8 exchange information about your intention with respect
9 to changes in list prices in order to convey information
10 about demand. What I have also explained yesterday and,
11 as Scania is arguing in the Commission's decision, that
12 having information about list prices, because it conveys
13 information about the relative prices of your
14 competitors and the relative competitiveness of your
15 competitor, is a more credible explanation for the
16 information exchange, but again it does not relate to
17 the intentions; okay? It only relates to the structure
18 of the list prices.

19 Q. So it is more credible than the explanation that you
20 offered in your own report I think is what you are
21 saying, the part we just looked at?

22 A. No, I do not think so.

23 Q. It is no more credible?

24 A. Sorry, I think that -- no, I do not accept the terms of
25 the question. I think that what I say in my report, it

1 is not that the change in list prices were useful to
2 convey information. What I say is that the information
3 that they exchanged with respect to delivery, order
4 intakes and what-not may have been useful in order to
5 anticipate demand. I think that the paragraph that you
6 have quoted does not say that exchanging information
7 about expected changes in list prices or intended
8 changes in list price was actually necessary to convey
9 information about demand. I think you are incorrect
10 there.

11 Q. Well, what I am putting to you is really this: the
12 cartelists run enormous legal risks in order to obtain
13 this information. They structured this cartel around
14 the exchange of gross list price information. I am
15 suggesting to you it is at least plausible, if not
16 overwhelmingly likely, that they did it for the simple
17 and direct reason that they wanted to use this
18 information to put their prices up.

19 A. But it has been amply clear in the last two days
20 I disagree with you.

21 Q. I know you disagree, Professor Neven, but it is part of
22 my job to put my case to you and I am.

23 Can I show you what is said in Recital 71 which we
24 have looked at a number of times? It is {AU/3.9/17} and
25 it is part of your bundle under tab 2. At the bottom of

1 the paragraph, the last five lines -- do you have that?

2 A. Which one is it? Sorry.

3 Q. Recital 71.

4 A. Paragraph 71?

5 Q. Recital 71.

6 A. Yes, okay.

7 Q. Thank you. The last five lines:

8 "The single anti-competitive economic aim of the
9 collusion between the Addressees was to coordinate each
10 other's gross pricing behaviour and the introduction of
11 ... emission standards in order to remove uncertainty
12 regarding the behaviour of the respective Addressees and
13 ultimately the reaction of consumers on the market."

14 The reaction of consumers on the market means what
15 they were willing to pay, does it not?

16 A. Yes, but, again, this is a legal characterisation.

17 I mean --

18 Q. Well, it is just binding. It is just a Commission
19 decision that is binding.

20 A. It is the Commission's decision and I respect the
21 Commission's decision, but I am looking at the facts --

22 Q. Well, I am suggesting to you it is just at odds with the
23 explanations that you are proffering.

24 SIR IAIN MCMILLAN: May I ask a question here?

25 MR WARD: Sir, please.

1 SIR IAIN MCMILLAN: I think what you appear to be saying,
2 Professor, is that, although there was collusion on each
3 other's gross pricing, in actual fact the information
4 was of no use to them in terms of trying to get higher
5 transaction prices.

6 A. What I am saying is that -- yes, I mean, the information
7 that they shared was not useful for them in actually
8 getting higher transaction prices, yes.

9 SIR IAIN MCMILLAN: Thank you.

10 MR WARD: Indeed, and I have put my case to the contrary, as
11 Professor Neven rightly observes.

12 I just want to finally move on to a related but
13 slightly different topic. When we have discussed your
14 theory of harm, you have posited the possibility that
15 the cartel information could have been used by the
16 cartelists essentially to undercut prices, in other
17 words -- no?

18 A. Sorry, say this again.

19 Q. So the cartel information -- you must tell me if I am
20 mischaracterising your evidence --

21 A. Yes.

22 Q. -- but I think what you were saying is they get the
23 cartel information and rather than saying, "Well, there
24 is DAF going up 3%, we will also go 3%", they say, "Well
25 there is DAF going up 3%, we can profit-maximise by

1 going lower"?

2 A. What I am saying is that any cartel has to make sure
3 that the members of the cartel do resist that
4 temptation, yes.

5 Q. If they do not resist that temptation, then the prices
6 are not increased?

7 A. The cartel is ineffective.

8 Q. You have not actually examined any file documents or
9 anything to tell you whether or not the cartelists did
10 or did not cheat on the cartel?

11 A. No.

12 Q. Can I just show you just one example, which is from the
13 file, which is {I1/376T}. I am afraid this is not in
14 your bundle, Professor Neven, but it is quite short.
15 This is a document that the tribunal at least have seen
16 before but you may not have as I know you have not
17 looked at the file. This is a memorandum from
18 Bernhard Purschhke of DAF, which assembles a whole lot
19 of information from different members of the cartel
20 about their proposed price movements. You can see that,
21 just for context, towards the bottom of the page he
22 says:

23 "Hello,

24 "Please find below the individual feedback on price
25 adjustments in 2005 in a brief summary."

1 The first one is Daimler Chrysler, but the one we
2 are interested in is actually DAF itself. So if we
3 could go to the second page, please, {I1/376T/2}, and
4 you can see in the middle of the page, before he says
5 "With kind regards ...", he has a heading for "DAF":

6 "From order date 01.04.2005 the list prices will be
7 raised by 3% for vehicles [plus] SE."

8 Which I seem to remember was a mystery last time and
9 remains a mystery. Do you see that, Professor Neven?

10 A. These are list prices, is it?

11 Q. Yes, these are list prices and the date of this is
12 8 December 2004 and the proposed change is 1 April 2005.
13 Do you see that?

14 A. I see the date, yes.

15 Q. Now can we go to {I1/347}, I think it is, but it might
16 be 342.

17 A. Which bundle?

18 Q. Again, I am so sorry, it is not in your bundle. It is
19 just going to be on the screen. Oh, dear. Can you try
20 {I1/342}? Yes, that is it. Thank you.

21 Now, this again you will not have seen because it is
22 a file document and this is a direction to managing
23 directors of sales units from Mr van Veen, no less. It
24 says -- it is dated 29 March 2004 and he says:

25 "This weekend the general price increase of 3% will

1 become effective."

2 So we can see here, can we not, that in terms of
3 list prices -- not transaction prices, but list
4 prices -- DAF is doing exactly what it told the other
5 cartelists it would do. Would you agree?

6 A. Of course. In that occasion, yes --

7 Q. Yes.

8 A. -- but, again, my evidence is about transaction prices.

9 Q. Absolutely and I want to come on to that now. Sorry,
10 just one moment. (Pause)

11 MR BEARD: I am slightly concerned about this. This is
12 a document from Mr van Veen. I do not recall it being
13 put to Mr van Veen but I am sure Mr Ward will be able to
14 tell me if he did.

15 MR WARD: I am actually told this is the wrong document
16 anyway! I am going to move on to the transaction --

17 MR BEARD: Then he probably did not put it to Mr van Veen so
18 I will sit down again.

19 MR WARD: You can sit down. I am afraid it is the wrong
20 document, so I will just move on to the next point in
21 any event.

22 THE CHAIRMAN: I thought the dates did not really match up.

23 MR WARD: Well, that was the realisation that we had the
24 wrong document. This is the problem with early hours of
25 the morning work, sir, so apologies. Apologies to you,

1 Professor Neven, as well. I have wasted a few minutes
2 of your time on that.

3 As you were saying anyway, the real issue is
4 transaction prices, and if there was widespread cheating
5 on transaction prices, would not the cartel have just
6 fallen apart many years before the Commission came in
7 with its dawn raid and put the thing to a halt?

8 A. Again, my evidence suggests that it is very unlikely
9 that there was an effective coordination so the issue of
10 cheating does not arise.

11 Q. It does not even arise on your case?

12 A. So I think it does not arise, this issue of cheating.

13 Q. Part of your argument was there could not be a focal
14 point because there would be cheating which would
15 undermine --

16 A. No, no, no.

17 Q. No?

18 A. No, no. What I said is that -- my evidence shows that
19 because there was a lack of pass-through between changes
20 in list prices and changes in transaction prices, there
21 was not even a focal point on transaction prices. So,
22 I mean, there was not even the definition of something
23 that they could define from which they could cheat. It
24 just did not exist.

25 Q. I see. I thought we spent a lot of time yesterday

1 talking about incentives to cheat and let me put --

2 A. Yes, because that is one of the conditions for this
3 coordination.

4 Now, if this is going to go on for much longer,
5 I think I would like to have a second break because this
6 is becoming harrassment.

7 MR WARD: I think it is going to go on for just actually one
8 or maximum two questions and then I am actually
9 finished, so ...

10 THE CHAIRMAN: All right. There may be some re-examination
11 and we have a few questions, so do you want to finish
12 and --

13 MR WARD: May I put this question?

14 THE CHAIRMAN: -- then we will have our break?

15 MR WARD: Yes, because it is really just part of what I am
16 talking about now.

17 All I am putting to you, Professor Neven, is that if
18 the cartelists were cheating, then the cartel would have
19 been totally pointless, would it not? It would have
20 just collapsed?

21 A. I think if you have a coordination from which members of
22 the infringement cheat, then the cartel is ineffective.

23 Q. It would not carry on for 14 years if it was
24 ineffective, would it?

25 A. It would not carry on for 14 years, but here what I am

1 saying is there was -- I see that there is no evidence
2 that there was effective coordination so, I mean, this
3 issue does not arise.

4 Q. I will put to you -- this really is my final question --
5 is it not just far more likely that what happened here
6 is the cartel just carried on colluding on gross list
7 prices and these other matters because they benefited
8 from higher prices as a result?

9 A. I think I have answered that about 15 times.

10 MR WARD: He has. Thank you, sir. That is the end of my
11 questioning.

12 THE CHAIRMAN: We will have ten minutes then.

13 (12.03 pm)

14 (A short break)

15 (12.12 pm)

16 MR BEARD: Obviously if the tribunal wants to ask questions
17 first, but shall I just go ahead --

18 THE CHAIRMAN: No, I think you should go first.

19 MR BEARD: Yes. That is fine. I only have a couple of
20 questions.

21 Re-examination by MR BEARD

22 MR BEARD: The exchanges that have just occurred referred to
23 the rationale for the cartel and so on. From your point
24 of view as an economist, does the rationale for the
25 cartel affect the way that you approach the economic

1 analysis you have undertaken here?

2 A. No.

3 Q. Okay. The next point I wanted to go to was actually
4 earlier this morning Mr Ward referred to you having made
5 a concession about a potential connection between list
6 prices and transaction prices. I think on the
7 transcript it is at [draft] page 10, line 8. I think he
8 was referring to -- suggesting that you had made
9 a concession yesterday about this, but could I just take
10 you to your supplemental report, {E/IC61}, please?

11 I think it is at page 9, {E/IC61/9}. No, sorry,
12 page 10. No, over again. My apologies. Page 11, we
13 will get there. 2.20, {E/IC61/11}. Could you just
14 review paragraph 2.20?

15 A. Yes.

16 Q. So could you just explain, broadly speaking, what you
17 are saying in this paragraph 2.20?

18 A. 2.20 -- sorry, I was looking at the wrong one.

19 Q. I am sorry. Yes, it is the one that starts "More
20 generally ..." (Pause)

21 A. Yes, so this is an argument that I developed yesterday
22 in relation to what I referred to as the theory of harm
23 involving the tide that lifts all boats. This idea that
24 simply because there is a coordination or the
25 development of a focal point on list prices, this will

1 necessarily lead to change in transaction prices because
2 there was a link between list prices and transaction
3 prices which, in particular, can be observed in the
4 competitive setting, in a competitive environment.

5 I explained that this theory of harm that simply says,
6 "If you were coordinating on a parameter that affects
7 transaction prices, transaction prices will increase",
8 I think is incorrect, and it is incorrect as long as it
9 remains possible for the undertakings involved to affect
10 transaction prices -- as long as they have the
11 possibility to affect transaction prices and hence to
12 cheat with respect to deviate, with respect to what the
13 coordination on this parameter of competition would
14 imply for transaction prices.

15 So, again, to be very schematic, if you assume that
16 there is an automatic link between list prices and
17 transaction prices, the argument would be you agree on
18 the list prices and, because there is automatic link,
19 the transaction prices will necessarily go up.

20 What I am saying is that that reasoning is
21 misleading as long as the undertaking, the companies
22 involved, the headquarters in this case, have the
23 possibility to break that link, they have the
24 possibility to deviate by reducing the transaction
25 price. What I am saying is that in the context of DAF,

1 in particular, because DAF always retained -- the DAF
2 headquarters always retained the discretion to approve
3 or not approve a transaction price, DAF has the
4 discretion to deviate, has the possibility to deviate.
5 So any theory that is premised on the existence of an
6 automatic link between a variable that affects
7 transaction prices and transaction price does not work
8 in this instance.

9 THE CHAIRMAN: But that would be the same for their
10 competitors as well --

11 A. Of course.

12 THE CHAIRMAN: -- the other members of the cartel --

13 A. So they all --

14 THE CHAIRMAN: -- so there would be the same incentive to
15 cheat?

16 A. Exactly. So this is why I think there was no cartel.

17 THE CHAIRMAN: Or maybe they were all respecting the
18 agreement because they wanted -- it was in their
19 interests to do so.

20 A. Yes, but you have to think about what it means, "in
21 their interests to do so". I mean, they will have a --
22 they will resist this temptation to cheat if indeed they
23 anticipate that there will be consequences to cheating,
24 so there was a mechanism that will discipline them. But
25 in order for this disciplining mechanism to operate, you

1 need to be able to observe what your competitors are
2 doing.

3 THE CHAIRMAN: But they all know that.

4 A. No, they do not. This is the thing, that --

5 THE CHAIRMAN: They all know there is a possibility that
6 each of them will be cheating.

7 A. That is right, but if they cannot check, the unilateral
8 incentive is to cheat. I mean, if you are in an
9 environment in which, I mean, you cannot check and you
10 know that if you cheat you are not going to be
11 uncovered, you will cheat.

12 MR BEARD: If I may, just following up, when the chairman
13 there asked you about they could all be respecting the
14 agreement, in economic terms, if they all respected this
15 hypothetical agreement in relation to list prices
16 feeding through into transaction prices, that would have
17 to be shown to be an equilibrium stake from an economic
18 point of view; is that correct?

19 A. That is correct, yes.

20 Q. I am just going to trespass upon one economic-related
21 question, going back to the Harrington model. I am not
22 going to go back to k. I think we dealt with k quite
23 extensively. There was also little z in there, which
24 was the cost element, which, even if you fell within the
25 Goldilocks k window, you still needed to show, and you

1 recall that Professor Harrington referred to the
2 possibility of z and talked about the cost of z
3 potentially being greater than zero because of a risk of
4 possible litigation.

5 I just wanted to check from an economic point of
6 view, in Professor Harrington's approach, do the people
7 concerned here have to recognise the cost of litigation
8 in order to --

9 A. Of course.

10 Q. Of course. Right. Thank you. So if they did not
11 recognise that there was a risk of litigation, then even
12 on Professor Harrington's terms you do not get z being
13 above zero?

14 A. No, that is right.

15 Q. Thanks. Then one slightly more general economic
16 question. You referred yesterday at various points to
17 falsifying a theory. Perhaps we could just -- is it
18 possible to call up page 181 of yesterday's transcript,
19 {Day10/181:7}? So this is a question from the chairman:

20 "So you are providing a theory that will potentially
21 prove why such a factual scenario could not exist?

22 "Answer: No, I am falsifying the theory so I am
23 providing evidence suggesting that the theory does not
24 work."

25 So, first of all, just checking, because you did not

1 deal with this specifically, you are not trying to prove
2 that facts do not exist in this case?

3 A. No, no.

4 Q. No, I did not take that as such. I recognise that is
5 a somewhat leading question but it is the next point
6 that I think is important. When you talk about this
7 process of falsifying a theory, could you explain what
8 you are doing -- to the tribunal what you are doing as
9 an economist when you talk about this falsification
10 process, as a general matter?

11 A. Okay. I mean, to falsify a theory, it is to try to test
12 whether you observe some predictions or whether you can
13 observe facts that are inconsistent with the theory
14 operating, and that is what I am doing with respect to
15 coordination. So you falsify the theory. When you
16 assume that a theory is correct, so you assume that, you
17 know, there is coordination, but is it that I can find
18 evidence that is in contradiction with that assumption.
19 That is --

20 MR RIDYARD: It is testing a hypothesis really.

21 A. Exactly. This is, you know, a fundamental approach in
22 the philosophy of science. This is due to Popper.
23 I mean, that is the idea that the only way to advance
24 knowledge is to falsify a theory, and that is what I am
25 doing here.

1 MR RIDYARD: It might just be a bit of a language point here
2 because I think it is testing the theory in order to see
3 whether you can reject it.

4 A. That is it, exactly; do I have evidence that allows me
5 to reject.

6 MR BEARD: I do not have any further questions for the
7 witness. Thank you.

8 I think the tribunal has one or two.

9 THE CHAIRMAN: Yes, I think we have one or two questions.

10 First, Mr Ridyard.

11 Questions by THE TRIBUNAL

12 MR RIDYARD: First of all, you mentioned yesterday -- I do
13 not think there is any need to go to the transcript but
14 it was on page 125 -- that -- you said this was not
15 a classic cartel and you referred to benchmarking it
16 against I think the LCD cartel.

17 A. Yes.

18 MR RIDYARD: I just was interested to know, have you done
19 something systematically of comparing this with other
20 cartel cases to see if this is at one end of the
21 spectrum compared to the other European cartel cases or
22 is that just a more anecdotal observation?

23 A. I think it was an observation on the basis of my
24 experience. I have not done systematic empirical work
25 in order to look at the evidence in this cartel relative

1 to evidence in other cartels. It was a statement based
2 on my experience.

3 MR RIDYARD: It was based on the belief that most cartels
4 involve a better mechanism than this one?

5 A. Based on the observation that in many cartels that
6 I have seen, in particular in the context of my work at
7 the European Commission, there were many more factual
8 evidence, pieces of evidence, about the way in which the
9 cartel was operating, and the type of evidence that
10 I would refer to would be evidence about frequent
11 meetings, evidence about meetings in which there would
12 be explicit discussions about particular price levels,
13 so in which the members of the cartel would discuss not
14 in general intentions but would --

15 MR RIDYARD: Right. Sorry to interrupt, but this is your
16 impression that this was a less organised cartel --

17 A. Yes, exactly.

18 MR RIDYARD: -- than most cartels? But it was not something
19 that you have done -- I just wondered whether you might
20 have done some systematic analysis on it.

21 A. No.

22 MR RIDYARD: Understood. You mentioned also in yesterday's
23 evidence that you had not asked DAF exactly how they had
24 used the information that was exchanged in the cartel
25 infringement. I mean, why did you not ask them? Would

1 that not have informed your views better about how the
2 cartel may or may not have worked had you asked some
3 follow-up questions about how the information was
4 actually used by the people involved?

5 A. I have not asked that question specifically, but
6 I understand -- well, I mean, how do I know? That
7 actually is a good question. I suppose that my belief,
8 but I have to qualify the source of this belief -- my
9 belief is that this information, in particular in the
10 context of the German exchange from 2000 onwards, were
11 that the information was not systematically passed on to
12 the headquarters in the Netherlands. I think that is
13 probably even in the Commission's decision, is that in
14 some occasions the information was passed on, in other
15 occasions it was not. But, again, I am expressing my
16 belief. I cannot tell you exactly where I am --

17 MR RIDYARD: My question is: why did you not ask some
18 questions to find out more about this because the nuts
19 and the bolts of the operation of the cartel would be --
20 may be interesting if you are looking to do an
21 assessment of plausibility and so forth.

22 A. I agree with you that this could have been a useful
23 piece of information. I relied more on what they did in
24 the marketplace than what they may have told me about
25 what they did with the information and I think that --

1 MR RIDYARD: But I am asking a question about whether -- why
2 you were not more curious, why you did not ask more
3 questions.

4 A. Because I think that I pay more weight to what they do
5 rather than, you know, what they say they would do with
6 the information.

7 MR RIDYARD: But I am asking why did you not ask questions
8 about what they actually did.

9 A. Okay, because -- no, I could have asked.

10 MR RIDYARD: Okay.

11 THE CHAIRMAN: Sorry, can I just ask: surely it is quite
12 important, when you are assessing the effects of
13 a cartel, to know how it worked, how it actually worked?

14 A. How it works internally?

15 THE CHAIRMAN: Yes.

16 A. Yes. I think that, as I said, my impression -- and it
17 is partly I think from the Commission decision, even
18 though I cannot quote the source -- is that the
19 information that they obtained from the German cartel
20 was not systematically used within DAF, but I did not
21 enquire about the details of it.

22 THE CHAIRMAN: No. Understood.

23 MR RIDYARD: The next question was really about the risks
24 that those involved took when getting involved in the
25 cartel infringement because, I mean, I think -- it seems

1 like a reasonable working hypothesis that getting
2 involved in exchanging information about future list
3 prices is something that is in the object infringement
4 box and many business people would be aware that that
5 would be a risky thing to do in terms of liability to
6 future fines and so forth.

7 So when you are doing your analysis of -- economic
8 analysis in general, the assumption is we are talking
9 about profit maximise -- or rational profit-seeking
10 operators and how they would operate and how they would
11 respond to the environment in which they find
12 themselves. So did you factor in that -- one might
13 think any assessment of the benefits of this information
14 exchange should be balanced against the risks of the
15 costs that were being incurred by engaging in these
16 activities, but did you do any sort of weighing up of
17 those costs against the potential benefits?

18 A. My understanding is that, in particular in the context
19 of the German information exchange, there was not a sort
20 of widespread awareness of the legal risks of what they
21 were doing, and this I base -- I mean, what I am sort of
22 expressing now, I base on conversations that I had
23 initially with DAF when they explained the circumstances
24 of the infringement to me. I mean -- and I think
25 repeatedly, actually after 2016, when we started -- when

1 I started with the team to do work with them, they
2 repeatedly expressed the fact that, at least in the
3 context of the German information exchange, there was no
4 general awareness of the ...

5 MR RIDYARD: Is this something -- have you mentioned this in
6 your reports at all?

7 A. No, I have not.

8 THE CHAIRMAN: Did you take it into account?

9 A. No, I did not take it into account because, again, my
10 evidence is with respect to whether the mechanism was
11 effective or not and I do not think that, you know, the
12 awareness of the legal risk was necessarily essential
13 for this assessment or important for that assessment.

14 MR RIDYARD: But surely it would be relevant for
15 understanding whether this was rational behaviour to
16 engage in this activity --

17 A. Yes.

18 MR RIDYARD: -- because, if anyone knew what the risks were
19 or had even an inkling of what the risks were, they
20 would know there was a very big downside so there must
21 be a very big upside to compensate for the big downside.

22 A. That is right. My understanding is that they did not
23 understand that this was potentially a serious
24 infringement.

25 THE CHAIRMAN: What, that nobody understood that?

1 A. My understanding is that the members -- those
2 participating in the information exchange in Germany
3 from 2004 onwards were sort of lower-level individuals
4 and did not understand that what they were doing was
5 unlawful. But, again, you know, I am not -- I can only
6 tell you what DAF has communicated to me. I mean, I am
7 not an actual witness of that. I am just expressing
8 what I have been told.

9 MR RIDYARD: But you know from your experience with the
10 Commission and anything else that there is a huge risk
11 and cost associated with this. Can you explain why you
12 did not talk about this in your reports when looking at
13 the motivations for the behaviour, at least -- even if
14 not just to sort of make it clear that you were assuming
15 that no one understood that there was any risk involved
16 in the first place?

17 A. I guess that I did not express that because I did not
18 observe that. I am not a witness of that. I mean --

19 MR RIDYARD: Sorry, but you are making predictions about --
20 yes, making predictions and analysing why this
21 behaviour -- how this behaviour might be motivated and
22 what effects it might have in the marketplace. So from
23 that point of view, just to do the economic analysis
24 job, understanding the commercial risks that are
25 involved, would that not be part of the equation when

1 you are assessing what the potential benefits might be?

2 A. Yes, but my analysis was not really focused on that, was
3 it? I mean, my analysis was focused on whether the
4 mechanism was effective.

5 MR RIDYARD: Yes, but I suppose what I am asking is why was
6 it not. If you are looking at rational profit-seeking
7 behaviour in all of this, it is kind of obvious -- maybe
8 it is only obvious ex post, but it is obvious now that
9 there was an enormous cost to this conduct --

10 A. That is right.

11 MR RIDYARD: -- so we are talking about plausibility. So
12 one of the reasons why it might be worthwhile incurring
13 those costs would be enormous benefits of raising
14 margins above competitive level through a cartel
15 mechanism. So I would have expected maybe to have seen
16 that discussion in the report, even if only to say that
17 it does not apply here because no one knew what was
18 going on.

19 A. Okay, I mean, that would actually support my line of
20 argument that, you know, they were not aware of the
21 potential consequences of it. Okay, it would have been
22 useful.

23 MR RIDYARD: Okay. Just to go on to coordinated effects
24 sort of theory, I mean, in your plausibility report you
25 present evidence about the number of players in the

1 market and you make the observation that there is, you
2 know, six or more players and that is a big number.

3 I think you refer to some literature saying, when you
4 get to six or more, then cartels are unlikely. You also
5 presented the evidence that we saw yesterday about
6 asymmetries. Obviously I understand how asymmetries
7 plays into the theory of stability of cartels. But
8 do you think there is a level, whether it is in terms of
9 number of players or asymmetries -- there is a way of --
10 there is a general point at which you say, "At this
11 point it is clear a cartel could not work", and if so,
12 where would you draw that line?

13 A. This is difficult. I mean, what can inform your
14 judgment about that? I mean, first, experience with
15 respect to cartels that had a large number of
16 participants; second, experimental evidence. As
17 I explain in my report, I mean, experimental evidence
18 suggests that coordination is difficult to sustain when
19 the number of participants increases beyond three or
20 four -- that is typically the type of result -- and
21 where there are substantial asymmetries. But, okay,
22 there is only so much that you can draw from these
23 experiments because, I mean, these experiments are
24 controlled experiments, they are not real-life
25 situations, so there is one source of information.

1 The other source of information is about the
2 observation of cartels that broke down because of
3 a large number of participants or the requirement for
4 cartels to be much more organised when you have a large
5 number of participants, and that is also what you
6 observe, is that, you know, cartels that work with
7 a large number of participants, they are very
8 disciplined, they are very organised.

9 MR RIDYARD: That is why I asked my first question, really,
10 to understand whether you had done anything systematic,
11 looking at how good the mechanisms were in this cartel
12 compared to all the others which you compared it to.

13 A. I have not done that.

14 MR RIDYARD: Okay, because there are -- also in the spirit
15 of hypothesis testing, it does not matter how many
16 cartels you observe that break down, it is really
17 whether there is any cartels with more than six players
18 that actually work.

19 A. That actually work, that is right.

20 MR RIDYARD: I guess there would be some of them.

21 Now, more specifically on a -- one thing that was
22 put to you yesterday -- and you answered this pretty
23 clearly -- was could you have a situation where you have
24 a cartel on list price changes, so the focal point is
25 list price changes and the belief that it will have an

1 effect on net prices. Now, you cannot observe net
2 prices properly to monitor compliance, but you could
3 observe market outcomes in the form of market shares and
4 you said that observing market shares would not be
5 a sufficient way to monitor the cartel conduct because
6 market shares could go up and down for all sorts of
7 reasons other than the amount of cheating going on,
8 other fluctuations in the market --

9 A. Yes.

10 MR RIDYARD: -- so you said it was too noisy a signal.

11 A. A noisy signal, yes.

12 MR RIDYARD: I get that as a point of principle, but cartels
13 do not have to be perfect to have some effect. So at
14 what point would you judge the signal is too noisy for
15 it to have any possibility of any effect? How do you
16 get to the point where you are convinced that this
17 mechanism would be implausible?

18 A. Okay, what evidence do we have to inform that judgment?

19 Again, sort of, it is really reference to economic
20 literature that looks at how noisy the signals are and
21 the consequences for the outcome in terms of the
22 coordination that you can sustain. I suppose that in
23 the classic papers of, you know, Perry(?) and
24 Portland(?) and so forth, you can look -- as well as all
25 the following literature -- you can look at the effect

1 of the random factor or the lack of observability it has
2 on the outcome, but I have not undertaken that specific
3 analysis which, in any event, would be somewhat
4 speculative.

5 MR RIDYARD: But you have reached the conclusion that the
6 cartel mechanism is implausible in this case and --

7 A. Yes.

8 MR RIDYARD: -- so that one could not work?

9 A. Yes, and that is essentially -- I mean, I think that the
10 main piece of evidence with respect to the conditions
11 has to do with the lack of observability of the prices
12 and because --

13 MR RIDYARD: Sorry, to be clear, I am talking about
14 observing market shares as a way of -- as a proxy for
15 the pricing.

16 A. I know. I am getting there. So what I am saying is
17 there is a presumption here that, because of these
18 individual negotiations, the prices are not observed;
19 okay? I think that is the presumption against which,
20 I mean, we are working.

21 Now, did I look as to whether changes in market
22 shares could have been a good proxy? Specifically,
23 I did not. I just used the argument that market shares
24 are noisy. But it is also particularly likely to be the
25 case with respect to a market like this one, in which

1 you have a lot of customisation and product
2 diversification(?), so what do we mean by "market
3 share"? Do we mean by "market share" for particular
4 families of trucks? Do we mean market share overall?

5 MR RIDYARD: Have you looked at what market share
6 information was available to DAF and others?

7 A. Yes, the market information from the SMMT is -- I mean,
8 this is public information. You know exactly how many
9 trucks are being registered so they have information --

10 MR RIDYARD: But is that -- have you put that information in
11 your reports anywhere or have you described what that
12 information was in order to dismiss the possibility that
13 it was sufficient to make some sort of cartel work?

14 A. It is not in the report. I mean, we have looked at this
15 market share information, we have used this data on
16 market share at the level of findings(?), but it is
17 not -- I have not used it in the report, no.

18 MR RIDYARD: Okay. Excuse me a moment. (Pause)

19 I think my last question, it sort of strays in a way
20 into sort of legal -- the interface anyway between the
21 law and economics, and that is this notion of object
22 infringements. To put it sort of colloquially or fairly
23 loosely, an object infringement is an infringement which
24 is so likely to be anti-competitive in its effects that
25 the Commission is given a free pass and does not have to

1 do the hard work of actually figuring out what the
2 effects were because of a belief, a policy belief, that
3 it is likely, if they did that extra work -- you know,
4 overwhelmingly likely that they would find an effect.

5 I think Mr Ward mentioned on the first day of this
6 trial the Oxera certainly for the Commission, where they
7 summarise the literature, which I am sure you are pretty
8 familiar with, where I think the bottom line was
9 something like 93% of cartels do have an effect, if you
10 believe the empirical studies.

11 With that background, it seems that a lot of what
12 you were saying about plausibility here is that you
13 could go through a number of cartel infringements which
14 are deemed object infringements and say, just on the
15 basis of some quite simple checks, that they cannot have
16 an effect and therefore they should not be in the object
17 box. Would you be in favour of changing what is in the
18 object infringement box? Is that an implication of your
19 analysis, if you had the --

20 A. If I was the Commissioner? No, okay, first observation
21 with respect to this is is that, I mean, the
22 interpretation of what is an object infringement that
23 you are putting forward is indeed an interpretation that
24 is suggested by some of the recent case law, in
25 particular *Cartes Bancaires*, and has been progressively

1 developed since *Cartes Bancaires*. Whether this was the
2 perception of the Commission before or whether this was
3 considered to be the proper definition of what is an
4 object infringement before this evolution in the case
5 law I think is maybe less clear.

6 MR RIDYARD: I do not think either of us is going to answer
7 that question.

8 A. Sorry?

9 MR RIDYARD: I do not think either of us is going to answer
10 that question.

11 A. Exactly, so it is less clear. Now, with respect to what
12 is the role for object infringement, I think you need to
13 understand what is the objective of the Commission.
14 I mean, the objective of the Commission is to deter
15 future conduct and so they are taking decisions in order
16 to make sure, that in the future, members of information
17 exchange do not adopt conduct that, in probabilistic
18 terms, could lead to negative effects. Of course, in
19 doing that, you accept that you are going to potentially
20 take decisions which are infringement decisions with
21 respect to conduct that did not have effect.

22 I think there is nothing -- I mean, I do not see any
23 contradiction with the idea or I do not see any problem
24 with the idea that the European Commission, as an
25 enforcement agency, takes decision and has a finding of

1 an infringement by object in circumstances in which, you
2 know, there might not be any effect because, you know,
3 their presumption is that, on the basis of some conduct
4 they will have a presumption, there is a probability
5 distribution, and that, you know, in many cases there
6 will be effects but in some minority of instances there
7 will not be effects. So I have no problem with the fact
8 that they would do that.

9 Turning to the evidence now, I mean, the Oxera
10 report is pointing to the fact that 10% of the cartels
11 that they reviewed had no effect --

12 MR RIDYARD: 7%.

13 A. 7.5, that is right -- but you have to consider the
14 characteristics of that sample. I mean, there is
15 clearly a bias in that sample towards including cartels
16 that had effects because those were effectively
17 estimated.

18 MR RIDYARD: That is a fair point, but I do not think there
19 is much benefit in going into the details of that.

20 I take your point, though, yes.

21 A. So the only point I want to make here is that cartels --
22 or -- sorry -- infringements by object in which it
23 turned out that there is no effect are not black swans.
24 I mean, this is something that is consistent with the
25 enforcement of the Commission's objective function and

1 it is also, you know, consistent with what is observed
2 even in the context of a sample that is heavily biased
3 towards cartels that have an effect.

4 MR RIDYARD: Okay. Thank you.

5 THE CHAIRMAN: I am not going to ask you about the
6 Goldilocks k window. I just wanted to ask you one
7 question. You were involved from 2013, that is when you
8 were first instructed by DAF, and you provided your
9 theory of harm at that stage?

10 A. No, not immediately. The theory -- you mean the
11 evidence?

12 THE CHAIRMAN: No, just presumably you gave some advice on
13 the basis of what you had been presented with and
14 I think you said in your evidence yesterday that you
15 discussed your theory of harm at that stage.

16 A. Yes. No, I think the theory of harm I think has been
17 fundamentally informed by the Commission's decision.
18 I think that before that I only had sort of DAF's input
19 about the conduct and I think that my initial thoughts
20 about the conduct were not informed by, you know, the
21 facts that the Commission has put forward in the
22 decision. So I think that what was essential for the
23 development of my thinking about the theory of harm was
24 the Commission's decision.

25 THE CHAIRMAN: Right. Thank you.

1 All right. Thank you very much, Professor Neven.

2 A. Thank you.

3 THE CHAIRMAN: That is the first round of your evidence and
4 you are now released from purdah.

5 A. Thank you.

6 THE CHAIRMAN: We will see you next week.

7 Yes?

8 Housekeeping

9 MR BEARD: It was really just picking up the housekeeping
10 point that I was going to raise on round 2, as it were.
11 There was nothing in relation to Professor Neven. It
12 was merely to do with really a question of clarification
13 in relation to the process for stage 2.

14 THE CHAIRMAN: Yes.

15 MR BEARD: I do not know if the tribunal has the protocol
16 letter that was very helpfully circulated along with the
17 various topics, for which many thanks.

18 THE CHAIRMAN: Yes.

19 MR BEARD: It is really just to clarify how the stages are
20 going to work. The way that we understood it was that
21 the tribunal would lead the questioning in relation to
22 each section of the topics and that there could then be
23 an opportunity for clarificatory questions from counsel
24 in relation to each topic before we moved on, but we
25 were not going to break out into cross-examination until

1 the end of all six topics.

2 MR RIDYARD: Correct.

3 MR BEARD: It was simply that. The issue then is --

4 THE CHAIRMAN: We would anticipate that being very limited,
5 the clarificatory questions.

6 MR BEARD: Absolutely. Sorry, no, it was really
7 a question -- a question had been raised in relation to
8 the terms of this letter, whether actually it would be
9 chunks of cross-examination after each topic.

10 THE CHAIRMAN: No.

11 MR BEARD: We thought not and that fitted with the
12 tribunal's timetable.

13 THE CHAIRMAN: Yes.

14 MR BEARD: So it was just clarifying that.

15 Then we have the question of purdah thereafter
16 because we will have the situation where both Mr Harvey
17 and Professor Neven -- we discussed this previously
18 about either they each come out of purdah or they both
19 stay in.

20 THE CHAIRMAN: I think you were going to discuss it.

21 I think Mr Ward, on the last occasion, preferred
22 remaining in purdah throughout. I do not know whether
23 that has changed.

24 MR BEARD: We did discuss it, so I think the position is --

25 MR WARD: Sorry, I cannot actually remember if we did

1 discuss it.

2 MR BEARD: Yes, we did.

3 MR WARD: We are happy with the proposal that the experts
4 come out of purdah.

5 THE CHAIRMAN: After the concurrent evidence?

6 MR WARD: After the concurrent evidence, before the
7 cross-examination.

8 THE CHAIRMAN: Well, that is helpful. So that means either
9 side can speak to their expert whilst the other is in
10 the box.

11 MR BEARD: That is fine. I am sorry. We did speak many,
12 many moons ago after the PTR, so that is correct.

13 I just wanted to clarify those matters.

14 THE CHAIRMAN: I am pleased you are speaking at least!

15 MR BEARD: That is all good.

16 THE CHAIRMAN: Right. Nothing else? All right. Well,
17 thank you very much and another long weekend. No doubt
18 more pleasurable for us than for you, but --

19 MR BEARD: It depends how much you enjoy overcharge --

20 THE CHAIRMAN: Well, the burden is on us next week. Anyway,
21 we will see you next Tuesday at 10.30.

22 MR BEARD: Thank you very much.

23 (12.51 pm)

24 (The hearing adjourned until

25 Tuesday, 24 May 2022 at 10.30 am)

INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PROFESSOR DAMIEN NEVEN (continued)1

Cross-examination by MR WARD (continued)1

Re-examination by MR BEARD 110

Questions by THE TRIBUNAL117

Housekeeping 134