IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 4 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 AN C E S

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

Wednesday, 4 May 2022

(10.30 am)

(Proceedings delayed)

(10.39 am)

THE CHAIRMAN: Good morning, Mr Beard.

MR BEARD: Sir, good morning. Good morning, members of the tribunal.

THE CHAIRMAN: Before we start, we will deal with the housekeeping matter in relation to the timetable.

Housekeeping

THE CHAIRMAN: In relation to Mr Ward's request to extend the cross-examination of the experts on supply pass-on, I am afraid we do not think it is appropriate in the circumstances to sit on that Friday, which I think is 10 June. We are already trespassing on this Friday and also I think Friday, 27 May and we think that nothing has frankly changed since this timetable was set and agreed between the parties and the tribunal.

I understand that when one comes to prepare cross-examination, new lines are thought of, but there is a morass of material in this case, much of it, I suspect, will turn out to be irrelevant or of marginal relevance, and we do think there needs to be a focus on the real issues. Essentially, from what Mr Ward was saying yesterday, it is essentially -- the question of

supply pass-on is a question of law as to whether there was a sufficiently proximate causation established. So we think that the claimants should be able to limit their cross-examination of Mr Bezant to the crucial aspects of expert evidence on this so that that should be achievable in the time allotted.

Looking generally at the timetable, it does seem to us that things might get shorter rather than longer. The financing issue, from what Mr Lask was saying, is largely also a matter of law and facts. I know the experts disagree on whether the WACC is the appropriate measure and, if it is not, what the rates of interest should be, but we do not think that that will necessarily take one and a half days of cross-examination. Also, in relation to tax, it looks as though the dispute is narrowing fast on that so we may very well not need a full day or even any time with tax experts.

So we are therefore attracted by Mr Beard's suggestion that those three days in the week of 6 June, incorporating both the financing cross-examination and supply pass-on, that that can be available to the parties to use as they please, so one and a half days each on supply pass-on and financing, and we are happy to start early or finish late, if that is necessary, but

we do think it is important to stick to the agreed timetable which has been set by reference to everyone's busy schedules and also to preserve the four-day week, which we think is probably important for our collective sanity. So that is all we will direct, that that will be dealt with in those three days.

MR BEARD: I am most grateful.

THE CHAIRMAN: Can I just add something about Covid because there is a lot of us in here, cooped up in a relatively small space for quite some time, and I know it might seem as though it has gone away but it has not and it is capable of disrupting this trial. So I am not suggesting that we all start wearing masks but I think everyone, if they can, should regularly test to make sure that we are all kept as safe as possible and hopefully that the trial will not be disrupted.

MR BEARD: I am most grateful on both counts and obviously those behind me hear that and no doubt on the other side of the court as well.

THE CHAIRMAN: Right. With that out of the way, Mr Beard.

Opening submissions by MR BEARD

MR BEARD: There is probably quite a lot to get through, potentially, today, so the way I am intending to deal with matters is to make a few brief opening remarks and then I will articulate the structure of how I am going

to deal with the main issues that I will try to cover in opening, but I am not going to try to be comprehensive on all of the issues. That is just not possible given the range of matters that arise in this case.

So just some opening remarks. Let us start with the most basic proposition. DAF has admitted participating in a serious infringement of competition law. It has admitted that its employees shared commercially sensitive information with competitors, including in particular pricing information. DAF recognised that conduct was unacceptable and it regrets it. It has paid a very significant fine. Those involved in the unlawful activity are now long gone.

We will come on to look at the legal significance of the decision in a moment, but I do not and cannot shy away from the fact that DAF has admitted that infringement. DAF recognised that, because the information it was sharing concerned pricing, that was of the type of conduct that is treated as having the object of preventing, restricting or distorting competition. Of course we can understand that when a type of conduct is treated as having that object, it is also understandable that customers of the business involved are concerned there may have been adverse effects and those concerns merit proper investigation.

But DAF has investigated them with careful regard to the Commission's findings and the circumstances of each national market and the individual customers concerned and it does not find good evidence that these claimants have suffered any loss, and that is the essence of this case.

DAF has looked at how its pricing worked and what was happening with prices and negotiations with these customers, it has looked at its prices across the UK market, it has carried out careful expert analysis and, of course, it has considered the material put forward by the claimants. But the evidence proffered by the claimants, our expert analysis, our assessment of the very extensive documentary material and the witness evidence, just does not show any adverse effects or loss being caused and certainly does not show the sorts of loss that are being claimed for.

The essential questions that this tribunal is dealing with is whether the evidence shows that DAF was charging higher transaction prices during the infringement period than outside it, all other things being equal. The second question is: does it show that it was charging higher transaction prices to these claimants? We say the answers to these questions are plainly no and no. What the Commission in fact found

was that employees of DAF's headquarters in the Netherlands participated in unlawful exchanges between 1997 and 2004, but, for most of that period, not only were customer prices, transaction prices, negotiated by DAF UK, but even list prices, the gross list prices, were set by DAF UK up until 2002.

Just for your notes, that of course includes list prices for Euro 3 trucks, when they were introduced in the UK, when we moved from Euro 2 standards to Euro 3.

From 2002 and throughout the remainder of the period, the centre of the mischief was Germany. It is during this period that we see regular and detailed exchange of list price information by employees of the manufacturer's German subsidiaries. But of the more than 30,000 documents on the Commission's file, DAF and the claimants have been able to identify only a very small number of exchanges involving individuals in the UK and really only one meeting involving DAF, which you will have seen the note of already by Mr Ward and I will be coming back to. It is often referred to as "the Castle Coombe meeting".

There is no evidence of anything like the consistent pattern of detailed exchanges seen in Germany and, more than that, the documentary evidence suggests that list prices in the UK, gross list prices, did not move

consistently with exchanges at headquarters and German level and certainly transaction prices did not. The data and the economic analysis back this up. They show that there was no consistent pattern of shifting transaction prices when list prices changed.

It is important just to bear in mind what that is doing. That analysis is effectively assuming that there was some kind of effect on gross list prices or at least it is agnostic as to whether or not there was an effect on gross list prices by reason of the exchanges and is then looking at whether or not there is an impact in changes in transaction prices.

Now, Mr Ward talked repeatedly about the cartel being pervasive and comprehensive. It just was not. What he did was picked up on individual documents and sought to extrapolate vastly from them. Just as an example, a key document he relied on yesterday was a print-out of some MAN list pricing. You will remember that one. I think it was about 54 pages long. But that is not even information DAF had. It was held by another OEM. So out of tens of thousands of documents that were disclosed by four truck manufacturers in particular who were seeking leniency from the Commission and therefore were under a duty to cooperate and provide all relevant material, the one document they are identifying is

a document that does not concern DAF.

Yet this, on Mr Ward's case, was supposed to represent the generality of exchanges. In practice, it simply does not. We only need to go back to the attempts at the pre-trial review to suggest that DAF had been sharing its Sprint configurator. You recall that various documents were put forward in that regard. The Sprint configurator is the configurator with the prices in, rather than just the technical details. There was no evidence that that happened at all, nor that DAF was receiving price lists, gross list prices or price configurators from others. We know of only two limited short instances of anything like that.

Now, Mr Ward talked then about the lack of evidence and trying to draw presumptions. I am going to come back and deal with presumptions. But let us pause. Not only do we have vast amounts of documentary material, we also have oceans -- I do not know what the metaphor is -- meadows, fields of data, that the economists can study to enable analysis of matters in a range of ways.

What all of that material shows, alongside the extensive evidence of Mr Ashworth, Mr van Veen, Mr Habets in particular, is that here you do have an enormous amount of material with which this tribunal can grapple in reaching its conclusions in relation to those

two key questions.

So with those initial remarks, just let me lay out how I am intending to structure submissions today. I want to deal with some of the relevant legal framework and some points on the nature of the decision and the case as it is put against us. Then I want to look at some of the material that Mr Ward directed you to, but actually to put it in context and show you a bit more about what was going on at the relevant time. Now, obviously, I cannot cover the whole period and every aspect, but I want to look at what was going on with price rises, gross list price changes and contracts with these claimants.

I should stress, this is not engaging in some kind of what Mr Ward was deprecating as a bottom-up exercise. We are not just starting at the negotiations and seeing whether or not a particular input of information was fed into a negotiation, which is what Mr Justice Roth deprecated, as you will recall. What we are doing is looking at the evidence to see how it fits overall with the story that the claimants are putting forward here.

Then the third part I will turn to is some of the expert evidence. Of course it is critically important. I will try to deal a little bit with the theory of harm and plausibility issues and the overcharge matters and

untangle some of the issues that were left by Mr Ward yesterday.

Now, in dealing with these three broad topics, I am dealing with the questions about whether or not there is causation and any quantum of overcharge in relation to transaction prices in relation to these claimants. Obviously, as we have set out in our skeleton argument, there are further questions about passing on, the questions of interest and issues to do with tax. I will try to make some initial remarks about those matters towards the end of the day but I am going to focus on the initial issues, if I can call them those, in this opening section.

So turning to the decision and legal framework. We outlined in our skeleton that it is important to consider what the decision is but also what it is not. Key to that is the decision -- is a finding of infringement by object. It is clear the Commission did not find that the infringement had any actual effects, let alone effects in the UK for these claimants. If I could go to Recital 82 in the decision, which is at bundle {I5/495/19}, I think.

THE CHAIRMAN: I am not sure that that is the decision.

MR BEARD: No, it is not. {AU/3.9/1}, can we try that? I am so sorry. {AU/3.9/19}. Thank you, 82:

"It is settled case-law that for the purposes of Article 101 of the [Treaty on the Functioning of the European Union] and Article 53 of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the internal market and/or EEA, as applicable. Consequently, in the present case it is not necessary to show actual anti-competitive effects as the anti-competitive object of the conduct in question is proved."

Of course the preparation for this case has proceeded on that basis. If I could just go to bundle G --

THE CHAIRMAN: What does that actually mean, an "infringement by object"?

MR BEARD: Well, I can go back to the passage that Mr Ward took you to. So before I go to that, could we go to authorities tab 14, page 51, {AU/14/51}. This is the Scania decision.

Could we just move down so we can see paragraph 309:

"... it follows from the Court of Justice's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their

effects ...

"The distinction between 'infringements by object' and 'infringements by effect' stems from the fact that certain types of coordination ... can be regarded, by their very nature, as being harmful to the proper functioning of normal competition ..."

But what is important in object cases is the identification of the type of conduct. Actually, it is worth picking up that one of the experienced advocate generals at the European Court talked about this in a case called T-Mobile. If we can go to authorities bundle 2.16 at page 7, {AU/2.16/7}.

Just picking up paragraph 47, this is in the T-Mobile case and this is Advocate General Kokott:

"Ultimately, therefore, the prohibition on 'infringements ... by object' resulting from Article 81(1) EC ..."

That is just the old numbering, just to confuse all those carrying out searches. It used to be known as 81, but it is 101 now.

"... is comparable to the risk offences (Gefährdungsdelikte) known in criminal law: in most legal systems, a person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly

irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant."

In other words, what the case law does is it says if you engage in a type of conduct that is of the sort that is generally regarded as giving rise to a real risk of harm, then in those circumstances you can be found to be subject to an infringement by object. One of the categories of conduct is sharing pricing information and it is not a type of conduct that is distinguished between gross list pricing and transaction pricing; it is just pricing information. That is essentially why there was never going to be a position by which DAF could avoid an infringement finding by the Commission in these circumstances because it was plain that there had been sharing of gross pricing information and some information in relation to emissions that we will come back to as well -- pricing in relation to emissions that meant that you fell within the object case.

THE CHAIRMAN: Is the fine then set by reference to the harm

that that has caused?

MR BEARD: Well, it talks about the gravity of the infringement and harm can theoretically be part of the assessment of gravity. But when you are thinking about an object case, what tends to be thought about is simply the nature of the activity that has been categorised by type, and that is why pricing information being shared is seen as a very serious infringement and therefore you get a very high gravity tariff when you come through the process of the fining guidelines steps that the Commission carries out, because what they do is they look at the overall turnover of the business in the relevant market that is to be affected, they attach to that relevant turnover effectively a percentage on a scale of seriousness, and the more serious the type of conduct, the higher up that scale you will be, and pricing information will push you fairly high up that scale, which is why you end up with significant fines being generated, because when you are talking about the European trucks market, which is what the decision was doing, and you are talking about large trucks manufacturers who have a lot of turnover and you are talking about a pricing object infringement, which is serious, the matter very quickly takes you to very large numbers.

That is how you end up with very significant fines, and the reason people settle is because you essentially get a discount off that tariff. So if you are faced with the proposition that you have identified, that people have been sharing pricing information, and you know that other of your competitors have gone in for leniency in relation to these matters because they have recognised there is a problem with these communications, you know you are going to be facing a significant fine in these circumstances. That is why people have a huge incentive to settle. So it is not just something to deal with in abstract.

If we could go to {I5/140}, please, this is a statement to the European Parliament given by Vice-President Vestager, who is the European Commissioner dealing with competition matters, and she is responding to a question about this particular case. She says in her written answer:

"Settled case law by the European Courts confirms that there is no need to take into account actual, or even potential, effects of an infringement of Article 101 of the ... (TFEU), when it has as its object the prevention, restriction or distortion of competition ... The case at hand ... (Trucks), concerned such a by object infringement. Thus, the Commission did not

assess effects on the market or calculated (any) price overcharges that might have been caused by the infringement."

Then:

"Under the Guidelines on Fines, the actual average market price distortions that would be caused by an infringement ... are not part of the parameters used to set a fine. Hence, in the Trucks decision, the actual market price distortions did not form part of the parameters applied to calculate the fine.

"The objective of actions for damages brought before national courts is to compensate harm caused by infringements of EU competition law based on the case put before them."

SIR IAIN MCMILLAN: Mr Beard, I wonder if you could assist me with this, please. I think that what you have read out there is pretty clear, but is it the case that whilst the European Commission did not take the infringement by object forward to examine infringement by effect because they did not need to, they were not ruling it out? It could have happened.

MR BEARD: They are definitely not ruling it out in that decision.

SIR IAIN MCMILLAN: Thank you.

MR BEARD: There is no way I would make that suggestion.

THE CHAIRMAN: They just did not have to go on to consider it.

MR BEARD: Because of the type of conduct that you are dealing with.

THE CHAIRMAN: Maybe, because also it is so obvious that there was harm.

MR BEARD: Well, obviously that is what is being said on the other side, that the categorisation of an infringement by object is it is the type of conduct that is likely to give rise to serious harm. We accept that because we accept that pricing information exchanges falls within that category. But, of course, the issue that arises here is that that category of pricing exchanges has been focused in previous cartel cases on exchanges of information about transaction prices, to use the language that we are using in this case, not in relation to gross list prices. Therefore we get caught by the object categorisation, we recognise that, but we do not accept there are any effects and we do not accept the Commission as finding any effects. We recognise that the categorisation of object is as it is, but you cannot presume effects from a finding of object. That is fundamentally correct.

MR RIDYARD: Are you saying that previous cartel cases have not involved list price information?

MR BEARD: No. Clearly there have been cartel infringements involving list price information but where the object box designation has been used, it has predominantly been in relation to exchanges of forward pricing that would be customer pricing. So it is not exclusively -- but that has undoubtedly been the focus. Cases like Dole were to do with customer forward pricing rather than just gross list pricing.

MR RIDYARD: Is that right? You are saying this is unusual, this case --

MR BEARD: No, I am not saying this is unique by any means but I am saying that the way in which the categorisation of price information being caught by the object box was focused on the concerns that arose in relation to price information being exchanged pertaining to customer prices. That is how the case law has essentially developed.

Now, it is true that in those cases you may also find that you are sharing both list pricing and the customer pricing information, I am not demurring from that proposition, but what is important is that we knew that we were going to be caught by the price object --

MR RIDYARD: Yes, understood.

MR BEARD: -- when it is gross list pricing only. I think the point I was just answering was that put by the

chairman, which is essentially: because you are falling within the pricing box for object, does that mean that there is some sort of grand presumption? The point I was making is so many of those cases are about transaction pricing issues that, even in relation to the history of the case law, I do not think you can just make simple assumptions about the extent of infringement effects when you are talking about gross list pricing.

MR RIDYARD: That is almost suggesting that the object infringement needs to be revised so that it makes a distinction between transaction prices and list prices. Is that what you are suggesting? I know we are not in a position to do that on the hoof, but are you saying that in an ideal world that you would adjust the object infringement, being that this kind of conduct is no longer caught?

MR BEARD: No, I am not saying anything of the sort because I think going back to the observations from Advocate General Kokott, what European competition law is trying to do is say, "Just do not exchange any price information. Just do not do that". That is what we are concerned about here. We recognise that there may be circumstances where exchanges of gross list price information in a market may well be such as to give rise to effects, we are not demurring on that proposition

either. Therefore, in those circumstances, we are not trying to radically change the object box analysis. There has been enough of that with cases like Cartes Bancaires and so on over the last few years that have tried to explain how the object category should work. But it is a policy. That is what is being used here for perfectly good reason.

I think it was Mrs Justice Rose who said, "Well, it is difficult to understand what the legitimate reason is for people getting together and sharing pricing information", and she was not there delineating between particular types of pricing information. She was just saying that you should not do that sort of thing and that is why you fall within the object category. I think it was in Balmoral Tanks she talked about that.

I think in those circumstances you have a situation where, no, we are not talking about trying to change the object box. We recognise what the object box does, we understand why anti-trust policy works as it does in the EU, but that still leaves you with the question of whether or not you have got effect.

THE CHAIRMAN: Can I just ask you about -- you were referring to the object box. Is it -- I am still getting used to the terminology. Is it actually in the treaty -- this type of infringement by object is

a different infringement to infringement by effect?

MR BEARD: Yes. Sorry, we have not put in all the background case law, but could we dig out --

THE CHAIRMAN: You probably do not need to, but --

MR BEARD: No, I will not go through the background case law, I was actually going to pull up Article 101 itself. {AU/31}, if we could.

THE CHAIRMAN: Thank you. Sorry to go back --

MR BEARD: No, no, absolutely not.

So this is Article 101, ex Article 81:

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices ..."

So that is the agreements and concerted practices point that was touched on yesterday.

"... which may affect trade between Member States [so that is just giving it a European dimension] and which have as their object or effect the prevention, restriction or distortion of competition within the internal market ..."

So "object or effect", and it is disjunctive. There is case law -- I do not imagine it is in any way controversial, but it is disjunctive. Object and effect cases are different.

So that is why we talk about objects and effect and I think the parlance of putting things in the object box may in fact be blamed on Professor Richard Whish, who wrote one of the textbooks -- writes one of the textbooks on competition law and he always refers to the "object box" and I think that is how it has come to be used. So what it is talking about is what types of conduct are to be treated as by object infringements, in other words they are object because of the characterisation of them.

In the early case law there was debate about whether or not it was a subjective issue, you know, was it the intent of the particular entity to prevent, restrict or distort competition, and you were looking at object as a subjective question. Then it was realised that was not appropriate and you had to look at it as an objective issue. If you are looking at it as an objective issue, you are then looking at the types of conduct to be characterised as object cases.

THE CHAIRMAN: So it should more properly be, probably, "object and/or effect"?

MR BEARD: Well, yes, I am not sure the drafters would necessarily thank you in that regard because I think that would have led to potentially a different way in which all those cases where people turned up and said,

"You have accused us of an object case but you have not shown effects, that was not good enough", and I think they would probably have got more leverage out of the court if they had had "and/or" in there, sir, but that is a counterfactual world. If we could rewrite treaty provisions, that would be a wonderful thing.

THE CHAIRMAN: At what stage do the Commission decide whether they are going to treat it as a purely object case and not bother with effect?

MR BEARD: Well, they need to have decided by the time they indicate what their objections to the conduct are, and they issue a document in that regard. Prior to that they can carry out an investigation and explore what is going on and they have various powers. Mr Ward referred to the power to dawn-raid and gather materials and so on. They can ask all sorts of requests and so on. So they can analyse these questions and then decide whether or not they are going to proceed on the basis that they think the conduct is such as to fall within the object category or that it does not fall within the object category and they need to consider whether or not there are effects.

THE CHAIRMAN: Is it more serious if there is -- if the actual effect is proved?

MR BEARD: I think that is a difficult question to answer.

I think the starting point would be that conduct where you have to prove effect would be presumed to be less serious of a type because you cannot make the assumption that it will always -- that the way in which that type of conduct is to be treated is such as to give rise to a real risk of serious harm. But, in practice, effects cases can be extremely serious. A number of the cases that have been rowing through the European courts recently have involved effects matters that have resulted in very high penalties.

I think just to close this off, if we could just go back to the Scania judgment, authorities tab 14, page 65, {AU/14/65}. So this is just -- Mr Ward took you to some paragraphs in here. I think it was at 388 he looked. But if we could just go down to 391:

"In the third place, as regards the applicants' arguments set out in paragraph 383 above, first, it should be noted that, according to the case-law, a concerted practice may have an anticompetitive object even though it has no direct connection with consumer prices ..."

So that is an important thing to bear in mind. You can have an object infringement which is concerned, for instance, with overall structure in the market. It does not have any apparent effect on consumer prices or no

direct link and that would still be an object case.

"Consequently, the absence of impact that a gross price increase, decided at any stage in Scania's distribution chain, might have on the price paid by the end consumer is not sufficient to call into question the Commission's conclusion that the exchange of information on future changes to gross prices, which took place inter alia at German level, constituted a restriction of competition 'by object' because the information that was exchanged was useful for defining competitors' pricing strategy."

So this rather goes back to the question posed by Mr Ridyard: are we trying to in any way attenuate, qualify the object box? Not at all. But what Scania shows is you do not need any direct connection with consumer pricing in order to fall within the object box and nor is it a failing on the part of the Commission that they did not make any finding that the exchanges in relation to future changes in gross list prices influenced downstream or transaction prices, as we would put it.

Just one more citation on this. This has framed the way in which the evidence has been put forward and matters have been dealt with in this case. If we could just go to bundle G, tab 54.1 at page 159, {G/54.1/159},

and if we could just move down slightly. This is the binding recitals -- the transcript of what is called the "binding recitals hearing", the judgment I will be coming on to of the then president, Mr Justice Roth. Mr Justice Roth is just observing -- I am not saying this is in any way binding itself. It is merely a transcript:

"Well, no one is suggesting, I think, that this is -- there is anything in this decision that is binding on what if anything was the actual effect on specific prices paid by these claimants in buying trucks. Of course they are going to have to prove that."

Now, I quite accept that Mr Justice Roth there is not saying, "Let us ignore the decision and what went on", not at all. Of course he is not doing anything like that. But what he is emphasising is you do not make any assumptions about actual effects. They have to be proved.

There is just one other strand of case law that I think is relevant and important. It has been touched on, I think, and we have referred to it in our skeleton. But part of the case law in relation to by object infringements makes it very clear that not implementing an agreement or concerted practice, cheating on it, providing false information in an information exchange,

actually trying to exploit a cartel by almost free-riding on it, none of those matter for the purpose of whether or not there is infringement. There is no defence, so it is no defence to turn up and say "There was no effect here". That does not get you off. It is no defence to turn up and say, "Well, we actively cheated. We took what was told and then we ..." It does not matter. It does not matter in the slightest. It does not matter if you actually try to mislead the people you were exchanging information with or agreeing with or engaged in a concerted practice with. That does not matter either. All of those are no defence to an object infringement.

So, again, you can immediately see that you can be cheating on, ignoring, doing something completely different from what was agreed from the information that was being exchanged, whatever else, and you are still on the hook for an object infringement, and that fits with the overall policy. That is why which prices there(?) are are another factor that does not matter. But, of course, that is why you cannot make these sorts of assumptions about whether or not there are effects, and the Commission just does not need to deal with those issues. It is not just the Commission, it is the CMA in the UK under the UK regime as well. Of course from an

overall point of view, that makes regulation, public intervention, much easier because they do not have to engage in that sort of analysis.

THE CHAIRMAN: If you are cheating on the cartel, then you are using the information that has been disclosed within the cartel in order to cheat.

MR BEARD: Not necessarily, no. You may be, but it depends what you are doing. You could end up with a situation where you know what people are going to do and you would actually price lower than you might otherwise have done. That is cheating on the cartel, but that is not an adverse effect. If, sir, you are simply saying, "Well, you can take the information into account and therefore it has an effect", I am not going to necessarily demur on that, but it would depend on the circumstances. But since the only question we are faced with is, "Is there an adverse effect?", you cannot make that assumption.

We are only looking at effects in one direction. We are looking at adverse effects here. Indeed it is one of the things we will come back to in due course, that you can have all sorts of information exchanges that might well be unlawful but that does not mean that you can tell how people are going to react to those information exchanges, as to whether or not they might actually push their prices lower rather than take their

prices higher. That is not going to surprise anyone in relation to the economic literature because what you may be getting from the information are signals about demand and cost and all sorts of matters that you would find quite useful, but might well take you to lower prices rather than higher ones. But I am going to defer to Professor Neven on some of that in due course.

THE CHAIRMAN: We are not going to know as a matter of fact how the information exchange was used by your clients.

MR BEARD: Well, I am going to come back to that proposition because the evidence we have supplied is from people with very long experience and long involvement in DAF in positions of significant responsibility, both in the UK and in the Netherlands, in relation to pricing. So we are proffering witnesses who deal with those pricing processes. The fact that those witnesses do not say what Mr Ward wants them to say, which is, "Yes, gross list pricing was terribly important to us", that is not a failure on our part to provide the relevant evidence. It is that the evidence that comes out is not what he wants. Therefore, in those circumstances, we do not understand the criticism. This case is about whether or not there was an impact on transaction pricing. We have been providing, through these witnesses, evidence in relation to how DAF did its transaction pricing.

In relation to the observations -- I will come back to it, but, of course, in relation to his observations, "Well, I would like to hear from marketing and sales people", he identified three and he inadvertently answered his own question about the possibility of them being witnesses. Two of them left in 2001 and one left in 2007. I think it would not surprise anyone if the relations between those people and DAF were not necessarily wholly warm after the process that the Commission has gone through with DAF and the settlement process and the penalty that had to be paid.

So we say it is important to think about what the decision is in terms of being an object decision, but we also think it is very important -- and we will be coming back to this repeatedly -- that it is focused on gross list prices and not on transaction prices.

Just in passing, there is a reference in the decision that we will come back to, Recital 51 to occasional discussions of net prices for some countries. Now, we do not identify any such discussions in relation to the UK and we know of none so we are not sure that that is taking matters anywhere further forward for Mr Ward, but it is also worth mentioning that it is not entirely clear what "net prices" means in that context. It is not right to just assume that means actual

transaction prices. They may be averages. We are not clear what was actually being referred to. It may well be that it is average transaction prices in particular countries, but we just do not know the answer to that. But what we do know is that, in relation to the UK, transaction price discussions and average transaction price discussions were not happening. That information was not being exchanged.

So that is the basic nature and focus of the decision. I think it is perhaps worth just picking up some of the points on the legal structure of what has to be proved by the claimants in this case in that context. In those circumstances, if we could just go to BritNed in the High Court, so this is authorities bundle {AU/7.1}. If we could just pick it up at page 11, {AU/7.1/11}.

So Mr Ward took you to some parts of this. You see under the heading "Legal Principles and Approach" -- I think there is a degree to which this is not a matter of dispute between the parties. You see there -- I think he took you to paragraph 10:

"... competition law infringements are vindicated as statutory torts."

Breaches of statutory duty.

Then there is a discussion of Mallett v McMonagle,

and then that is seen by Mr Justice Marcus Smith, as he then was, or still is -- sorry, I was going to refer to him as the president of the tribunal, but he is not -- he was not at that time.

THE CHAIRMAN: This was in the Chancery Division then.

MR BEARD: Yes, the now president but sitting in Chancery, I am sorry.

He then says it is a helpful summary and recognises the importance that, on the balance of probabilities test, which picking it up just over the page, at the top of the page if you would not mind -- no, sorry, that is perfect. No, if we could keep going down to (4), please.

THE CHAIRMAN: Paragraph 12?

MR BEARD: Yes, there we are. So the basic proposition is that, in relation to all the elements of the cause of action, they have to be proved on the balance of probabilities. Then the question is: what has to be proved in relation to loss and damage? Now, here I pause slightly because the pleadings in the case that has been put forward is fairly clear, that what is alleged is that there was an overcharge on the trucks purchased by the claimants from DAF. It is not an allegation that they would have bought different trucks and so on and so it is a claim of monetary loss. That

is the gist of damage.

There is no magic in the term "gist of damage". It is a term that was, I think, developed by Professor Stapleton in various articles, where she was talking about what can constitute proper damage for various sorts of causes of action.

Mr Ward, at times, seemed to be drifting into a suggestion that this was almost like -- our case is like a bid-rigging case, that actually there was some kind of bid-rigging in relation to the tenders that went on with Royal Mail and BT, but that is plainly not the case at all and it is not the pleaded case. On various occasions he said the market was rigged, but, of course, that is just a circular accusation because the question we are testing is whether or not there is an effect on transaction prices and the market rigging that he is talking about in that context is an essential -- is an argument that it is essentially the case that different manufacturers were pushing their transaction prices up and therefore our transaction prices were higher in competition. But since the question you are asking yourself is, "Were transaction prices higher?", you cannot make that assumption to begin with at all. It just does not follow. He cannot make these generalised assumptions about the market being rigged in relation to

transaction prices and assume that that has an effect because he is assuming his own conclusion here.

The test we have got to carry out is whether or not the exchanges that occurred in relation to gross list prices and emissions pricing information had an effect in relation to transaction prices. He has to prove that in relation to DAF, and if what he is saying is, "Well, I would like to be able to prove that in relation to other OEMs as well and they would then have an impact on DAF's pricing", he is going to have a number of additional steps that he would have to go through. So I do not think that this argument about the gist of damage takes him any further forward, so far as I can see. It is a simple monetary claim that he has put forward and that is what he has to prove. He has to prove that we overcharged in relation to our trucks, and we say we simply did not to these claimants.

THE CHAIRMAN: As Mr Justice Marcus Smith put it in that paragraph (5), it is usual tort measure; what is the position they would have been in had the tort not been committed?

MR BEARD: That is right. I think Mr Ward tried to drift towards a more generalised formulation, drawing on what was actually going on in BritNed because BritNed was a very different situation. There was market allocation

going on. So really what Mr Justice Marcus Smith was dealing with there was, "Well, look, do I need to find specifically that there is a monetary impact on the tendering process or can I just find that there was damage because you rigged the tendering process in the first place?", and he says, "Well, that can be the gist of damage when you are dealing with a sort of market allocation cartel".

We do not have any issue with that, but that is different from the present case and here they need to show that there was actual loss and actual effect on the prices that they paid in order to get the relevant gist of damage in this case.

THE CHAIRMAN: Even in this case the tendering was to all the manufacturers who were part of the cartel.

MR BEARD: Yes, and others on occasion, yes.

THE CHAIRMAN: And others. That is not the allegation, that the market was rigged in that way. The allegation is that Royal Mail paid too much for the trucks because the prices -- because of the infringement by DAF.

MR BEARD: Well, because of the infringement by DAF obviously infringing with the other OEMs because you -- cartels, like tangos, cannot be done alone. So, in those circumstances, you have a situation where the arrangements involving the other OEMs are part of the

infringement, no doubt about that.

The point I am making is that for him to then say, "Well, actually, the gist of damage is some kind of rigging of bids", is not actually saying anything different from a basic allegation that there must have been an increase in the transaction prices of DAF Trucks, and that is the gist of damage he has to prove.

Now, he was beginning to hypothesise yesterday that there was a rigging of the market, and all I am pointing out is that that rigging that he is talking about is either at the gross list price level in accordance with the decision, in which case that does not tell you anything on the basis of what we are putting forward about transaction prices, or he is saying, "Well, all of the other OEMs changed their transaction prices and that meant DAF's transaction price was different". If we are asking ourselves that question, (a), that is still, "Is DAF's transaction price different?", so it is the same gist, and (b), in order to make that out, he then has to be talking about what the actual transaction prices would be for the other OEMs and how, as we will come on to see, DAF could possibly know what those pitched transaction prices were on a general basis.

So he is just making life hard for himself by trying

to come up with a gist that is relating to BritNed, but I just want to deal with that here.

MR RIDYARD: Mr Beard, I understood the point that was being made by Mr Ward on this yesterday was that, if the actual prices that Mercedes and Iveco put into a tender were higher than they would otherwise have been, then DAF would not need to know that in detail but the outcome of the tender might well be that DAF would win the contract at a higher price than if those Mercedes and Iveco prices had been lower. Do you disagree with that proposition?

MR BEARD: That I can see, but in order to do that you have still got to get through the mechanism of how it was that the exchanges that you are talking about in relation to gross list prices then affect the other OEMs and that they affect the OEMs in such a way as that is communicated to DAF so that DAF pitches its prices differently. Now, we do know that customers do provide tenderers with information about rival bids -- we will be coming back to that -- but that we would not say was going to be enough for the sort of theory that Mr Ward is putting forward there.

But the key point is he still has to carry out the analytical and evidential step of showing why it is that the exchanges that are identified in the decision feed

through to transaction prices, and that is why it does not fundamentally change the gist that you are identifying here. That is really the point I am making. So his expansive references to rigging the market do not take him any further forward in relation to gist. Sorry, that is the short point here.

I think it is worth just picking out in relation to BritNed, there is some discussion in BritNed about under- and over-compensation. I just mention it, and this was in reliance on Mr Justice Popplewell's decision in Asda Stores, because we recognise that if you show the gist of this damage, in other words, you show that it is more likely than not that there was actually an adverse -- a material adverse impact on the transaction prices that you paid, the quantification of that we recognise is not simply a balance of probabilities analysis because this is where broad axes get wielded in the metaphor that is used in a lot of the case law.

Obviously, the extent to which one needs to make assumptions or wield broad axes depends on the level and detail of evidence you actually have, and here we would say you have actually got an awful lot of evidence, particularly from the experts on this because of the richness of the data that they have been able to use, particularly for the later periods.

I think it is just important if you read -- if we go down to paragraph (9), which will be just over the page, I think, {AU/7.1/14}. So that is the quote from Mr Justice Popplewell in Asda. If we could just go down again -- oh, I am sorry, would you mind going back up? I misread the text. He says:

"The claimant's compensation cannot simply be 'plucked from the air'. It must be grounded in the evidence before the court. The court must, when quantifying loss, be astute to identify those points where the evidence falls short, and where the court becomes reliant upon estimates or assumption. Such estimates or assumptions will need to take account of the fact that the probabilities in the counter-factual world may not mean that these estimates or assumptions will inevitably hold good. I do not take this dictum to mean that every calculation made in the course of assessment of damages must be reduced to avoid ... over-compensation."

That little caveat at the end is because in -- he cites earlier the idea that you should avoid over-compensation in relation to any damages award, but then he qualifies that and that statement is then later approved by the Court of Appeal.

The reason I emphasise it is because there is

a readiness to start swinging broad axes when in fact the reason you are swinging a broad axe or turning to use a broad axe in relation to the assessment of damages is because of uncertainties and lack of evidence. If in fact you have got good evidence, you should be much more cautious about that sort of generalised assumption-making and, whilst there is not a presumption against over-compensation, what is being highlighted are those concerns and uncertainties, working in both directions.

Just for your notes -- I will not go to it, but so that the tribunal has it for its notes, the Court of Appeal dealing with these issues is in authorities bundle {AU/7.2/9}, starting at page 9, and I think the relevant paragraphs begin at page 19, {AU/7.2/19}, in particular paragraphs 59, 60 and 65.

THE CHAIRMAN: This is the Court of Appeal in BritNed?

MR BEARD: Yes, it is the Court of Appeal in BritNed. It is just essentially saying, "Do not work on the basis of a presumption against over-compensation", but that remark -- that passage I have just taken you to is said to be not making that sort of presumption.

So before we get into dealing with evidence and so on, there are a couple of points, further points, I need to just pick up in relation to the presumptions that

Mr Ward has been seeking to deploy here. I think we have identified so far four. The first of them was identified in the claimants' skeleton at paragraph 25, and that referred to a statutory presumption that has been introduced that did not exist at the relevant time. Mr Ward was cautious not to rely on that proposition. He was wise to do so because it was specifically deprecated in BritNed at paragraph 42, so I think we can leave that one.

The second presumption or gloss that he seemed to be putting forward was some sort of reliance on the European principle of effectiveness. Now, we entirely recognise that there is a principle of effectiveness and we recognise that that means that people must be able to bring damages cases in relation to infringements of competition law and it must not be made unduly difficult to do so, but we also say that the standard procedure for treating a competition damages case as a breach of statutory duty is entirely consistent with that principle. We are not alone in saying that. That is also, just for your notes, what is said in BritNed itself -- actually, it is perhaps just worth, whilst we are there, going to the BritNed judgment. It is {AU/7.2/13}.

THE CHAIRMAN: Is this the first instance decision?

MR BEARD: Yes, I am just doing the first instance decision. I will give you the reference for the approval by the Court of Appeal, yes. It is paragraph 42, I think, if my notes are right. No, that is not right. If you just give me one moment. (Pause)

Yes, I mean paragraph 22. I am grateful to Ms Mackersie. This is under a heading higher up the page. If we could just go to above -- we are looking for paragraph 19 to begin with.

THE CHAIRMAN: I think it might be Court of Appeal --

MR BEARD: No, I think we are on the Court of Appeal. I apologise. It is my error. {AU/7.1}. I am so sorry. If we can just go down to paragraph 19, which I think is about page 7, maybe 8.

THE CHAIRMAN: I think it is page 17 actually.

MR BEARD: 17, I am grateful, {AU/7.1/17}. You see "A presumption of overcharge and the principle of effectiveness" and in this section the judge deals with that first presumption that I have just referred to that Mr Ward does not run. Then at 22 he says:

"Nevertheless, BritNed contended that the principle of effectiveness requires a presumption of harm."

MR WARD: Can I just say, we are not making that point in this case.

MR BEARD: Okay. I can move on.

Now, the third presumption I think that he referred to and sought to rely upon was the presumption that participants in unlawful infringing behaviour, including DAF, took into account the information exchanged with their competitors when determining their own conduct on the market. Now, that presumption that he relied upon is sometimes referred to as the Anic presumption from the Anic case from which it is derived.

I am hoping my notes on this are right, {AU/2.7/42}. This is an older case so the references here are to Article 85, which was the precursor of Article 81 that became Article 101, but it is unchanged.

"It follows that, as is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies [because here we are dealing with a concerted practice, not an agreement], beside ... concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two."

So a natural reader of the term "concerted practice" might think, "Well, that feels like there must be effect involved".

Then it says:

"The Court of First Instance therefore committed an error of law in relation to the interpretation of the

concept of concerted practice in holding that the undertakings' collusive practices had necessarily had an effect on the conduct of the undertakings which participated in them."

So actually what is being said is that, even in relation to a concerted practice, you do not make any assumption of necessary effect.

Then if we carry on to 120:

"It does not, however, following that the cross-appeal should be upheld. As the Court of Justice has repeatedly held ... if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds, the appeal must be dismissed."

So they are saying, "Look, the court below got it wrong because they made an assumption that there were necessary effects and that was a relevant ingredient of concerted practice, but we can go on and consider these things further".

"For one thing, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerted arrangements and remaining active on the market take account of the

information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance."

So this is the presumption. This is why it is called the Anic presumption because this was the first time it was articulated. Then it says:

"For another, a concerted practice, as defined above, falls under Article 85(1) of the Treaty even in the absence of anti-competitive effects on the market."

So it is saying, "Yes, you can make presumptions but actually you do not need to identify any effects at all". That is what is being said in 122.

If we go on to the next page, {AU/2.7/43}:

"First, it follows from the actual text of Article 85(1) that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.

"Next, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of

restricting, preventing or distorting competition."

In other words, yes, you are presumed to take matters into account -- information into account when you receive it, that is the Anic presumption, but that presumption is much more limited. Because in European law you do not need to show effects in order to get to an object case, there is no requirement here or implication that there are concrete effects on the market even by a concerted practice.

THE CHAIRMAN: This goes back to your earlier point about the distinction between "object" and "effect".

MR BEARD: It does, but it is picking it up in relation to concerted practice and it is picking it up in relation to the presumption that Mr Ward wanted to rely on. What I am taking issue with is his series of references to presumptions.

THE CHAIRMAN: Right.

MR BEARD: So, yes, in short order, sir, it is going back to that distinction between "object" and "effect", and what it is saying here is, even though that presumption that you take information into account exists when there is an information exchange, that does not necessarily imply that there is any concrete effect on the market.

THE CHAIRMAN: Paragraph 121, which suggests that it is for the economic operators concerned to adduce evidence to

the contrary.

MR BEARD: Yes, that is in relation to the presumption that they take matters into account. So, yes, what this does is it says, "If you get information, you will have to prove that you did not take it into account".

THE CHAIRMAN: Right. You accept that?

MR BEARD: We accept that. But what we say is that that does not mean that you then flow into a further presumption of any effect because that is what Anic is saying you cannot do. That is all I am saying in relation to it.

THE CHAIRMAN: It does not prove it as such --

MR BEARD: No.

THE CHAIRMAN: -- but it is something that can be relied upon.

MR BEARD: Of course it can be relied upon. We are not demurring in relation to that. So in relation to the gross list price exchanges, it has never been part of our case that we just ignored them. So we have never put forward evidence that we did not take them into account in relation to the receipt of the information, but what we say is that we did not take them into account in relation to transaction prices, and that is what we are putting forward in relation to these matters.

THE CHAIRMAN: But you accept that, once there is a finding of infringement by object, and I think you probably accept that the infringement carried on on a regular basis over a long period, that the presumption applies and it is for your side to put forward evidence that shows why it should not apply?

MR BEARD: Yes, we accept that it applies. We accept that in relation to gross list pricing information that these matters were taken into account. We are not saying we ignored the information we received in that regard. What we are saying is that does not help Mr Ward because it does not take him to a presumption that there is some sort of concrete effect, which is what matters here; in other words, it is the limitations of that presumption that matter.

THE CHAIRMAN: I hope it is not going to come down to a question of burden of proof --

MR BEARD: No.

THE CHAIRMAN: -- but is it for you to show that the gross list prices did not actually feed into the transaction prices?

MR BEARD: No.

THE CHAIRMAN: It is not for you?

MR BEARD: No, it is not for us.

THE CHAIRMAN: It is for them?

MR BEARD: It is for them to prove that. It can be presumed against us that we took gross list prices into account, in other words we did not simply ignore them when this information was provided to us, because what is being tested here is whether or not it was right. So what had been done was a finding had been made by the court below that said, "These exchanges necessarily gave rise to effects", and I took you to the initial paragraphs where the Court of Justice here, on appeal, is saying, "No, no, that was the wrong approach". Then it is saying, "You did not need to do that because we can assume that the information was taken into account". But that is enough to make out the concerted practice by object; it is not enough to make out a concrete effect. That is the difference here. So it is the limitations on the presumption that is critical.

THE CHAIRMAN: Is that a convenient moment?

MR BEARD: A convenient time, yes. Thank you.

THE CHAIRMAN: All right. We will break until 12 o'clock then.

(11.51 am)

(A short break)

(12.02 pm)

THE CHAIRMAN: Mr Beard.

MR BEARD: Sir, I was just dealing with the presumptions

that Mr Ward had relied upon. I dealt with the first two on statute and effectiveness and I was just finishing on the Anic presumption.

The fundamental point here is you can assume that information is taken into account that is not any presumption of effect. That is what the headline is in relation to this.

The fourth presumption or adverse inference that Mr Ward wanted to draw was based on the Herrington and Coombs case law that was cited in Prest v Petrodel about witnesses, as you will remember. He cited the quoted judgment. Just for your notes, Prest v Petrodel, the relevant passage is in {AU/3.5/24}. But you will recall that Lord Diplock had given a fairly fierce judgment about the Railways Board producing no evidence and no witnesses. We really just could not be further from that situation here, where extensive evidence has been provided, both documentary and in data terms. We have extensive expert analysis and we have provided multiple witnesses.

We have Mr Ashworth, who was the UK managing director at the end of the period and who worked at DAF and Leyland for almost 40 years and was involved in dealing with the claimants; we have Mr van Veen, who is now the managing director of international fleet sales,

again has been at DAF since 1991 and involved in the sales process and, like Mr Ashworth, is talking to the pricing and sales process including the mandate structure; then, of course, we have Mr Habets, who is now the finance director, again who has been at DAF for a long time. He has been there for 20 years and speaks to the cost measures and their role in DAF's pricing decisions. That is of course in addition to Mr Borsboom.

So there is a whole range of material that we have put forward, even though the burden is not on us in relation to causation issues. But there is a vast amount of material that we have put forward here. The idea that somehow an adverse inference should be drawn against us is plainly not right. This is not silence, this is not an absence of evidence, and I have already dealt with the issue that was specifically raised by Mr Ward about M&S directors who have left in any event. But we do not say you could possibly draw any adverse inference from the fact that we did not call an ex-M&S director.

THE CHAIRMAN: The point was in relation to how the cartel operated and how the information was used, and you have not produced any evidence on that.

MR BEARD: Well, as I say, what we have produced is -- in

terms of how the material was used, we have produced the people that were involved in the pricing process --

THE CHAIRMAN: You say they did not use it.

MR BEARD: Yes.

THE CHAIRMAN: But we are still completely in the dark as to why you did it for 14 years.

MR BEARD: Well, yes, obviously those sorts of questions will always hang over the consideration of a cartel. We completely recognise that. But there can be a whole range of reasons. People may have intentions to do things that do not come to fruition. They may have wanted to exchange information, soften some sort of competition that they thought they were achieving. We do not know what they were doing in relation to those issues, but what we can test is how those issues feed through into the pricing process. That is what we can test and that is the evidence that we are putting forward in relation to those matters.

It is interesting, there is a judgment in a case in Oviedo, a Spanish court looked at this, and apart from doing quite a detailed analysis of a range of matters, also asked itself this question and recognised that there is not going to be an easy answer as to why these things mattered, but observed very sensibly that that of course is not the question that arises in relation to

a damages case.

MR WARD: Sorry, can I ask Mr Beard to clarify the submission he just made? He said "We do not know what they were doing in relation to those issues", meaning what they were doing with the material. That is at line [14] of the transcript, page [52], {Day2/52/14}. I was not sure whether the "we" in that was him speaking on behalf of DAF lawyers or whether he was giving evidence on behalf of DAF itself.

MR BEARD: I would not dream of giving evidence on behalf of DAF itself. I recognise the limitations I have in relation to those matters. I was answering the question about why it was that people may have persisted in exchanging information over a long period and I was merely articulating why that is not the question that arises for disposal here, but also why -- even if one were making assumptions about why people intended to do things, that that does not tell you what the outcome is in these circumstances.

So we say that none of those presumptions that Mr Ward has put forward advance his case and the truth is he cannot take short-cuts here because the decision itself is written in broad terms. It is not drafted like a statute. The language is imprecise, it is often very general, something that Mr Justice Roth recognised

in the binding recitals judgment itself, and of course it is not a decision trying to identify effects at all.

Now, there are two points in relation to the decision in relation to what Mr Ward said were very important recitals that I do need to pick up because he says that we are putting forward a case that we are not actually permitted to put forward. That is in relation to Recitals 47 and 27, so I just need to deal with those points I think in particular.

So if we could just call up Recital 47. It is in the authorities bundle at {AU/3.9/12}, please. So:

"In most cases, gross price information for truck components was not publicly available and information that was publicly available was not as detailed and accurate as the information exchanged between, amongst others, the Addressees. By exchanging ... gross prices and gross price lists, combined with other information gathered through market intelligence, the Addressees were better able to calculate their competitors' approximate current net prices -- depending on the quality of the market intelligence at their disposal."

Now, it is worth just going to the pleadings properly in relation to this because Mr Ward referred you only, I think, to one or two extracts from the pleadings. If we could go to the particulars of claim,

the re-re-amended particulars of claim, which are bundle {B/1/6}. That is the relevant paragraph, I think. So this is the pleading in relation to the settlement decision itself. Paragraph 18:

"The Claimant relies on each of the facts and findings of infringement set out in the Commission's Settlement Decision. The Claimant relies on a redacted confidential version of the Settlement Decision that was disclosed ..."

Then if we go over the page and to the bottom of the page to (2), {B/1/7}:

"The conduct comprising the infringement was a cartel relating to:

"Collusion on pricing in the EEA for Trucks, in particular.

"All of the cartelists exchanged gross price lists and information on gross prices, as well as other commercially sensitive information (such as order intake, stock and other technical ...). By exchanging current gross prices and gross price lists, combined with other information gathered through market intelligence, the Cartelists were better able to calculate their competitors' approximate current net prices. This also placed the Cartelists in a better position to understand each other's European price

strategy, than they would have been solely on the basis of the market intelligence at their disposal."

I only read it through because it is obviously replicating, broadly speaking, Recital 47.

It is then right to go to our response to that, which is at bundle {B/2/8}.

SIR IAIN MCMILLAN: Just before we do, can I perhaps just, if I may, take you back to the expression "net prices"?

MR BEARD: Yes, of course.

SIR IAIN MCMILLAN: "Net prices", is that what was charged to the customer, the transaction price?

MR BEARD: We are not clear about that. We think that it may be averages that are being referred to, so it may be average customer prices or average prices for certain types of trucks, but we are not clear because the Commission decision just does not define that.

SIR IAIN MCMILLAN: I see.

MR BEARD: The problem is that the term "net prices" is very difficult to understand because, of course, if you were talking about individual transaction prices, of course they are all different because of the complexity of trucks, and so we do not think that it is talking about individual transaction prices. It may be talking about some other aggregation of transaction prices by reference to models, but we are not clear.

We also know that within the industry, including within DAF, "net price" can be used as a very different term. It is not actually a term that we use within DAF as referring to transaction prices on many of the documents that we have internally. So it is just a sort of -- it can be used as a discount off gross list prices, for example.

THE CHAIRMAN: It is presumably used because "gross price list" is an expression that is used.

MR BEARD: Yes, it is undoubtedly different from "gross list prices", we see that, but beyond that -- obviously it looks like it is to do with -- something to do with customer prices but we are not clear because the language is used within the industry differently from that and we just do not think it can possibly be referring to individualised transaction prices because that does not make any sense. What we do know is that there were not any exchanges in relation to the UK, so far as we are aware, in relation to net prices, whatever they may be.

I am sorry, sir. That is only really a half-answer to your question.

THE CHAIRMAN: You would normally -- when you are using the phrases "gross prices" and "net prices", you would assume that net prices are derived from gross prices.

MR BEARD: Yes, you would.
THE CHAIRMAN: That is the normal use of the expression --
MR BEARD: Yes, I completely understand.
THE CHAIRMAN: -- like "gross profit" and "net profit".
MR BEARD: Yes, I completely understand that, sir.
SIR IAIN MCMILLAN: It is the application of other information gathered through market intelligence applied to the gross price which reaches the current net price.
MR BEARD: Yes. I completely understand how you would read it like that and the only point I am making is --
SIR IAIN MCMILLAN: That is what it says.
MR BEARD: It says what net price is, and I understand the natural assumption you make. All I am saying is that, because you do not actually have specific transaction prices, it cannot be to do with individual truck transaction prices and therefore it must be at some sort of other aggregate level, and at that point we struggle to understand what they are actually talking about. That is the difficulty. But the natural assumption you are making we completely understand. We cannot cavil against that.
THE CHAIRMAN: You understand what they are talking about when they refer to "gross price lists"?
MR BEARD: Yes, we do.
THE CHAIRMAN: What is that?

MR BEARD: "Gross price lists" are the documents and figures that we have that we use now in relation to the Sprint configurator, for instance, which are referred to internally as "gross list prices", and we understand that other OEMs use the same sort of terminology.

THE CHAIRMAN: What is that actually? Is it like the best case scenario, the price that you would like to achieve --

MR BEARD: No.

THE CHAIRMAN: -- or it is the maximum or --

MR BEARD: Well, no, because, as the evidence has explained, because truck prices are negotiated on an individualised basis, we do not use gross list prices as the point of negotiation and therefore they are not treated as best case. What they do do within the complexities of the configurator is they essentially rank by value different sets of options, so you effectively get a relativism.

So, for instance, if you were to pick a particular size of cab with a sleeper option and then you wanted a particular music system and you wanted a fold-down extra chair or something, a seat in it, the people configuring the truck might not know whether that is to be treated as a more expensive or less expensive set of options than if you did not have the sleeper cab but you had some kind of greater luxury within the cabin

otherwise because of the complexities of all these things. So what it does is it provides an ordering overall. But in terms of the actual transaction price, the evidence that we have is that it is not having any effect on that and therefore --

THE CHAIRMAN: Leaving aside the cartel for a moment, what is it used for? What are the gross list prices used for within DAF?

MR BEARD: As I say, the best we have is the evidence, and they say, "Well, we do not use gross list prices for pricing, we do use it for this sort of ordering function", which is what you get within now the configurators and --

THE CHAIRMAN: Is there any evidence as to how they actually get to those figures? Are they included in the gross list price? How do they ...

MR BEARD: I am not sure that those -- because I think they tend to change -- no, they change incrementally, so what we see are the gross list prices and then we see announcements of rises in those.

THE CHAIRMAN: It must in some way be based on cost, on the underlying cost, and then adding something to that to get to a live(?) figure.

MR BEARD: I am not sure to what extent that is actually true because there is also the possibility that

different options have different values for customers but are not necessarily the same cost. I do not know the answer to this, but say the fold-down seat option would be highly valuable to customers but it is actually pretty cheap to include, you might then rank that truck with that option higher up in the order within the gross list price scheme but you would not be doing that on the basis of the incremental cost in those circumstances.

You just cannot make those sorts of assumptions. Of course these are questions that Mr Ward can put to our witnesses in relation to these matters.

THE CHAIRMAN: If they were exchanging gross price lists, as we know they were, there must be some sort of similarity of approach between the different manufacturers as to how those gross list prices are arrived at.

MR BEARD: Well, no, not necessarily. We are not making any assumptions about exactly how other manufacturers use these things or exactly how they do any of their assessment --

THE CHAIRMAN: It seems like it would be pretty meaningless information otherwise.

MR BEARD: Well, in terms of transaction prices, that is what the evidence shows. It is pretty meaningless information, it turns out.

Sorry. So I have inadequately answered the question

but I will go back to the pleading, if I may. I was just picking it up -- I think I was moving on --

THE CHAIRMAN: You were going to the defence.

MR BEARD: I was going to the defence, yes. Bundle {B/2/8}. So this is paragraph 17 of the re-re-re-re-amended defence, and it says:

"As to paragraph 18(2)

"The Defendants use the following terms for prices."

Here we have list price, transaction price. Just for Sir Iain's benefit -- I was not going to go to it, but 17(b) actually sets out the pleading in relation to net prices. I am not being corrected but I do not think I misspoke in relation to ...

So what you have got in (a) and (b) is a discussion -- a setting out of the understanding of DAF or the lack of understanding of DAF in relation to the terminology used by the Commission because it is being pleaded back to. There is also a statement in (a) about how transaction prices are individually negotiated and agreed with each customer and that there is not a relationship between list prices and transaction prices such that an exchange of list price allows for effective calculation of transaction prices. Then we have got the net price paragraph.

Then it goes on to deal in relation to the

allegations made in what we saw at 18(2). You can flip backwards and forwards, but I will just go to some of the key points. {B/2/9}:

"The first sentence [of 18(2)(a)(i)] is admitted save that it is denied (if alleged) that all of the exchanges were commercially sensitive."

So we start off with an admission in relation to 18(2) which is to do with the exchange of commercial information but it is denied that they had an impact. Then (ii):

"The allegation in the second sentence is addressed in paragraph 19A(24) below."

Which I will come to. Then the third sentence of (2)(a)(i), which I read, which is about the better able to calculate prices, and it says:

"... it is admitted that the exchange of gross price information placed the Addressees in a better position to understand each other's ... price strategy than on the basis of market intelligence alone."

In other words, it is an admission. It is an admission in line with -- it is effectively not denying the Anic presumption in relation to these issues.

"For the avoidance of doubt, a manufacturer's 'European price strategy' is understood to refer to its List Price changes. No further admission is made."

So when Mr Ward was saying, "Well, you have given a blanket denial in relation to 47", it is a very, very odd proposition he is putting forward because we actually admit what is said in 47 and then we take issue with what that means specifically for DAF and the language which is unclear in relation to 47.

"No further admission is made. It is denied, if it is alleged, that the exchange of gross price information put the Addressees in a better position to understand each other's Transaction Prices."

MR RIDYARD: Mr Beard, how does that square with what is in paragraph 47 of the decision, where it says that the addressees were better able to calculate their competitors' approximate current net prices?

MR BEARD: Well, it is subject to that caveat at the end, Mr Ridyard. It depends on the degree of market intelligence that you had. That is what is being pleaded to here effectively.

It is saying, "Yes, in principle, getting this material could provide you with an advantage in terms of market intelligence", but whether or not you can actually go on and better understand transaction prices, in other words, specific prices provided to consumers, (a) there is the question that Sir Iain has raised about the difference between net prices and transaction prices

definitionally, but I am raising a broader point here, which is it is being said by DAF that we could not understand the transaction prices better. We did not have enough of whatever other market intelligence was required in order to fulfil that.

MR RIDYARD: So you are saying that DAF was not better able to calculate competitors' approximate net prices because the other information it had was not good enough?

MR BEARD: Yes, it is the "depending on". I place the caveat again about net prices, but if you are going to read "net prices" as "transaction prices", that is what is being said.

THE CHAIRMAN: So you are denying that you can understand transaction prices from the gross list prices?

MR BEARD: Yes, because we do not have enough of the other market intelligence, but we are not denying the general proposition as put forward in relation to 47, and that, of course, fits with us accepting that we should not have been exchanging gross price list information. That was what we were recognising by accepting this as a settlement decision.

THE CHAIRMAN: What does "market intelligence" mean?

MR BEARD: That is something we do not know either. We plead to the fact --

THE CHAIRMAN: Is that information that is available to

everybody?

MR BEARD: We do not know. It is not clear what that actually means. That is part of the problem of translating this sort of provision into a pleading because it does not have the relevant specificity. It is a point that we raise elsewhere in this pleading, that just simply wheeling the provisions across, because they are put in general terms, means that it is actually quite hard to understand what is going on. The idea that we should then be precluded from setting out what we actually did in relation to pricing because somehow we are stuck with this we say is just wrong.

So I do not want to stop there because there is -- I can see already the tribunal is enormously delighted to plough through some of these pleadings, but I think we need to just look at one or two of the other pieces here. So what we have got is an admission, but then with a qualification in relation to the specifics, in relation to 18(2), but there is a further pleading here we should just go on to, which is at 18(g) in the particulars of claim which is at page 14, so that is {B/1/14}. So there you have a situation where:

"As found by the Commission in Recital 47 of the Settlement Decision, by exchanging current gross prices and gross price lists, combined with other information

gathered through market intelligence, the Cartelists were better able to calculate ... approximate ... net prices."

So again it is just reiterating 47, which we have already seen earlier in 18(2), and then it cites two examples, which I think were the examples that Mr Ward actually went to yesterday: a Daimler employee sharing Volvo's gross list prices and then a Daimler employee explaining to his colleagues how Daimler was able to derive comparative competitor net prices.

So those were two examples. If we go to our pleading in response to that, so this is {B/2/16}. If we could go down to paragraph (24):

"Paragraph 18(g) introduces two subparagraphs, none of which contain allegations that involve DAF. Further, the overarching allegation in ... 18(g) is expressly conditional on the nature of information gathered through market intelligence but the nature of the said information is not particularised, nor is the nature of any information alleged to be at DAF's disposal. In the premises, DAF is unable to understand the allegation against it."

Sir, you somewhat anticipated the way it got pleaded to in relation to this. There is a lack of clarity about what is actually being alleged in terms of market

intelligence. No doubt it will be said by Mr Ward, "Yes, but you settled on this basis", and we say, "Yes, we did, we did settle overall, but that does not mean that we know the meaning of every term that is used here". We simply do not know that.

THE CHAIRMAN: Well, that is quite a big thing to sign up to. You are saying you did not understand what was meant by "market information"?

MR BEARD: No, we did not know what the details of market information were.

MR WARD: Now you are opening up the DAF settlement process, which is a completely closed box to us.

MR BEARD: The settlement is a closed box. I entirely accept that the settlement process is a closed box, but the point is we plead here to the ambiguity of the terms being used.

Then we get into "Without prejudice to the foregoing", then again at (aa) we are admitting the generalised allegation in 47. So this is not a denial, as Mr Ward was putting it; it is an admission.

Then at (a), {B/2/17}, which is the point he referred to:

"It is however denied, if it is alleged, that DAF was in fact [I agree the "not" should not be there] better able to calculate competitors' approximate

current net prices, whether on an average basis or as regards Transaction Prices, as a result of any information exchanged."

THE CHAIRMAN: So you are relying on the exception for a lack of market information, but you do not know what is meant by "market information" in the decision?

MR BEARD: Well, what we are saying is we do not know exactly what is being referred to as "market intelligence", but what we are saying is that the information we had, whatever might be covered by market intelligence, did not leave us in a position to, as we put it here, calculate competitors' approximate current net prices or transaction prices.

Now, the market information might have been publicly available information that the Commission had in mind, it might have been bilateral information. That is the bit we do not know about. What we can say is, whatever information we had, however it is characterised, did not put us in that position.

THE CHAIRMAN: Was the Commission, in paragraph 47, intending to distinguish between the addressees based on the information -- the specific market intelligence that they had or was it just making a sort of generalised point that the extent of what you might -- what any of the addressees might be able to deduce from the

information is subject to whatever market intelligence was available?

MR BEARD: Well, we say that there are two issues here. One is, going back to the observation of Mr Justice Roth, that this is undoubtedly vague, but it is also clear that the caveat at the end of 47 that says, "You are better able" -- so it is not saying "You can even" -- but "better able to calculate the competitors' approximate current net prices depending on the quality of the market intelligence at their disposal" -- and that caveat is not suggesting that you must be able to do it or it is simply a matter of degree. It is clearly saying, "If you have enough of the market intelligence, you may be able to calculate or you will be better able to calculate approximate current net prices". That is what they are saying here is possible in conjunction with the information that they are referring to as having been exchanged. We are simply saying, yes, but in practice the level of information we had did not enable us to do these things, and that is entirely within the scope of --

THE CHAIRMAN: What, you have adduced evidence to that effect, have you?

MR BEARD: We have pleaded to that effect. The question is --

THE CHAIRMAN: Pleading is not proof.
MR BEARD: No, no, but the question that we are dealing with here is whether we are entitled to plead to this. The question of the evidence that then arises --
THE CHAIRMAN: If you do not have the evidence to support the pleading, then you should not be allowed to plead it.
MR BEARD: Well, we have got evidence about what we knew about transaction prices and how we set out transaction prices.
THE CHAIRMAN: Yes, but you are relying on so-called exception in the decision for market intelligence which you say you did not have.
MR BEARD: Yes, and our witnesses --
THE CHAIRMAN: Well, where is the evidence to that effect?
MR BEARD: Well, it is proving a negative in these circumstances, that the witnesses are saying, "We set out transaction prices by these means", and we have actually got --
THE CHAIRMAN: They are saying, "We set the transaction prices without reference to the gross price lists".
MR BEARD: Yes.
THE CHAIRMAN: They do not refer to other market information.
MR BEARD: They do not specifically refer to other market

information, save that they do in part refer to information being provided, for example, in the course of negotiations with, for example, the claimants, so that sort of market information is being referred to.

I think it is accepted that there are other forum, fora, where there is all sorts of market information that is provided, including the Association of Motor Manufacturers and so on. So I do not think it is quite right, sir, to say that there is no indication of what sorts of market information might be available, but I think the point here is are we permitted to plead that in fact we did not better know what other parties' approximate net prices were, were we able to calculate them, and we say we were not.

THE CHAIRMAN: You are saying that -- in (a) you are denying that you were better able to calculate competitors' approximate current net prices as a result of any information exchanged.

MR BEARD: Yes.

THE CHAIRMAN: So you are saying that what they found in 47 about exchanging gross prices and gross price lists did not in fact mean that you could actually work out what the competitors' net prices were?

MR BEARD: Yes, that is exactly --

THE CHAIRMAN: Now, the heart of what is being said, it

seems to me, in paragraph 47 is that that is exactly what you were able to do.

MR BEARD: Yes and we are saying that is -- we plead with more particularity then at (b), {B/2/17}:

"It is averred that the most a Manufacturer could have done based on the information exchanged concerning List Prices and depending on the quality of market intelligence available to them, would be to estimate a competitor's average aspirational realised price increase based on their assessment of the extent to which List Price increases were likely to be achievable in increases to average realised prices."

So we are actually engaging with what we think we could do here. We are not just leaving it completely open.

MR RIDYARD: So that might well have made DAF better informed than it would otherwise have been and therefore that might have affected its conduct, pricing conduct, its transaction prices.

MR BEARD: Well, if we just read on:

"Further, such an estimate would have provided no insight into the Transaction Prices that the competitor was willing to or would offer for any given transaction. It is further averred that the information exchanged did not influence the Transaction Prices agreed between the

Defendants and the Claimant."

That is exactly what our evidence goes to.

MR WARD: Sorry, Mr Beard said his evidence goes to this but, as far as we are aware, there is no factual evidence addressing these generalised assertions in 19A(24)(b), which talk anyway about "a manufacturer". It must be read with his bare denial in 19(24)(a) which is specific to DAF.

MR BEARD: Sorry, I do not think it could be expected that we would be providing evidence in relation to other manufacturers, but I think it is worth bearing in mind that Mr Ashworth, for instance, specifically refers to market intelligence at paragraph 75 of his witness statement, so it is not as if there is no reference to this sort of evidence and its materiality in our witness evidence.

So what is being said by Mr Ashworth and those who are being proffered for cross-examination is, "Yes, we do get market intelligence, but that is not telling us how we can position our transaction prices for these purposes".

THE CHAIRMAN: You do not actually plead, I think, that you did not have any other market intelligence. What you are saying is you do not understand what is meant by that.

MR BEARD: Well, what we say is two things. We do not understand precisely what is meant by the term, but, more importantly, we say we do not have enough information actually better to ascertain competitors' net prices. So we are not taking the point about the definition issue. We are just saying -- that is what the pleading says here, that we do not have enough information to do that.

THE CHAIRMAN: Information on what or from what?

MR BEARD: Well, that is what is not entirely clear because, in fact, the reasoning of the Commission in relation to this is not entirely clear as to precisely what sort of market intelligence it has in mind, which is why I cannot say we know what "market intelligence" means for the purposes of this decision.

So I think that what we see here is, in fact -- contrary to what Mr Ward was saying, that these are bare denials -- these are not bare denials. They are proper pleadings that explain why it is we say that, notwithstanding Recital 47, in fact we could not understand the -- we were not better able to understand the competitors' net prices that were being put forward.

Of course, this is a matter that was consideration -- the role of 47 was a matter for consideration in the binding recitals process. Now,

Mr Ward yesterday, at this point, started engaging in a discussion of the relevant considerations of abuse of process in relation to these matters but we are not quite sure why he was focusing on abuse of process.

If we could go to the tribunal's decision in relation to binding recitals, and in my notes I have that at {F/33}, and I think we want to go to the final page of that, which I think is page 58, {F/33/58}. So just picking it up at 148:

"As explained above, we find that pursuant to Article 16 [which is Article 16 of the European Regulations] the defendants are bound by the following in sections 3, 4 and 7 of the Decision for the purpose of these proceedings."

Now, the reason I emphasise the word "bound" is because there were two issues that arose in the binding recitals judgment. One was: what is the essential basis of the Commission's decision that goes to the operative part, the operative part being those final paragraphs, some of which Mr Ward took you to, that said, "There is an infringement and you will be fined".

What the tribunal does in relation to those matters is it identifies what is the essential basis which all of the parties are bound by and then it carries out a further analysis as to whether or not there are other

recitals where, even if it is not bound by them, the parties would be operating an abuse of process if they denied them. But the key point is that, in 148(a), what Mr Justice Roth does is identify what he considers to be the binding findings and, in particular, binding findings to be drawn from Recitals 46 to 49 in the judgment and obviously, therefore, including Recital 47.

If we could just go over the page, {F/33/59}, this is what he says are essentially the binding findings coming from these paragraphs:

"The Addressees exchanged gross price lists and information on gross prices, including planned future gross price increases, and most of them exchanged truck configurators containing detailed gross prices as those came to replace gross price lists. This included information which was not publicly available and was commercially sensitive. The exchange of gross price information placed the Addressees in a better position to understand each other's European price strategy than on the basis of market intelligence alone. The exchange of configurators helped them to compare their own offers with those of their competitors, which further increased the transparency of the market. Some configurators only granted access to technical information, such as bodybuilder portals, and did not include any price

information. In addition, between 1997 and 2004:

"(a) the Addressees at their meetings in some cases also agreed their respective gross price increases; and

"(b) occasionally they also discussed net prices for some countries."

So what, after this long exercise was done -- and this was later approved by the Court of Appeal -- that this was essentially the binding finding to be drawn from all of those recitals because, having parsed the decision and encountered a number of the problems that you are encountering in actually interpreting these various provisions, he distilled these matters out.

What we say is that the pleading that we are putting forward is in no way contrary to the binding finding as summarised by Mr Justice Roth that the exchange of gross price information placed the addressees in a better position to understand each other's European price strategy than on the basis of market intelligence alone.

THE CHAIRMAN: He seems to be putting to one side market intelligence, whereas he is saying -- so he is saying that that is the way that Recital 47 perhaps ought to be interpreted, is that, purely from the exchange of gross price information, you could understand other things about your competitors' price strategy, which must be a reference to transaction prices.

MR BEARD: Well, no, we do not assume that it is a reference to transaction prices here.

THE CHAIRMAN: Well, that is the whole point of Recital 47.

MR BEARD: Well, I am not sure that is right, sir, with respect. Recital 47 is not simply talking about transaction prices. It does talk about, as we have discussed, net prices, but this is the reason why Mr Justice Roth is so cautious in the way that he drafts it, because he recognises that the language of the provision is ambiguous and it is not necessary to be making those findings in those specific terms in order to have the essential basis for the findings in the conclusions, the operative part, that there was here an infringement by object. That is why in that sentence he just talks about European price strategy and then talks about market intelligence.

So he has done the exercise that we have been briefly engaging in, but, obviously, across all of the recitals and at much greater length, and that is the distillation that he arrives at. We say there is nothing wrong with our pleaded approach in relation to any of that material.

THE CHAIRMAN: Does he discuss in there precisely what Recital 47 means?

MR BEARD: I do not think he specifically goes through that.

We would have to go back to -- there were extensive pleadings in relation to this, in relation to which different propositions were put forward, but my recollection is -- I think it is around paragraph 63 where he talks about the details of the essential basis. I do not think there is any specific reference to Recital 47 in this, is my recollection. We will check that over lunchtime and revert.

In any event, that is our position in relation to Recital 47, and so we say actually it is not a question of abuse of process at all; it is a question of what is to be considered as binding coming out of Recital 47. Actually here we have the advantage of what Mr Justice Roth has done in relation to the whole exercise to assist us, so that we do not need to do it again.

The other recital then focused on was Recital 27, which, if we could go to, is pleaded in the re-re-amended particulars of claim at bundle {B/1/120}. So this is an appendix and it is at paragraph 2. I will just let the tribunal read through that because effectively it is just a replication of Recital 27 from the decision.

So, again, without going back to the decision, it is obvious that there is a vagueness about what is actually

being set out here. You have got "generally" used twice in the first couple of sentences and then, importantly, although there is a reference to substantial rebates, there is no sense that there is any sense that the rebates were fixed or aligned in relation to particular customers. The overall wording here is, I think we can fairly say, very open.

If we then go to our response to that, it is at {B/2/16} --

SIR IAIN MCMILLAN: Can I just ask?

MR BEARD: Please. I am so sorry.

SIR IAIN MCMILLAN: It is at paragraph 2, where it says -- it reads:

"The final net customer prices reflected substantial rebates on the initial gross list price."

Does that not suggest that the final net customer price is the transaction price?

MR BEARD: Certainly that sentence is implying that you are looking at some form of transaction prices, I agree with that, because you are talking about final net prices, yes -- customer prices, yes. I think that must be right. Whether or not they were aggregated, I do not know the answer to that, but undoubtedly that language is much closer to transaction prices. But, equally, what we say cannot be read from that is that there is

some sort of causative link from gross list prices down to transaction prices because, as we will see, what often happens in relation to the way in which indeed DAF's own internal numbers are produced, that you get a transaction price negotiated and then there is an arithmetical calculation that fills in a gap to suggest what the notional discount is from a gross list price, but none of the negotiation is starting from gross list price at all.

So if we could go to {B/2/77}, if we just go down to the bottom of that page, if we could, please, it says, "As to paragraph 3 ..." That is a mistake in the numbering. It is responding to the paragraph 2 that we have just seen. I just ask you to just read through probably down to the end of (c) for the moment.

(Pause).

THE CHAIRMAN: Yes.

MR BEARD: So there is an emphasis on the lack of clarity. We are not in the territory of any sort of bare denial here because, in fact, as you see at the beginning of (a), there are admissions being made and indeed in (b) in relation to the second and third sentences. So we are not in that territory at all. There is a reference back to 17(a) of the defence, which was the paragraph we have already seen that was responsive in relation to

Recital 47 and, in fact, there was an RFI in relation to paragraph 17(a) that is referred to.

If we could just go to that at tab {C/14}, you will see there that there is a request made in relation to the meaning of paragraph 17(a) about the lack of relationship between list prices and transaction prices. Here we have a situation where DAF is spelling out its case further in relation to those matters. So, again, not bare denial, admission with qualifications, further elucidation.

If we can just go over the page, please, {C/14/2}, you will see as we work down the page not only do we have an account, but then we have references to the witness evidence that is dealing with these matters, in particular Mr Ashworth.

So if we could just move down again there, please, and Mr van Veen, thank you. So there was further clarification and provision of references in relation to witness evidence in the response to an RFI in relation to these matters, and although Mr Ward did not specifically refer to the criteria for abuse of process in relation to Recital 27 pleadings, we say that this is not in any way an abuse of process to spell out our case in relation to these matters in pleadings and respond to RFIs in the way that we have done and, indeed, the

position is somewhat odd because if we could go to bundle {G/61} --

THE CHAIRMAN: Are you pleading this on the basis of the practice generally within DAF or for these specific transactions? So when you say at paragraph (c) of this response, "Transaction prices were not arrived at by applying a discount to a corresponding list price [as read]", are you saying that is generally across DAF or it is for these particular transactions?

MR BEARD: I think it is for both.

THE CHAIRMAN: So the decision says that is how the prices were generally arrived at.

MR BEARD: Generally. In the market overall.

THE CHAIRMAN: You are denying that though?

MR BEARD: No, we are not denying whether or not it is generally the case, but we are saying that that is not how DAF --

THE CHAIRMAN: It is not DAF's general practice.

But is the decision not saying that it is the general practice of all addressees?

MR BEARD: No, we say it is not doing that. It is saying that is generally across the market. We could not speak to how other people did these things so we would not be able to disagree with that. We can speak to how we deal with these things and we can, in those circumstances,

disagree with it being generally the case across the market.

THE CHAIRMAN: "... for all of the addressees."

"The pricing mechanism in the truck sector follows generally the same steps for all of the Addressees."

MR BEARD: "... follows generally the same steps ..." but we say --

THE CHAIRMAN: But you are saying not in relation to DAF?

MR BEARD: We say not in relation to DAF.

THE CHAIRMAN: Well, that is directly contrary to Recital 27, is it not?

MR BEARD: We say not because of the term of generality that -- it is talking about the truck sector generally.

THE CHAIRMAN: "... for all of the Addressees."

MR BEARD: We say that that is not the case here because, in relation to DAF -- not only is it true in relation to these particular transactions but we say that the evidence we have is that that is not the way in which these matters were dealt with by DAF.

We say that is consistent and not only is the caveat in 27 about the truck sector generally, "... for all of the Addressees", but, further on, when it talks about pricing starts generally from an initial list price, set at headquarters, we say those two "generallys" just are not -- that may well be true for everybody else but it

is not true for us and we have the evidence in relation to it.

THE CHAIRMAN: So you say within the term "generally" you can exclude one of the addressees?

MR BEARD: Well, as it turns out, yes. It has to be the case because that is the evidence we have in relation to how we actually do the pricing.

THE CHAIRMAN: I would have thought, if that was your case, you would have made it clear to the Commission.

MR BEARD: Again, we are straying into the settlement box.

THE CHAIRMAN: All right.

MR BEARD: As I say, there may be a range of reasons why one would settle in circumstances, but we recognise the position.

THE CHAIRMAN: This is what you signed up to.

MR BEARD: But the question is, can we plead to the position and can we go to the reality of the evidence? Because if I may just go to the transcript of a hearing in February 2020, {G/61/78}, these are comments by Mr Justice Roth talking about statements being made about how entities operate and, in particular, how they engage in pricing. Picking it up at line 15:

"Then we have talked about the other issue of mitigation earlier, which is a separate matter.

"That was, for the moment, we thought, all that we

would propose to say about these very helpful statements and we hope that's of some assistance to everyone going forward.

"We did want to mention another set of statements which were ordered in our September order, which were the statements provided in the Ryder case about how the defendants approach their pricing and we thought those statements were very helpful [in the Ryder case] and we think it would be appropriate for equivalent statements to be filed in the other actions as well."

So notwithstanding that this is at a time when there is a debate going on about binding findings, the pricing statements are seen to be very helpful and are being ordered, and our pricing statement, which was served in fact after the binding findings judgment was given, is at {C/9/1}. I think it is around 30 pages, this statement, and it is explaining in some detail how pricing was actually undertaken by DAF. We say it is entirely legitimate and entirely consistent with the way that the court has proceeded, that we should not be precluded from explaining to the court how pricing actually operated by dint of the generalised language that is used in Recital 27 and that the statements that were found by the tribunal to be helpful in Ryder that we have replicated pursuant to the order are clearly

matters that this tribunal should have reference to.

Of course, in addition to this, we do have evidence of course from Mr Ashworth and others in relation to pricing matters and of course we have the expert material from Professor Neven about how and whether there is evidence of a systematic relationship between gross list price changes and transaction price changes.

Of course he is not giving evidence in relation to mechanisms, what he is looking at are outputs in relation to these issues, and it is not clear to me that anything there is being suggested that that material should somehow be excluded either, although it is all going to the same issue about the relationship between gross list prices and transaction prices and the changes in the two.

So those are our submissions in relation to 27 and 47, which were the key points that Mr Ward relied upon. After the short adjournment I was going to deal with some of the evidential matters, actually go to some evidence. I am conscious of time. I do not know whether or not it would be preferable to sit slightly late this afternoon or whether to have a shorter short adjournment, if that were possible for the tribunal.

THE CHAIRMAN: All right. We think we should have a 45-minute short adjournment. I have interrupted you

quite a lot. I understand you may be running short of time. Okay, we will resume at 1.45 then.

MR BEARD: I am most grateful. Thank you.

(1.02 pm)

(The short adjournment)

(1.45 pm)

THE CHAIRMAN: Yes, Mr Beard.

MR BEARD: Before I move on, there were just a couple of references I wanted to provide in the light of the discussion before lunch in relation to the pleadings that might be useful. There are just two passages in the witness evidence that deal with issues like the nature of list prices and so on that were being picked up. So just for your notes, Mr Ashworth, paragraphs 111 through to 128, that is {D/22/31}, is the starting point; Mr van Veen, paragraphs 40 to 41 and 92 to 95, and his statement is at {D/IC24}.

I think that it matters because it will be relevant to the considerations of the nature of list prices, how they feed into pricing and so on, but I think it will also pick up a little more on what I answered slightly obliquely when I was giving an incomplete answer to Sir Iain's question about the nature of net prices because, when I said that in the industry the term "net price" is used and within DAF the term "net price" is

used not referring to transaction prices, I think there are two things that one needs to have in mind. First of all, there are different sorts of customers and therefore you have dealers as well as end consumers. Here we are dealing with direct sales. But historically my understanding is that net prices were referred to as what the prices were that went to dealers, and there were, I think back in the day -- but this will be a matter for evidence. I am not going to give evidence on it -- there were standard discounts that were given to dealers. That broke down and in the end the way in which dealers dealt with customers became much more complicated in relation to the discounts given and so on, but net prices were referred to as being dealer prices effectively. Of course, that can be significant in all of this because --

SIR IAIN MCMILLAN: Is that the price that the dealer charged to the customer?

MR BEARD: No, it was the price that was charged to the dealer, you see. That is why it becomes difficult in these circumstances because, even though you might charge a particular price to the dealer, the dealer might then have a negotiation with the customer and then might come back and say, "Can I have a further discount?", and so on, so even then there are a range of

issues that can arise. But I refer to it obliquely and I think it is something we will come back to.

You will also see that within DAF's own systems, this notion of a net price is actually referred to, but it is not a transaction price, nor is it a list price. So I think this is something that we will pick up further in evidence.

SIR IAIN MCMILLAN: Thank you.

MR BEARD: I was going to reorganise things just slightly, if I may. I was going to deal with some of the expert material up until the next break and then I will come back to some evidential material, if that is ...

THE CHAIRMAN: Yes.

MR BEARD: With that in mind, what I was going to do was just touch on some of the criticisms of the overcharge analysis that is carried out by the experts. So obviously at the core of a great deal of the economic analysis is the consideration of the data that has been provided in order to carry out an assessment of whether there is any impact on transaction prices and, if so, how much. Of course, Mr Ward and Mr Harvey, on his behalf, rely very heavily on this both for the causation and for the quantum measure. I think it is important perhaps just to have in mind the admonition of Mr Justice Marcus Smith in BritNed in the High Court.

I will not take you to it because I can just simply quote it. It is paragraph 299 and for your notes it is in {AU/7.1/98}.

He makes the point that of course regression analyses do not allow analysts to claim a causal association. He added that, at most, it can be scope for inferring some causal effect because, of course, in a regression analysis what you are formally doing is carrying out a correlation analysis.

I realise that this is something that Mr Ridyard is more than familiar with and I step there with some trepidation, but that is I think broadly what is being reflected by Mr Justice Marcus Smith in his observations, the limitations in causal terms that one can draw from a regression.

But beyond that general point, which we will no doubt be coming back to, I wanted to highlight four problems with Mr Harvey's regression insofar as he is putting this forward and Royal Mail and BT are putting this forward as evidence of a market-wide impact on transaction prices. I leave to one side for the moment the further question of what this shows in relation to the particular claimants.

So the four points I am going to highlight are the exchange rate issue, the financial crisis, the

interpretation of the emission standard of fixed effects and Mr Harvey's before and during model.

Now, you will be familiar, I think, probably from the papers that both experts carry out an analysis using the data on a during and after basis; in other words, comparing the data during the infringement period and after the infringement period. Professor Neven also does a combination analysis, doing before, during and after. Mr Harvey does a before and during analysis, and I will pick that up at the end.

But let me deal with currency because it is this issue of exchange rates that Mr Ward spent a little time on yesterday that I want to pick up. There was an extent to which his submission was, "Well, you could have chosen to do it in euros, you could have chosen to do it in pounds, potato, pot-ah-to, as long as you put in the relevant controls you would be okay". The central problem is that if you do what Mr Harvey does, which is try to carry out the regression in euros, you have to control for exchange rates. You require a separate exchange rate control, and he does not. That means his analysis is flawed and, as I will come on to explain, he is unable to distinguish between effects of an exchange rate and effects of infringement and that identification problem flaws his model.

So just to deal with this, we take a step back and ask ourselves why do exchange rates actually matter here. Now, to answer that question, of course, we ask ourselves what are we doing with this regression analysis and why are we doing it. Of course the question we are posing ourselves is whether the prices paid by the claimants in pounds were affected by the infringement or, more exactly, there was a correlation between the infringement variable and the prices paid in pounds.

So where does the exchange rate come into this? Well, obviously, one of the factors that you need to control for in deciding whether or not there is a correlation between an infringement variable and the pricing is the costs of producing the trucks. If the prices of the trucks had correlated with their costs rather than with the infringement variable, in very simple terms and leaving everything else to one side, then the regression just is not supporting any finding of effect. So we all agree you have got to take into account the costs in the regression. So what are the costs of producing the trucks?

Well, if all of these trucks were made at Leyland and they were all dealt with in the UK, we would just look at UK cost data in pounds and no issue of exchange

rates would arise, but when trucks are partially built outside the UK, in this case in Eindhoven, the costs that are going to be taken into account will obviously be incurred in euros, in Eindhoven. The question then you have is: how do you convert those euro costs into pounds for the purposes of a regression, assessing the impact on the prices in pounds? You are just dealing with that costs issue.

Now, I will come back to that costs issue in a moment, but that is essentially what you should be focusing on. But Mr Harvey's approach is radically different from that because his starting point is to take all of the prices that are in pounds and convert them all into euros. He does so using the exchange rate that applies at the invoice date for each truck, so he is taking the prices and translating them, and that creates a very significant problem here.

Could we turn up our skeleton argument which is in bundle {S/IC3/19}, please? I am sorry, page 22, {S/IC3/22}. Now, we claim no originality in this paragraph of the skeleton because we are simply developing a point that Professor Neven developed, but it is a criticism of Mr Harvey's approach.

"... what [his] approach is effectively doing is taking the exchange rate on the date of order and

immediately and fully passing it through into the prices."

Then the rest of this paragraph explains why in particular this is a problem. It just takes an example:

"... if on day 1 a DAF [we have called it an LF 45/130. That is one of the smaller models and it is a common model that was bought by Royal Mail] had a transaction price of £22,000 when the [euro/pound] exchange rate was 1.5/1, in Mr Harvey's regression the price of the truck would be 33,000 euros. If it turned out that a second identical Truck was ordered a week later and, during that week, the Euro collapsed [so that it became a 2:1 exchange rate] the same Truck price in pounds would be 44,000 ..."

That is just the arithmetic, but what you can see is that if DAF is keeping the pound price of its truck constant, in Mr Harvey's regression, because of this euro translation, it looks like the price of the truck has vastly increased.

So when he comes to carry this regression out, he is saying that the price of the particular truck has actually changed for these purposes, using these exchange rates. What he is effectively doing is saying that DAF UK would immediately change its prices in pounds as soon as there was some kind of exchange rate

change to keep the price in euros and, he emphasises, the margin taken by DAF parent companies constant. That is why Professor Neven has referred to it as a "one to one relationship", an immediate and direct translation of pound prices into euros.

This price-changing mechanism creates two critical problems. The first I have adverted to is the identification problem. He is assuming differences in price result from the infringement when they can just be due to a lag or incompleteness of exchange rate pass-through in DAF's pricing.

The problem is particularly acute in this case because there is a correlation between the evolution of the exchange rate and the period of the infringement. So, for example, the experts agree that at the start of the infringement, that coincided with an appreciation of the pound against the euro and so, in Mr Harvey's regression, he will be looking at prices of trucks that will effectively have gone up. So the start of the infringement period, in Mr Harvey's regression, is showing higher prices for trucks, but that could just be due to the change in the exchange rate that I have just illustrated here.

MR RIDYARD: The missing piece in that jigsaw is what DAF's pricing actually did.

MR BEARD: Yes.

MR RIDYARD: The implied assumption of what you are saying is that, all other things equal, DAF's pound pricing would be sticky irrespective of euro rates; is that something --

MR BEARD: Well -- I am so sorry, I cut you off.

MR RIDYARD: Is there some evidence you can point to on that particular point?

MR BEARD: Yes, that was the second of the problems because I was going to say what you have here is a fundamental identification point being created because essentially, by carrying out this pricing mechanism, you end up with him considering effectively correlation with exchange rate changes being interpreted as an infringement. But the second problem is it just does not match what the evidence shows about the way in which DAF prices in pounds and the way that it changes its pricing in pounds by reaction to the exchange rate. So we entirely recognise that the evidence in the end depends on -- the answer in the end depends on how they treat lag rates and so on. We recognise that. But I am just dealing with the two aspects of the problem.

I emphasise that the start of the infringement coincided with an appreciation of the pound but that the other problem is that the end of the infringement

coincided with a fall in the pound. So, of course, what you then get is, in Mr Harvey's approach, prices for trucks after the end of the infringement appearing much lower in euros. So there is a danger, of course, you are then attributing the fall in prices in trucks after the end of the infringement to an infringement variable when in fact it is the exchange rate that is dealing with these matters and causing them.

So the critical issue is that, by failing to control for the exchange rate, Mr Harvey creates a substantial problem for himself in terms of identification. Just to illustrate this -- and this slightly goes to the point that Mr Ridyard was illustrating -- if we actually go to one of Professor Neven's reports at {E/62/30} -- if we could just go up the page slightly so we can just see a bit more of the text, but I will want to come back to that diagram. Thank you.

So, {E/62/29}:

"Consider Figure 3, where I report [this is Professor Neven] the price of two identical XF trucks sold before and during the infringement."

So these are actual trucks. These are not theoretical trucks. What he has done is identify two materially identical spec trucks and said, "Well, what has gone on?". He says that, "Well, look, the MLO cost,

the underlying cost in euros between these two trucks, is identical because they were assembled in Eindhoven and their costs are not materially influenced by the exchange rate".

"The invoice price of these trucks ... did not change. However, the price in Euros of these two trucks is materially different, because of the appreciation of the Pound."

So:

"Mr Harvey's before-during model would attribute all the difference in the Euro price to the infringement, while in reality this is due to the variation in the exchange rate."

So this is actually a manifestation of the issue that Mr Ridyard was just raising. What did DAF do in relation to the pricing? We know the pricing of these two XF trucks in pounds. How does Mr Harvey's regression treat it? Not that the prices stayed the same but they went upwards.

You can see this, if we just go back over the page, in the plot, {E/62/30}. You see the straight line in pounds and you see the fluctuation line of the exchange rate and then you see Mr Harvey's differential pricing of these trucks for the purposes of his regression. So this is precisely the identification problem. You

actually have an example, matching trucks, matching prices in pounds, and yet, on Mr Harvey's case, during the infringement period, that second truck would be substantially more expensive.

THE CHAIRMAN: It is DAF UK, is it, that invoices for these trucks?

MR BEARD: Yes.

THE CHAIRMAN: So it takes the profit?

MR BEARD: Well, initially it will take the profit but it percolates upwards.

THE CHAIRMAN: Right. For the purposes of DAF UK's accounts, what do they do about the exchange rate issue?

MR BEARD: I am sorry, I do not know what you mean in terms of -- do you mean --

THE CHAIRMAN: Well, it draws up financial accounts each year and --

MR BEARD: Yes.

THE CHAIRMAN: -- the invoicing is in pounds.

MR BEARD: Yes.

THE CHAIRMAN: Its costs -- do they purchase the vehicle from another DAF company?

MR BEARD: I think generally we are not talking about transfer pricing. There is one situation where I think there is a transfer pricing premium included in some of these trucks, but otherwise --

THE CHAIRMAN: Presumably there is some sort of conversion from euros into pounds for the purposes of the accounts --

MR BEARD: Yes, there will be at some point -- for the consolidation of the accounts in the parent company. Yes, I can make enquiries in relation to that, but I do not think that is --

THE CHAIRMAN: Right. It is not material.

MR BEARD: I do not think that is material to this issue. I do not think either of the experts are identifying that as the issue, so, no. I will take instructions but I do not think that is how the end term profits are to be dealt with.

We heard from Mr Ward yesterday that, because some truck pricing is approved further up the mandate chain and sometimes a comparison between the transaction price and the MLO cost in actual euros is made, that that is an indication that somehow you should be using euros. We say, no, it is not. In fact the ones that went up to full corporate approval were around 0.5 to 1% of deals, but, in any event, it does not solve Mr Harvey's problem, which is he has built a model which has a fundamental identification issue in it and it does not match the way in which the actual pricing is done for these purposes.

MR RIDYARD: Mr Beard, just to get back to the actual pricing. In this illustration, the key assumption is -- provision or whatever you want to call it -- (b) in paragraph 4.22 where he says:

"The invoice price of these trucks in Pounds did not change."

MR BEARD: It is not an assumption. These are actual trucks.

MR RIDYARD: Right, but so -- so there were two identical trucks which had the same price in pounds?

MR BEARD: Yes.

MR RIDYARD: Were they to different customers or ...

MR BEARD: I will double-check that. I do not know whether they were to different customers.

MR RIDYARD: If one was to a big customer and one was to a small customer, then the constant price in pounds could hide, if you like, an adjustment in prices.

MR BEARD: Yes.

MR RIDYARD: It would have to be --

MR BEARD: That I can see. I can see that is true. I will confirm that because I am not going to try to parse the footnotes of Professor Neven's report on the hoof, but I can confirm that. I think, in any event, even if that were a concealment, I am not sure that -- your question is going to the evidence in relation to pound pricing.

I think what this is illustrating is -- assuming that it is the same customer and it is the identical truck, then this is illustrating what the problem is that arises with Mr Harvey's approach, and that will be true even if you were to be right that it was actually a different customer and actually in other circumstances the price might have fallen.

MR RIDYARD: Yes, but -- this may be something that we can take up with the experts when we get the chance to talk to them about this, but just to flag it up, what I would be interested in knowing is what we know about DAF's pricing in pounds. Is DAF's pricing in pounds sticky, as it were, between one period and another even though the exchange rate and therefore the true cost of producing the truck or supplying the truck has changed or does DAF's pricing to a customer change when the costs in euros -- rather, the costs in pounds have changed because of the exchange rate change?

MR BEARD: I think this is what takes us into the debate that you briefly touched on with Mr Ward. The reality is that the way in which the systems work in the UK is that they deal with these matters by reference to a budget rate and the budget rate is effectively an annually set lag rate, which is what Professor Neven explains. Therefore, for these purposes, yes, that

element of the pricing is sticky, I think is the simple answer to your question.

MR RIDYARD: If the pricing is based on the budget rate and we know that the budget rate is like a historic exchange rate which is fixed for the period of the budget, then that would -- I can see why that would --

MR BEARD: It would not just be that, of course. Even if you moved away from the budget rate for certain purposes, in order for Mr Harvey's approach to be correct you would be having to constantly change your exchange rate. So even if you varied from the budget rate in certain respects, that would not render his approach sound.

The key point that is made by Professor Neven is not that it is impossible to carry out regressions in euros, that is not what he is saying, but what he is saying is it is impossible to do it accurately without controlling for the exchange rate. Mr Harvey does not do that and then says he cannot do that, so that is really the key point.

I should say -- I will not go into the material on budget rate any further, but it is not just, I think, a question of mere budget rate issues. I think there is extensive economic literature which I clearly underestimate the complexity of, which says, well,

broadly speaking, companies that are manufacturing things do not flex their pricing immediately in relation to exchange rate changes. There are some circumstances where they do.

MR RIDYARD: That would depend on the industry and on who the competitors were and what costs the competitors were facing.

MR BEARD: It does. These things are all true and that is why I do not want to underplay the complexity of the literature, but the literature does say that a lagged approach and therefore imperfect pass-through of exchange rate is the way that you would expect most manufacturing industries in these circumstances to operate, which does not come as a huge shock. The idea that you would be flexing your prices day by day or week by week just in relation to exchange rates, obviously subject to the caveats Mr Ridyard places, seems just intuitively less likely than not.

THE CHAIRMAN: Do you say that Mr Harvey could have controlled, using his method of converting the prices into euros, for the exchange rate? He says he could not.

MR BEARD: He says he cannot. I think Professor Neven says he cannot because of the problems that he has in building it this way; in other words, he built something

which requires a control and he cannot introduce it. But I will place a caveat on that response because I think that is one for Professor Neven to answer.

Sorry, Ms Mackersie very kindly said that, in relation to invoicing, it is DAF UK up until 2005 and then NV. Then it is the Dutch entity that is invoicing, but it is still invoicing in pounds. She is quite correctly correcting me that I had talked about it as the UK entity as well as being in pounds, so I am clarifying that.

Now, these are matters that obviously will be subject to cross-examination of both the experts and the fact witnesses in relation to points that, in particular, Mr Ridyard was touching upon, but, as I say, the critical problem is the inability of Mr Harvey to include a control variable in relation to this.

Mr Ward explained how Mr Harvey tries to get out of this conundrum and he says, "Well, look, it looks like, on the face of it, the exchange rate might well be driving the price -- the changes in prices during the infringement period, but when I look at it, it looks like the margins might increase during that period, and if the margins increase, then I can assume that essentially it is the infringement that is causing the problem, not the exchange rate, because otherwise the

margins would be competed away". Now, we will come back to this no doubt in cross-examination, but, with respect to Mr Harvey, that does not amount to a proper account in these circumstances. He refers to his approach euphemistically as being a "simple graphical analysis". As far as we can see, he appears to be eye-balling some squiggly lines and saying that this is something that should have happened.

There is no account of what a competitive margin might or should be in these circumstances and, of course, we know from the material available that in fact these claimants were getting very, very low margin deals indeed. So we say that Mr Harvey has built a structure on a fundamental issue in relation to the regression which is deeply flawed. It will be explored further, but his attempts to get out of that conundrum, we say, do not work.

I said I would come back to the costs issue because I said the costs do have to be fed into the analysis and, indeed, because the costs incurred in euros would have to be fed into the analysis any which way, Mr Harvey says his pass-through is not complete and immediate. I will leave that terminological debate for another day.

But that question of what exchange rate you use for

transferring the costs incurred in Eindhoven, which are euro costs, into your pounds regression, is not the same sort of problem as you would create by transferring all of the prices into euros. Professor Neven's primary analysis uses effectively the budget rate as the mechanism to translate the euro prices -- euro costs into the regression in pound prices, which, for reasons that will be clear from the evidence, is a perfectly sensible way of dealing with things. But I should also say that he carries out various sensitivities in relation to this issue as well and therefore deals with the variability of exchange rate in his analysis and he tests it against market rate, but he is focusing on the costs side, focusing on prices in pounds.

Now, I have picked up some of the points that I think Mr Ward raised about mandate structures and his suggestion that they face equivalent problems. They do not face equivalent problems. The mandate structures issue does not alter the difficulty with which Mr Harvey is faced. I will not go through Professor Neven's results. I do stress, of course, that it is for the claimants to make these points out, but, in contrast, Professor Neven's results are both well articulated and robust and show that, both for the during and after period and the before, during and after period, you are

not getting any evidence of a statistically significant positive overcharge or, more exactly, a correlation between the infringement and the prices in question.

With that I am going to move on to the next of the four topics, which is the financial crisis. Now, Mr Harvey in his approach tries to use two different variables to account for the financial crisis. He has a demand control and then he uses dummies, and I think, as the question from Mr Ridyard to Mr Ward yesterday highlighted, there is a real question why you need dummies at all in relation to the global financial crisis because, if you are controlling for demand, in other words, you are taking into account fluctuations in demand and seeing whether those might be affecting prices rather than the infringement period, it is unclear why you need another variable or factor to be taken into account, given that the global financial crisis was effectively creating very significant demand shocks. With respect to Mr Ward, the articulation of why there were other features of the financial crisis that required these further dummies is, we say, not compelling.

But leave that to one side. Let us assume there is some notion of further effect by the financial crisis beyond the effect on demand, how do you then control for

it? Well, the problem is that the dummies that Mr Harvey uses effectively exclude the key trucks for the purposes of the analysis of the infringement during the relevant years. As it has been put, I think it is that they switch off the relevant trucks for the purposes of the analysis of the infringement.

Now, Mr Ward yesterday protested that was not taking them entirely out of the analysis. We understand that what is -- that for certain indirect purposes they remain in there, but for the key question of how the trucks sold and in particular Euro 5 trucks sold during the periods -- 2008, 2009, 2010 are factored into the modelling -- those transactions are effectively eliminated from the assessment of the infringement correlation.

That, we say, is removing one-third of the data and it is doing so asymmetrically, effectively, because it is doing so during the period but not taking out any data subsequently. One of Mr Ward's points yesterday was, "Yes, but Professor Neven does something similar in one of his sensitivities", to which I think -- and we will hear from Professor Neven -- he would say, "But I am doing it consistently during and after as a sensitivity test. I am not taking a chunk of data out of the period during the infringement which can skew the

overall analysis".

It may be, just to put it in very simple terms -- if we could turn up {E/35/7}. This is in the control -- and if we could just move down, please. If we could go to page 23, {E/35/23}. So here we have a sort of scatter plot of all of the Euro 5 trucks sold in the UK during the period 2005 to 2013. What the effect of Mr Harvey's dummies is doing is effectively switching off for the purposes of the infringement analysis all of the yellow dots. Now, I am going to leave it at that non-technical level for these purposes and leave it to Professor Neven to explain the details of the problem, but what you are doing is removing essentially three years of data which you are using otherwise to compare before and after effects because all of these dots are Euro 5 trucks and therefore they are at the same level of emission standards and therefore they are exactly the data you want to be comparing before and after in any regression.

So we are not suggesting that the global financial crisis did not have a significant effect on business, it had a vast effect on business, but you cannot control for it by essentially eliminating a large chunk of the data for the purposes of the process of analysis of the infringement.

THE CHAIRMAN: This is what Professor Neven is saying it would show if you put back in what would have been excluded.

MR BEARD: Effectively, yes. So Professor Neven's approach is to treat everything as a blue dot and not have any yellow dots, but Mr Harvey, by using these dummies, is essentially taking the yellow dots out of the relevant part of the analysis in relation to the infringement. Mr Ward pointed to paragraph 3.126 of Mr Harvey's supplementary report, where Mr Harvey says, "No, no, no, they are not completely out of the analysis", but this is where it becomes more technical. For the purposes of the infringement variable correlation analysis, they are essentially silenced for these purposes.

SIR IAIN MCMILLAN: Is it Professor Neven's argument that if the yellow dots on the scatter diagram were not there, then the blue and red regression lines would be in a different place? The slope would be different?

MR RIDYARD: I think that is -- the two regression lines that are shown there, one is shown on the assumption that the yellow dots are blue and one is that they are not there, so you get a steeper line in the scenario where you exclude the yellow dots, so ...

MR BEARD: Yes.

MR RIDYARD: Both lines show that margins were lower post

infringement than during infringement, but the effect is bigger if you take out the yellow observations.

MR BEARD: Yes, and these small differences can matter, given the scales of what we are talking about in relation to the overall overcharges, which is why it is important. It actually makes -- even though, as Mr Ridyard says, the difference between the gradients of those two lines may not look significant to us, just eyeballing them, in terms of what it means for the output in relation to the analysis, it is more significant.

So I should say that, as I said, Professor Neven, as he does with a number of these things, does carry out various sensitivity analyses, but I think it is probably better just to leave that to him to discuss further. I wanted just to illustrate the key issue here, that removing the data as he has -- effectively disabling this data for these purposes has a material effect.

I will deal briefly with the last two problems that we have highlighted in relation to the overcharge analysis. The third of them is the emission standard fixed effects. So this is, when you change emission standard for a truck, so you move from Euro 3 to Euro 4 or Euro 4 to Euro 5, is there essentially a premium being charged by reason of these that otherwise would

not be being charged absent the infringement?

There are two issues here. The first is -- and again this is one where we are going to defer to Professor Neven. He actually looks at the way in which Mr Harvey approaches this because Mr Harvey says, "Well, I can recognise that in principle, when you get a new model truck that fulfils the emissions criteria, the new emissions criterion, you might get a whole load of other bells and whistles". The truck may just be greatly improved because what we see from the evidence is that they did not just change the minimum for a new truck when they introduced an emission standard. They would put in place a whole package of changes including the emission standard required technology. The question is: was that new truck such that there would be a greater willingness to pay for that truck as compared to the previous version because it has got a whole range of other attributes and that there may be a greater willingness to pay for those sorts of packages of attributes?

Mr Harvey recognises that that may well be an effect that arises, but he says, "No, I do not think that is the case. I think it is actually due to the infringement and the exchanges in relation to emissions costs". But Professor Neven then carries out some

empirical tests which show that Mr Harvey's interpretation is not correct. These are, I would say, frankly technical exercises that are carried out by Professor Neven to test Mr Harvey's analysis and Mr Harvey's analysis is found wanting.

If you want a layman's summary of the analysis, we have included at skeleton footnote 65 -- I will just provide you with a reference. That is page 28 -- the sorts of tests that are being carried out. But, as I say, I imagine these are matters for the hot tub. The reason I stress it is because Mr Ward, when touching on these issues yesterday, just did not mention this sort of technical analysis. He immediately moved to the second point, which is to do with the extent to which the new model has a range of attributes that make people more willing to pay for that truck than they did before. Mr Ward and Mr Harvey take issue with that, but I do not want to lose sight of the technical analysis that goes with Professor Neven's approach.

I should also emphasise that in this regard the fourth witness, Mr Borsboom, provides evidence of what the sort of changes are that come with a new truck model that is introduced when there is a new emission standard and the drastic technological changes that are introduced to the model and other core customer

enhancements that are brought to the truck as well.

So we will no doubt be coming back to those issues in due course, but in relation to emission standards, fixed effects is both technical analysis and these questions about evidence on willingness to pay that are critical.

MR RIDYARD: Can I ask one question there -- it is not a technical question at all -- on the willingness to pay point?

MR BEARD: Sure.

MR RIDYARD: If you had a change in a product that makes it better, so let us say it costs £5 more to introduce these improvements but you think you can charge a premium of £10 for it, so when you are talking about willingness to pay, you are saying that the customer would be happy to pay an increased margin for this product, happy to pay £10 more, even though it only cost £5 more to achieve?

MR BEARD: Yes, in simple terms.

MR RIDYARD: But what does it say about competition if the market works in that way, that even -- if it only costs £5 more, all the producers in the market are able to charge £10 more for it. In a simplistic world competitor market that would not happen, would it? The competitor price would be £5.50 more or something,

would it not?

MR BEARD: Look, there are two issues. Obviously you are talking about a doubling of margins, which I think probably is much more than we are talking about here. But I think if you ask business people -- and obviously we are providing testimony from them -- about how do you configure products in order to achieve better margins, you look at what it is that customers value more that costs you less. That is part of the way in which you go about doing your business. You are constantly looking to increase your margins.

I do not want to speak for Mr Borsboom, but what obviously DAF is doing is it is faced with these legislative changes in relation to emissions technology but -- and realises that they come with significant costs, no doubt about it, but at the same time, because it is having to reconfigure, it is looking at all of those other business opportunities for it in relation to what it can offer to customers that will be of greater value. I am not sure that is indicative of some sort of broader failing in relation to competition, nor that one could infer that from it. It depends on what you are doing and why you are doing it and what you think you can get from customers in relation to it.

MR RIDYARD: Yes, fair enough. My illustration was a highly

simplified one.

MR BEARD: I am not taking issue with that.

MR RIDYARD: But the point I wanted to ask you, I suppose, was your -- DAF's contention is that it is a competitive outcome, that margins increased for these products because they improved them -- because they were improved, even though the cost of improving was less than the increase in the price.

MR BEARD: Yes, that is what "willingness to pay" means, yes.

MR RIDYARD: You are saying that is a competitive phenomenon?

MR BEARD: Yes, that is perfectly -- given the sort of step changes that you get in the market, yes, because you are essentially -- you are getting a new product out there. It is not just a --

MR RIDYARD: I understand.

MR BEARD: I understand your question.

MR RIDYARD: Just to make clear what it is you are saying about willingness to pay.

MR BEARD: Yes, it has to be in relation to margins insofar as you identify a premia accurately through the regression analysis, and I do not want to lose sight of the technical analysis.

I am grateful to Mr Bourke. If it is of assistance

to the tribunal, Mr van Veen explains somewhat more in relation to the emissions pricing that DAF engaged in -- emission standard related pricing that DAF engaged in, paragraphs 96 to 104 of his statement, which is at {D/24}.

Sir, I will very quickly deal with the last of the four criticisms, though it is a substantial criticism of Mr Harvey, and I go back to the fact that Mr Harvey needs to make these matters out or, rather, Royal Mail does and that, although Professor Neven has put forward extensive material in relation to these issues, the burden is not on him in relation to these matters. Obviously, when we come on to questions of quantum, the burden issue is less clear, but I touched on those issues earlier this morning.

So the fourth point was the reliability or use by Mr Harvey of his before and during model. As the tribunal probably understands, the during and after modelling done by both Mr Harvey and Professor Neven relies on what is known as the "MI data set". Now, that is a very -- it is a relatively detailed data set that provides you with information at individual truck level in relation particularly to costs, which is going to be important for when you are trying to carry out this regression analysis and identifying different technical

characteristics for different trucks so that you can look at the different costs, depending on the configuration of the different trucks.

Now, Mr Harvey, as I have said, does what is called a "before and during model", and he does that based exclusively on older data set. But it is not the age of the data set that is critical because, inevitably, if you are doing the earlier period, it is going to be older. It is the level of detail in that data set that is critical. Again, this is a matter where I defer to the experts, but Professor Neven has articulated the problems with trying to use this much less granular data set for carrying out the sort of regression that you are talking about here, where you do not have the truck level information available to you. Of course, as we know, trucks and the nature of trucks vary enormously depending on their configurations and, in those circumstances, there is a real danger that what you are doing creates a significant problem for you.

Now, there is obviously the problem that arose in relation to the currency that I have already touched on because this before/during analysis is covering the period where you had the appreciation of the pound. I leave that to one side. Because the before/during model is based on this aggregated data set, the lack of

granularity will enable changes in price to be wrongly attributed to infringement variable rather than to composition of the truck mix that is being considered for the particular costs; in other words, if you have a whole bunch of much more expensively configured trucks that you are dealing with or a mix of trucks that you are dealing with, some of which have more high-spec configurations, some lower, the analysis here cannot break that down because you do not have the relevant truck level costs information.

In those circumstances, what you end up with is a significant risk that the product mix changes are correlated with the infringement variable and you are therefore not actually identifying an infringement effect; you are just identifying a change in the product mix in the aggregated data.

MR RIDYARD: That could go either way, presumably?

MR BEARD: Yes. I do not think Professor Neven is saying that he is trying to pick out how it goes, but he is looking at the robustness of the analysis. So I do not think he is trying to say he is making a prediction about which way it goes. That would not be right. But I think the question is whether or not it is robust, not whether or not it could go both ways.

THE CHAIRMAN: What he is saying is it is inappropriate to

use the before/during model --

MR BEARD: Yes, using that data set alone, because of that, yes, because you just do not have anything reliable coming out of it. The fact that it could be in either direction does not make it somehow on average reliable, I think is in simple terms --

MR RIDYARD: It is clearly more noisy. I think both the experts recognise it is much more noisy, but the question is what you do about it, given that you are interested in the period between 1997 and 2003.

MR BEARD: Of course, and, look, Professor Neven does not throw up his hands and give up. What he does is he tries to combine the data set with the later, more granular data set so that you actually can cross-refer the data in the regression, as far as I understand it. In those circumstances what he then explains is how, using the combination of all of that data, you can get more robust analyses out of it. So he is not giving up on a before period at all.

So he is engaging with the question that you have just posed, sir, which is, you know, how do you deal with this, given the level of noise, and what he has done is said, "Look, the way in which Mr Harvey has done it does not deal with the noise", and actually, because of the way he has focused only on before and during, he

exacerbates the problems. The exchange rate issue becomes more acute because you have got more noise in the data, in the before/during and so on.

I think the other passing point which I think probably is an aspect of answering Mr Ridyard's question is that, because in the before/during analysis you end up really focusing only on Euro 2 trucks because what you end up doing is comparing the particular standard, emission standard, type of trucks before and during, you end up finding that you have a very small or relatively small data set to use, and so not only do you have an aggregation problem, but you actually have a limitation on the data set, in particular the data that you have got for trucks beforehand.

So we say Professor Neven has not only explained why there are significant problems with this before/during analysis that is relied on, he has also gone away and tried to overcome that noise as best as possible by combining the data with other matters. So those, in summary, are four of the key points in relation to the overcharge analysis.

Of course, the importance of this is -- as I said at the outset, it is for Mr Harvey and Royal Mail to explain this. This is the core of their reasoning in relation to not only the existence but the level of

overcharge here, and what Professor Neven explains is that actually, if you do these regressions properly, robust analyses suggest no overcharge that is of statistical significance.

MR RIDYARD: Just one other point before you move on to the next topic. One thing you have not touched on but I thought you might have been about to talk about earlier was the fact that the regression analysis deals with the UK market as a whole, whereas what we are interested in here is the prices to Royal Mail and BT. Clearly, they are not a typical customer, they are one end of the spectrum in terms of customers, so do you have any comments about whether the UK-wide analysis of pricing is informative to the question that is in front of us?

MR BEARD: I think both experts recognise that market-wide analysis can be informative, that is undoubtedly right, otherwise we would not have embarked on it. Obviously, when Professor Neven is getting a result out of the market-wide analysis that is suggesting there is not an overcharge, the need for some sort of more refined analysis in relation to these particular claimants does not appear necessary or appropriate and, as I say, the burden is not on us.

In relation to Mr Harvey, yes, it will be part of

the submissions we will make and it is a point I have been picking up all the way along, that the burden lies on them not only to show that there is a market-wide effect but it is actually an effect to them. They are the claimants, that is what is required to be shown and that is not being done by this in and of itself.

MR RIDYARD: Okay. I understand you do not agree with Mr Harvey's assessment of the cartel effects, but do you think, if that were right, that it would be wrong for Royal Mail?

MR BEARD: Even if it were right that that actual level of overcharge was wrong for Royal Mail, well, there may be, yes, a range of reasons why that would be the case. Indeed, what I was going to touch upon was some of the dynamics of the contract changes that have actually occurred in relation to them in the face of changes in gross list prices towards the end of this afternoon.

MR RIDYARD: Thanks.

MR BEARD: I started with overcharge because that is the essence of Mr Harvey's case. I think we also then need to deal with the questions about theory of harm and what has been referred to as "plausibility". Mr Ward has been somewhat scornful about the idea that anyone could contemplate suggesting that there is not a plausible story of adverse effect in circumstances where there is

an object infringement. We got the gist of that from his submissions.

Now, I will not go back to what an object infringement actually requires in law and what is being found there and I will not reiterate the point I have made many times that what is critical to these questions about theory of harm and plausibility is that the effect we are identifying has to be in relation to transaction prices, whereas the infringement is focused on gross list prices and emissions costs matters.

Plainly, analysing the economic framework and the theory of harm is important not only for issues of causation but also for issues of quantification and for considering, as Professor Neven rightly puts it, as a complement to any regression analysis. So we see the theory of harm analysis as potentially having a number of roles here.

When it comes to actually identifying what the theory of harm is that Mr Harvey puts forward, there is a degree of vagueness about exactly what that theory of harm might be. Mr Harvey talks about his theory of harm, which is broadly that the defendants received information which they would not have had without the infringement and that they might therefore have taken different decisions. Well, we can see that that in and

of itself is a theory of difference, but, going back to the point that was touched on earlier, what we are interested in here is whether or not there is an adverse effect, not just an effect.

He says that all that is required is that it is plausible that there was some kind of adverse effect in relation to customers. We say that is not enough. But then he also talks about certain potential mechanisms by which the infringement might have had an effect. Now, we do not accept that this story works or the various stories that he appears to start telling work. This general story, this sort of instinctive, "Well, there must have been some kind of softening of competition" story, in and of itself just is not sufficient. The real question is whether the sort of information sharing that occurred here in this case likely adversely affects customers at all and, if so, how it could do so to the extent that Mr Harvey is suggesting.

Now, in order to look at the economic framework, it is perhaps just worth taking a brief step back. The Commission has issued guidelines long ago on concerns about horizontal cooperation agreements. If we could turn those up, they are at authorities bundle {AU/2.17} and if we could go to, I think, page 13 in that, {AU/2.17/13}.

These sections that just for your Lordship -- I am sure Mr Ridyard is very familiar with these, but the European Commission issues notices of various sorts to assist in the interpretation of law but also to give guidance as to how it is going to treat matters for the purposes of subsequent investigation and so on.

You will see at the top there:

"The purpose of this chapter is to guide the competitive assessment of information exchange. [It] can take various forms ... data can be directly shared ... data can be shared indirectly through a common agency ([or] a trade association) or a third party such as a market research organisation ..."

What it goes on to talk about is that -- if we go just down to 59, it talks about a range of sorts of information exchange, and then it says:

"... communication of information among competitors may constitute an agreement, a concerted practice ... with the object of fixing ... prices or quantities. Those types of information exchanges will normally be considered and fined as cartels."

So obviously that is the territory we are in here. So we are not cavilling at the idea that European law says that information exchange cannot be caught.

"Those types of information exchanges [it is

important to note] will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel."

So it goes into the monitoring.

Then if we could just turn over two pages to page 15, {AU/2.17/15}, you will see at the top it says "Main competition concerns". So this is what the Commission is saying are the main competition concerns pertaining to information exchanges. It is paragraph 64. Then it has two sets of concerns. The first is "Collusive outcome":

"By artificially increasing transparency in the market, the exchange of strategic information can facilitate coordination (that is to say, alignment) of companies' competitive behaviour and result in restrictive effects on competition."

So this is information exchange facilitating coordination.

"This can occur through different channels.

"One way is that through information exchange companies may reach a common understanding on the terms of coordination, which can lead to a collusive outcome

... Information exchange can create mutually consistent expectations regarding the uncertainties ... On that basis companies can then reach a common understanding ... of coordination of their competitive behaviour ..."

Now, you might say, "Why are you reading this out? This is surely all against you. This is the sort of thing that suggests there is something terrible is going on here". I am doing it because collusive outcome and, further down the page, the alternative that is set out is "Anti-competitive foreclosure". Now, we are not concerned with anti-competitive foreclosure, that is keeping others out of the market by engaging in information exchange. That is just not relevant. What we are interested in here is what the economic framework for considering problems of information exchange are.

What this is saying is, yes, they can create real problems by enabling coordination as a primary focus. It is not saying, "We contemplate no other mechanism". But when it comes to the economic framework that we are dealing with, what it is importantly emphasising is that collusive outcomes, coordination and alignment, which in this context would mean coordination and alignment of transaction prices, is the paradigm case of problem in relation to information exchange, when you are thinking about it from an economic point of view.

The reason why --

THE CHAIRMAN: So this is not that case? Sorry, you are saying this is not that case?

MR BEARD: We are saying that that is not what happened here and that Professor Neven goes off and tests this. That is what we are saying because the work that Professor Neven does in his plausibility theory of harm report is looking at whether or not there is a plausible theory of coordination, alignment, on transaction prices.

THE CHAIRMAN: We just do not know, do we?

MR BEARD: Sorry?

THE CHAIRMAN: We do not know what the effect of the information sharing was in this case?

MR BEARD: Well, that is what Professor Neven is looking at because that is what he is testing. There are two aspects to the analysis that Professor Neven engages with. If I can just turn over the page to page 17, {AU/2.17/17}, the guidance says:

"Companies are more likely to achieve a collusive outcome in markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric. In those types of markets companies can reach a common understanding on the terms of coordination and successfully monitor and punish deviations."

So what is being said here is that for that -- whether or not your collusion might have an adverse effect and be problematic will depend on market characteristics. So what I am doing here is just setting out how the Commission thinks about the overall framework of problems with information exchanges because it also accepts, and it is well accepted, that information exchange may not have adverse effects on competition at all.

But if we go to Professor Neven's report, if we could pick it up at {E/10} and if we could go to paragraph 2.4, which is I think on page 6, {E/10/6}, you will see what Professor Neven is doing here:

"My assessment of the plausibility of effects stemming from the infringement with respect to list prices is a useful complement to the econometric analysis of effects that is presented in the [overcharge analysis] ... Indeed, there may be a concern about causality when identifying effects in the context of an econometric estimation. Even if a robust conditional correlation can be estimated between transaction prices and the infringement, whether higher prices could be thought of as 'caused' ... can be usefully informed by additional evidence. This is particularly the case when the effect ... is clustered around zero and/or when its

statistical significance may depend on technical assumptions. An assessment of plausibility requires both the formulation of a theory of effects and an empirical validation of this theory in the particular circumstances of the case."

So what he is doing is saying, "Look, regression analyses, even if they are perfectly specified, you want to make sure you are putting them in context in relation to a theory of harm. When I carry out an analysis of a theory of harm, I need to think about how to formulate a theory of effects and then think about how to test it".

What he identifies then in section 3 in his report, in particular at 3.3, which is on page 10, {E/10/10}, is that, in the context of the coordination concerns, which are the ones that have been identified as the paradigm concerns for information exchange by the Commission, there are some particular problems that arise. So if you are thinking about the economic framework that the Commission has built from analysing information exchange, he then says, "And there are some particular problems". The first is the implementation problem; in other words, unless you have got transparency so that competitors can monitor one another, people cheat because they have an incentive to do so. If you cheat,

that undermines the putative effect of any information exchange agreement or cartel.

THE CHAIRMAN: Unless you assume that all your -- all the others are cheating as well.

MR BEARD: No, you hope everyone else is not cheating, but as long as they are rational operators, then the danger is that people do cheat.

You see how that works, that you can get a knock-on effect because everyone thinks that everyone else is cheating, so they all say, "We will agree to do these things", and then in practice, if they cannot be spotted, then they cheat. If you can be spotted, it is different because then there may be all sorts of social or other economic punishment --

THE CHAIRMAN: If you know that you are cheating and you think everyone else is cheating, how does the cartel continue for 14 years? I just do not understand that.

MR BEARD: Well, you may get a situation where some people are cheating more than others, for example, because you have no monitoring. You do not know what other people are doing. That is what --

THE CHAIRMAN: Everyone knows that there is no way of monitoring it so it breaks down immediately.

MR BEARD: Well, in practice it may mean that there is not any effect in relation to these things. That is the

problem. If you are asking whether or not the exchange of information in relation to gross list prices enabled a coordination of transaction prices, you have a fundamental problem in relation to the theory of harm here. Because there is not transparency, everyone can cheat, which would be perfectly consistent with a regression outcome that says, "Actually you are not seeing an overcharge here in relation to transaction prices".

So if you take the paradigm case that the Commission is putting forward for the concerns about information exchange, what Professor Neven is doing is saying, "Let us look at this economic framework. How does it actually work in relation to transaction prices here given what we know in relation to the infringement?"

MR RIDYARD: But, Mr Beard, there is, to put it at its mildest, a bit of a puzzle as to why you would carry on doing this for 14 years if you thought it was not working.

MR BEARD: Well, I understand that and it was a point that was raised earlier. As I say, that issue as to why it would be that you would carry on exchanging prices, whatever you think might be being done -- obviously all companies want to get as much information as possible, there is no doubt about that, and they will want market

information if they can get it. If they can get information about rivals' conduct, they are interested in it. There is no doubt about that either. They may think that it provides them with some kind of strategic benefit in relation to these things. Whether or not that has any impact elsewhere, I do not know.

I am interested in whether or not there is an impact on transaction prices, so whether or not it is delusion, intention that is not met or in fact it has some sort of benefit to them more broadly that is not fed through into transaction prices, I can be entirely agnostic about because all I am concerned about is whether or not there is an impact on transaction prices here because that is what matters for this case.

But I am not trying to answer your conundrum. It is the same conundrum as I said the Spanish court looked at and I said that this is a sort of cosmic question that I do not think I am in a position to answer and in those circumstances I am going to focus on what I can deal with, which is the evidence in front of me and the analytical approach that is to be adopted in relation to these matters.

But, in any event, the point I am making here is what Professor Neven is trying to do is apply some sort of rigorous economic framework and analysis and what he

is doing is identifying, "Well, look, if you are talking about coordination on transaction prices, you have these fundamental implementation problems", and he also picks up, further on, at 3.6, just over the page, what is called the "agreement problem", which is how do you work out what your focal point of coordination is because, if you have got diverse products, it is actually very hard to work out what the focal point is.

Now, at one point there was a debate between the experts, where Mr Harvey was saying, "Ah, but Professor Neven is trying to be too granular, he is trying to focus on particular models of truck, particular specifications of truck", and Professor Neven has explained that he does not test these things on that basis of, you know, are you talking about one particular truck with a whole set of options. He is talking about types of truck when he is talking about focal points and the agreement problem that arises.

So, in any event, what he is trying to do is look at the economic framework that has been previously applied and what are the problems that arise here. He then follows on by looking at the market characteristics, just as the Commission said was appropriate in relation to information exchange cases. You see that at page 15, {E/10/15}. There he works his way through and I will

just provide you with the references.

If we go to page 19, {E/10/19}, he looks at the transparency of the market in terms of the transaction pricing. Then if we go over to page 21, {E/10/21}, he looks at the number of competitors in the market. Over the page at 22, {E/10/22}, he looks at the degree of complexity that exists in relation to products. At 23, {E/10/23}, he looks at the degree of asymmetry in the market. Then he also looks at the degree of market stability, which is at 25, {E/10/25}. Now, these are all factors which the Commission in that guidance was saying, "These are things you need to take into account when you are thinking about whether or not the market is going to be susceptible to some sort of coordination".

THE CHAIRMAN: This is all on the assumption that there was that sort of coordination.

MR BEARD: The collusion involved some sort of coordination on pricing, but --

THE CHAIRMAN: We do not know that. All we know is that there was market -- there was sharing of information.

MR BEARD: We know there was sharing of information and what we are asking ourselves is, within an economic framework, is there a structure whereby, given what has been identified as the infringement, we could expect that there might be an adverse effect on transaction

prices, and in doing that, you look at the characteristics of the market because they will make it more or less likely that such coordination is possible in relation to pricing.

THE CHAIRMAN: But coordination assumes that there is some sort of agreement between the participants as to how prices are going to be fixed or whatever.

MR BEARD: Well, that is the agreement issue that is raised, yes, and obviously that is not what the infringement is finding here because the infringement is not to do with transaction prices.

THE CHAIRMAN: But that is what he is assuming for the purposes of this analysis, is it not?

MR BEARD: No, what he is testing is whether or not -- given the nature of the infringement, if a paradigm example of information exchange infringement is to create coordination, how does that work when you are talking about coordination of transaction prices. What he is pointing out is the characteristics of the market are not conducive to that.

THE CHAIRMAN: What I find difficult about this is because we just do not know the actual facts. We are having to make assumptions as to what was the nature of the agreement between the cartel members.

MR BEARD: No, I do not think we are having to make any

assumptions about that. We have the decision that Mr Ward is so heavily relying on as to the nature of the agreement and it is --

THE CHAIRMAN: The agreement was to share information.

MR BEARD: Yes, share information on gross list pricing. Yes, we have that.

THE CHAIRMAN: We do not know anything about any agreement to fix prices.

MR BEARD: No, that is not what Professor Neven is doing. He is asking whether or not the characteristics of the market that exists for trucks actually bought are such that you could expect or believe that there would be an adverse effect due to that infringement in relation to gross list prices. That is what he is asking about. He is asking about: are the characteristics of the market effectively conducive to the passing-through of some kind of adverse coordination arrangement in relation to transaction prices? He is concluding that does not work because of the -- or, more exactly -- I do not want to overstate his position -- that the market characteristics are not such that any sort of stable coordination of transaction prices would be likely to be expected here. So he is testing, looking at the characteristics downstream, whether or not these gross list price exchanges are problematic.

Just turning over the page to 28, {E/10/28} -- I just put this in the tribunal's mind for the moment -- if we could just go down to the lower plot, you ask about whether or not cartels were effective. If you are Iveco, who is the green dots there, during the period of this infringement you see a massive loss in market share. This is illustrative of the instability of the market and it is a pattern of change which is entirely consistent with, at a transaction level, matters operating competitively.

THE CHAIRMAN: They were the only ones not cheating perhaps.

MR BEARD: We suggest everyone else is competing vigorously, so I will take that.

THE CHAIRMAN: Anyway, we ought to have a break. Is that a convenient time?

MR BEARD: That is a convenient moment, thank you.

THE CHAIRMAN: Right. Quarter past.

(3.05 pm)

(A short break)

(3.19 pm)

MR BEARD: I am just going to briefly finish off in relation to introducing Professor Neven's theory of harm material. I just want to be clear, when I am going back and looking at the market characteristics and indeed his empirical analysis and when he is looking at the

economic framework, it is not critical whether or not it is information exchange or a price fixing agreement or a notional concerted practice. None of those things matter. All that is critical in relation to this analysis is that difference between the infringement being at the gross list price level and an assessment being required in relation to transaction prices. That is the key issue here. It is not the modalities of the higher level infringement that are critical. It is because that infringement is concerned with gross list prices that is most important in relation to the issue of the market characteristics and their relevance.

Now if I could move on to his empirical analysis, which is at page 32 in the document that we have up on the screen, {E/10/32}. Here I will deal with it very briefly because inevitably this is going to be a matter that is the subject of cross-examination and indeed no doubt considered in the hot tub. But what Professor Neven has done in relation to the data available is considered whether or not there is a systematic relationship between changes in list prices and changes in transaction prices because, obviously, the infringement is about communicating or agreeing movements in gross list prices. The question is: do those feed through in relation to transaction prices?

More particularly, what he studies here is: does the level of change that occurs in relation to a gross list price feed through into transaction prices on some sort of consistent basis?

Of course, for these purposes, you can be as Machiavellian as you like in relation to the causes of the gross list price changes. One can assume that one has a strong agreement and everyone is agreeing to change their gross list prices. The cause of those changes do not matter for this analysis.

Now, obviously, Professor Neven is not saying that the gross list prices were actually changed by the information exchanges, but he is being agnostic in relation to that and then asking whether or not there are changes in transaction prices flowing from those changes in gross list prices or, more particularly, whether there is a systematic relationship between the two.

I am not going to go into the details of his analysis, but I do just want to turn on to page 40, {E/10/40}.

THE CHAIRMAN: Is that redacted?

MR BEARD: I think it is. I do not know if you are able to go to {E/IC10}. If you are not easily --

THE CHAIRMAN: This is in the outer confidential or inner

confidential?

MR BEARD: Inner confidential expert reports, {E/IC10/40}.

THE CHAIRMAN: Figure 6 is that?

MR BEARD: Yes, figure 6. It is a very simple point that I just want to identify from this, which is what you are seeing is the average list price being the blue line -- sorry, I will just pause in case Sir Iain... (Pause)

THE CHAIRMAN: All right. We are there.

MR BEARD: Great. I promise I will not go to any more confidential diagrams. Well, I hope. I was going to go to a couple but I will just refer to this one. What it is looking at is the evolution of a chassis price over time and what it is doing is looking at the average list price, which is the blue line and the average transaction price.

Now, bearing in mind what we are talking about here is an information exchange or an agreement or some sort of price fixing in relation to list prices, gross list prices, what you are seeing is increases in those list prices over the period from 1997 through to 2002 and yet falls, consistent and substantial falls, in relation to the average transaction price, so you are getting a vast divergence.

Obviously, that is just a snapshot and Professor Neven's analysis is carrying out much more

sophisticated analysis, but what he is indicating is that you do not have the sort of mechanisms here that Mr Harvey is generally talking about. There is a reference to a Professor Harrington, who is not a witness in these proceedings, and other sorts of references to mandate structures and so on that Mr Harvey makes, but whatever the mechanism you are talking about, you are not seeing any sort of systematic change in transaction prices when you have changes in list prices.

THE CHAIRMAN: Can I just ask what the list prices were? Were they UK list prices or were they --

MR BEARD: Yes, this is all UK.

THE CHAIRMAN: So there were separate UK list prices in pounds?

MR BEARD: Sir, there were always separate UK list prices in pounds. Up until June 2002 the UK list prices were set by DAF UK. Afterwards, the UK list prices were set in pounds but they were set by DAF NV.

Now, I am not going to deal with Dutch judgments and German judgments. I will make two remarks about those that Mr Ward relied upon as suggesting that Professor Neven's reports had been rejected. They do nothing of the sort. The Dutch judgment was an interlocutory judgment and the matter is still

proceeding and further evidence is going in. The German judgment was an appeal judgment that resulted in a remittal and someone explained to me last night what was going on in terms of the German procedure and it was not something that I thought I needed to trouble the court with further.

If you are going to look at any foreign judgments, we would say the Spanish judgment that actually carries out an analysis of matters pertaining, for instance, to the characteristics of the market and frameworks of theory of harm is the Oviedo judgment, authorities bundle {AU/12.5/86}, and in relation to the characteristics of the market and so on you will find that at paragraphs 173 to 185, but I am not going to, in the time available, take you through that.

But Mr Ward reaching for strike-out judgments or interlocutory procedural judgments in other jurisdictions is not finding solace in relation to his objections to Professor Neven's indication that one needs to look at the economic framework and actually analyse the theory of harm rigorously and test it, which is what he does in his reports.

With that, I am going to move on to evidence, if I may. Having regard to a question that was raised by Sir Iain yesterday about how the contracts worked and so

on, what we have done is we have looked at some contracts with these claimants and what we have tried to do is look at how the contracts developed and what was going on in terms of the evidence we have about the infringement as well and then think about how the pricing worked, so we can get a bit more context on the material, some of which Mr Ward referred you to.

Now, we have taken the first example by looking at a CF85 truck or type of truck in relation to Royal Mail. This is a contract that is identified in our skeleton argument, if we could go to {S/5/2}. If we could just move down slightly, please -- I am sorry, I misread it. Would you mind going back up to the top again, please?

We are looking at contract number VEH397026 and it was a contract that originally started on 20 June 1997, and you will see the types of truck involved are a CF FT85.330, 340 and 380. Those latter numbers are indications of horsepower, so 380 is a bigger, more powerful truck than 330. The emissions standard is Euro 2.

Now, it is worth perhaps just turning up the contract itself, if we could go to {I1/11/1}.

THE CHAIRMAN: It is actually linked in the actual document.

MR BEARD: Yes, we have built links in. I credit those behind me for that. It helps.

If we look at that document, what we see is, page 1, the front of the contract with the contract number, the overall estimated value of the contract, the start and end dates, so 1997 through to 1998, and "Contract for the supply of: Motive units". Now, "motive units" in this context just means the tractor trucks, rather than the ones with bodies, so it is the ones that would take trailers, and so these are trucks that would take trailers.

If we go on to page 5, if we could, {I1/11/5}, you will see that the truck specified here is actually an FT 85.330. At this stage there was in fact no 380-horsepower truck. You will see on the far side a price excluding VAT. So this is in fact a tractor unit and it has a sleeper bit in it, so it is in the top of the cab so you can actually sleep if you are on long journeys. You can do that. As I indicated, it is a Euro 2 truck. So that is the start of this contractual process and you will see what the price is there, 39,995.

Then if we could go to the next amendment to this contract -- I should say these trucks were for Parcelforce. We know that because it said "Parcelforce delivery" for them. If we could go to {I1/26/1}, now, this, you will see the contract number is the same

contract number and you will see the dates for it, July 1997 through to March 1998. It is signed by the same person. But this is in fact an amendment. You can see that just on the left-hand side under where it says "Motive Units". We do not have the earlier amendments but this is amendment 4 to this contract.

If we go on to page 2, {I1/26/2}, what you will see there is:

"Leyland DAF Trucks FT 85 ..."

"340" has actually been crossed out and it has been turned into "380" at this point.

The price is 40,975, so this is for a more powerful truck. It is 40,975 and this is a March 1998 amendment.

THE CHAIRMAN: On the original contract they provided those trucks, had they, 330?

MR BEARD: 330, 340, 380 had been effectively the category that could be called down, yes.

THE CHAIRMAN: That was in the original contract?

MR BEARD: Yes.

THE CHAIRMAN: This is an amendment to add in 380s?

MR BEARD: Well, I think -- in fact it looked like it was playing with 340s, but it may just be the number of trucks because what happens with these contracts is that they -- there are two ways they operate. They either operate as a generalised umbrella or they have

a specific number of trucks that are being delivered under the first period and then they are added to. So that is how these work. But I am most interested in just picking up the process of pricing here.

Now, I should note that I have emphasised the price being 40,975. This is on the right-hand side. If you go down, actually under the summing line, it looks like it is cheaper than that at 39,975, but we understand that that is not the case because this was one of the issues which -- you can see on the left-hand side "No Buy Back Option" would be minus £1,000. That is essentially saying, "If you want us to undertake to buy it back at a particular level, then it is £1,000 more expensive". We understand that Parcelforce kept the buy-back option and therefore it is the upper price that is relevant here.

THE CHAIRMAN: That is probably why a cross is next to that one.

MR BEARD: Yes, I think that may well be right. You see the asterisk next to it and then you go down to the manuscript annotation, "Option of reduction not taken...", so you are absolutely right, sir.

Overall, this is a slightly more powerful truck for a slightly lower price if you do not take the buy-back, a slightly higher price when you do take the buy-back,

as compared with the original contract.

Now, what I am going to do now is work through the contracts that were undertaken in relation to this type of truck but over a period of about eight years. Now, in order to assist this process we thought it might be helpful to set it out graphically for you so we have some timelines that we are going to hand up and then I am going to speak to. (Handed)

Sorry they are so big but it is the only way they can become legible. We had debates about format. It could have been done as a scroll but we decided that was not the way forward.

THE CHAIRMAN: If we can be provided with a framed copy?

MR BEARD: Yes, in due course, sir. There are more so you will get a full set.

So the heading "CF85.380", 1997 through to 2006, so it is nine years we are covering here. If you just look at what we have, we have obviously dates and months in yellow running along, starting in June 1997. Underneath that, in light blue, are the details of the contracts. So I took you to the first of those, which was for the 85.330 Euro 2, price 39,995. Then I have come to the contract I was just looking at, the next in from the right, price from 27 March 1998, 40,975, and I am going to just work through these other contracts, if I may,

quickly.

What we have also done in relation to this is we have included on the timeline information about salient exchanges or meetings, and those are in purple and orange boxes along the way. So purple is referring to a meeting where there was a discussion about emissions matters and orange is in relation to gross list pricing. So we have included those along the way.

Now, we are not going to say this is an exhaustive record of all infringing exchanges, but what we are doing is we are trying to highlight the key documentary material. I think we have been trying to pick adverse documents in the sense of the ones where they involve some kind of future prices in the UK or in the post-2003 period, future pan-European prices. So we will go to one or two of those documents in due course, but that is the purple and orange.

THE CHAIRMAN: The green boxes are the list prices changes, are they?

MR BEARD: Exactly. That was the next thing I was going to come to because those are not exchanges. Those are just DAF announcing. So what you have are the green -- so the green is DAF announced gross price list changes. Purple and orange --

THE CHAIRMAN: Did they announce it? Not publicly

presumably?

MR BEARD: I am sorry, yes, these are the implementation dates. They do not announce it publicly but obviously we have things like the -- they are referred to as "PIBs", but the pricing bulletins that are provided internally within DAF, yes. What we are just trying to do is show you where the price list -- the gross price list changes occurred, compare it with the contract prices and fit it with some of the material, some of which Mr Ward took you to yesterday.

So we have done the first two blue ones. If we go to the third, which is price from 18 June 1998 -- this is in tab {I1/38}, if we could. So this is the same number of contract that we have seen before, on the left-hand side, "Motive Units", "Amendment Advice No: 5", dated April -- it should be "1998". Then you will see further down:

"An Additional Quantity of:

"72 ... Motive Units ..."

Then it specifies they're 380s and some 340s. You will see, 1, it is FT85.380s plated at 32 tonnes, so they are suitable for carrying or towing trailers weighing up to 32 tonnes.

Then the next one down is slightly different in terms of their plated weight.

If we can go on -- if you look at the price at the bottom, under 1, 2, 3, it says 40,997. So in fact there has been a £22 increase in price since the previous contract. You will see that marked on the timeline.

THE CHAIRMAN: Those are the same lorries, are they?

MR BEARD: Yes, this is all the same truck. We are focusing on the FT85.380s. They are the same trucks. That is what we have been trying to do. We have been trying to effectively here take a contract for a particular truck that was bought in reasonable quantities by Royal Mail and look at what the progression of contract pricing was.

THE CHAIRMAN: There are three different types of trucks here.

MR BEARD: Yes.

THE CHAIRMAN: Are they all priced at the same rate?

MR BEARD: They are all priced at the same rate, yes.

They are all four-axle, two-steering-axle, trucks. The 340s are a slightly lower horsepower and then the other two variants on 380 are different platings for weight. I am just focusing on the FT85.380s, but you are absolutely right, there are three trucks there.

The timeline is just explaining in relation to the CF FT85.380, just to be clear on that. That is what we have in the blue box as the pricing.

Then if we move on, if we go to tab {I1/124}, again we are still under the same contract number, we are in amendment 6 now and there is an additional quantity of 102 motive units wanted.

If we then go over the page -- sorry, I am grateful to Ms Mackersie for that. If we look just down below, the "Quantity of Contract increased by actual: 102", it says:

"All other terms and conditions of the Contract remain the same."

So we are still at 40,997 here. That of course is the price staying the same for these trucks, notwithstanding all that had been going on above the line, as one might put it, previously, including discussions that form part of the basis for the infringement finding. For example, we know that in July 1998 there was a meeting attended by Mr van den Assem in Brussels, 3 July 1998.

If we could just go to that document just to remind the tribunal, {I1/41}. Mr Ward took you to this yesterday, but what you have there is an exchange occurring which Mr Ward relies upon. We see there is also a DAF UK increase in price in September 1998 but we are not seeing any change in the price of these 100 trucks that are being ordered by Royal Mail under

amendment 6.

THE CHAIRMAN: This is the one that said "network net prices" (inaudible) in the UK?

MR BEARD: Yes. It is not making any difference to the pricing to Royal Mail here.

Then -- I do not know whether I need to go through all of these, but you then see there is a further amendment, number 7, which is the start of the next row, which was in -- a price from June 2000. The price stays the same. But you will see below that -- in around September/October you will see that there was a new tender submission made by DAF for CF FT85.380s. I will just pick up the tender submission so you can see it.

If we can go to {I1/122}, so you will see -- if we could go down to the next page, please, {I1/122/2}, and here we are. This is all part of the tender submission but, again, it is for FT85.380s, 4x2, Euro 3, and that is part of the reason perhaps why there was tendering done because we are moving from Euro 2 to Euro 3 here. Then also for 85.430s with six axles. "6x2" just means six axles, two steering.

If you look at the bottom of the screen, you can see the price that is being tendered for those trucks, "FT85.380 CF Euro 2 or Euro 3 Sleeper Chassis Cab", and it is the same price for those units that we were seeing

under the previous contracts, 40,997.

So what we are seeing manifest here is a tender in relation to new emissions standards trucks of otherwise the same specification and there is no increase in price in the tender that is going in. It is just worth noting, of course, that if you go back up to the top line, you will see in the green box that there had been an indication that DAF was increasing its list prices by 2%, and that has not affected either the contract amendment number 7 nor the tender submission in relation to these matters and it certainly has not been affected by any of the meetings that Mr Ward was referring to yesterday, and I will just give you the references.

He referred to the meeting on 6 April 1998, where there was a discussion about the range of prices, additional charges, for Euro-3-compliant trucks -- that is actually the first purple box on the timeline. Just for your notes, that is {I1/29} -- nor is it affected by the 3 February meeting in Amsterdam, which is at the far right-hand side of the top line, where there was a discussion of Euro 3 pricing. You recall that Mr Ward went to the agenda for that, {I1/291}. So not only was DAF just holding its prices in the face of gross list price changes that it was making, it was holding its prices even in relation to the changes in emissions

standards.

Now, if we then go on to the actual contract which DAF won following that tender, that is at {I1/169}. You will see the contract start date is 30 April 2001, which is how we have started the blue box under May 2001, and if we go down to page 4, {I1/169/4}, you will see there in manuscript that the basic cost for the 4x2, so this is the four axle, two steering FT85.380s that were being tendered for, 40,997, so that is the same price.

In fact you get a discount if you do not go for a buy-back and we understand that in this case Royal Mail did not go for the buy-back, so in fact the price of the truck actually fell. So you got a new model after a new tender and the price actually fell. This of course is around the time when DAF is introducing a new list price change, as indicated in the green box.

Now, this contract had a term of one year to April 2002, with the capacity to extend it for up to 24 months. Now, on this timeline we have an empty blue box, you will see. We cannot find quite what happened in relation to that period because, in theory, the contract came to an end and then there is an amendment to it that is entered into in August 2002, so we assume actually people just let that drift.

But you will just see above the line two things. First of all, on 20 May 2002 there was a DAF European list price increase and in June there was the introduction of European list prices more generally into the UK. But if we go to that further contract in 2002, it is at bundle {I1/278.5} -- and again same contract number that the tender had been won on -- if one goes down to the next page, {I1/278.5/2}, you see the prices there have actually fallen, so they are now 38,325 for this Euro 3 FT85.380.

Just having in mind the fact that those two green boxes above the line preceding that amendment, May 2022, this was, as it says there, an increase of 3% for CF. Then in June 2022 --

THE CHAIRMAN: You mean 2002?

MR BEARD: I am so sorry. I do mean 2002. I am so sorry -- June 2002, when European list prices were introduced, Mr Ward took you to a document that was written by Kerry McDonagh, yesterday. Just for your notes -- well, we can go to it. {I2/482.1} if we may. You will see there that in relation -- midway through those figures, F65-85, plus 3% general price increase, so you had two list price increases in May and June 2002 and yet the actual price in the amendment falls for these trucks.

Then if we go on, you can see during the period of

that contract there is another beige submitted tender document that you can see in April 2003. The invitation to tender is found at {I1/290.4}, so that is the invitation to tender being put out in relation to heavy vehicles.

Then if we go on from there to the contract which was in fact won, that is at {I1/312.31}. So this is the contract dated 8 August 2003. If we could just go to page 9, {I1/312.31/9}, the penultimate column there -- I do not know if you can read it -- is "4x2, DAF, FT CF 85.380", and although the chassis price is 30,301, if we scroll down, we will see the bottom price there is £35,050, which we think is the relevant comparator here.

Now, that is another decrease of 8.5%, so it is the same truck, same emissions standard, 8.5% drop in price. That is notwithstanding that we see on the timeline, April 2003, a 4% list price increase on chassis and options.

THE CHAIRMAN: What is happening to the exchange rate over this period, do we know?

MR BEARD: Yes, we do know what is happening in relation to it but we have not mapped it on to here. What we are trying to do is just show -- we are not trying to control for everything. That is obviously what Professor Neven does. What we are trying to do is just

show you through documents and put some of the documents in context because the next one I want to come to is actually the document on 1 December 2003, which is known as "the Castle Coombe meeting". {I6/127}, please. This is the one meeting that we know of in the UK which DAF had a representative at, at which there were discussions of confidential matters. You will remember it signs off with "The dinner and wine was very nice".

On pricing, though, Mr Ward rather skipped through some key aspects of this. "Pricing" -- he read the first paragraph talking about what Volvo was going to do.

"DAF indicated a price increase, prior to the Show, of 3%."

That has obviously not been reflected in what is going on here.

"The general consensus was that prices would rise, on average next year, between 5 & 6%.

"Horror stories were indicated. [One of the attendees] accused [someone] of selling 7.5-tonners [so the smallest type of truck] for £15,000 ... Equally the meeting discovered that ... Volvo and Mercedes had ... been selling 4x2 340s bhp [tractors] for £32,000 ..."

So when they are talking about "horror stories", it appears to be low-price horror stories so far as they

are concerned; in other words, we are in 2003, this is six years into this supposed pervasive and comprehensive cartel and the one meeting we have is people saying it is a nightmare.

THE CHAIRMAN: Well, they are accusing them of cheating presumably.

MR BEARD: Well, they are horror stories so far as they are concerned.

"The meeting agreed that large operators were completely manipulating Manufacturers and that prices in the UK are far too low. Everybody agreed that prices were lower today than they were 6 years ago."

Now, we can see on the timeline that later that year, 5 April 2004, DAF published internally a 3% list price increase, but then we can also see from this contract in August 2004 an extension and amendment 2, that in fact prices were not going up for Royal Mail in any substantial degree. They were going up £40.

{I1/363.2}, if I may. Now, I have skipped over, given the time, an interesting exchange of emails where there are pleas on behalf of DAF to push prices up that are all just rejected by Royal Mail, but we see here in this contract, on page 7, {I1/363.2/7}, if we go down to the bottom of that page, if we may, ex VAT £35,090. So we have the Castle Coombe meeting, we have an announced

price increase and it is making no difference to these prices at all.

Then if we go on, we can complete this. We see two more price increases being announced, 3% in 14 February 2005, 2.5% in 5 September 2005 and the final contract in this run is then at a 0% increase in price in relation to these arrangements -- I think that is {I1/425.1}, please -- so zero change.

Just to complete this, if I could go back to {I1/376T}, you will recall these as being the translations of the German emails that Mr Ward showed you yesterday. What those show, Mr Ward was saying, was that DAF shared information about a planned list price increase of 3% to take effect on 1 April 2005. Now, in fact the increase happened in February 2005, but the critical thing here is that it does not matter when that price increase occurred, whether it was February or April or another time in that year, it made no difference to the prices that were being paid by Royal Mail in relation to these trucks.

Now, this model of truck was then phased out after Euro 3 so we have to stop the contracts there, but what that timeline illustrates very clearly is the disparity between the reality of what is going on with the actual prices being charged to Royal Mail and what is happening

with the gross list prices which are being moved up.

It also indicates, going back to Sir Iain's question yesterday, about the longevity of some of these contracts and how they were effectively fixed prices and renewals over long periods because we have looked at essentially three rolling contracts here in relation to this period.

I am going to, if I may, hand up two further timelines. I am not going to speak to them in the time available in any detail, but can I -- I have one in relation to LF 45s, which are the smallest trucks but the most numerous ones. The reason I am not going to go into that in any detail is we have outlined these points in our skeleton argument. We set out various of the points in relation to these in our skeleton. (Handed)

THE CHAIRMAN: They are very useful, these, but slightly awkward.

MR BEARD: I am sorry. We will load them up so you can have them electronically, but we did try to get them in the most usable size.

THE CHAIRMAN: It is a good layout. I can see what you are doing.

MR BEARD: If the tribunal wants them in a different format, now that we have them we can play with them, but getting them to a usable legible state was an exercise.

So if I could take the smallest of them in size. That is LF 45.130s. So LF45s are the smallest. Just for your note, we have dealt with the broad history of this in our skeleton at paragraph 132, but we have done it in the same way. We have looked at the prices for the Euro 3 version. We have shown the changes in the chassis transaction price over time. You will see from the first to the second contract extension there is a fall of 13.6%, notwithstanding an announced or an internally announced price increase. You will see reference there to the Castle Coombe meeting and a further price increase which we saw on a previous timeline. But then you see what prices were then paid for chassis subsequently, and depending on whether you took the buy-back waiver, it was either a 0.7% increase or a minus 1.8% discount. But then we see the further contracts where you are getting no or negative changes in pricing.

So that is in relation to a large number of trucks. There were a lot of LF 45s that are bought and therefore we thought it was sensible to identify this, which is why we have flagged it in the skeleton argument. Obviously it runs across a period of four years, this timeline.

As I say, I am not going to go through documents in

relation to it. I was just going to move then on to the third -- the middle-sized timeline. We did not want to leave BT out of this analysis, so this is the BT timeline in relation to LF 45.150s. This runs from 1998 through to 2006, so, again, it is a long-running analysis.

Again, we have done the same format. We have included the price rise -- the gross list price rises, we have included the exchanges we have identified. What you see is our tendering process, what the initial chassis price was in early 1999 and then you see drops in price in 2002 and then no increase in price through to 2006.

So essentially you are seeing prices set in January 1999, following a tender in July 1998, turning out to be lower after seven years than they were at the start because you have a drop midway through in 2002. So if I may, might I be indulged to carry on until 4.30 or is that --

THE CHAIRMAN: Yes, fine.

MR BEARD: Thank you, because there is one other set of documents I just wanted to go to and then I will finish off with some short remarks about the other matters in relation to the case.

The third set of documents I want to go to actually

relates to the 2009/2010 period, which Mr Ward referred to as the activity in the cartel "stepping up" because there was a more formalised spreadsheet exchange of information. We have that referred to in Recital 56 in the decision, that there was a more formalised process of exchanges. I think these -- I think on the basis of Mr Ward's submissions, he probably puts these as the fullest exchanges between the manufacturers. This was obviously done between the German subsidiaries and I want to focus on two periods, one from 2009 and one from 2010.

So if I can start with the 2009 exchanges, the first document I would like to show you is an email from a Ms Ilona Rothacker at Daimler, and this is in {I2/118.3T}.

You will see on page 1 at the top -- yes, I am at the bottom, sorry.

"I wish you all a healthy and successful year in 2009.

"Please find attached the file for the above topic. I deleted the delivery times and took the price increases from the last file so that you only have to enter any changes. If I can get this back from everyone by 12 January, I'll send the full list back to everyone before my holiday (yes, I'm going again!)"

So this is early January. Ms Rothaker is essentially sending round a request for information to be filled in by the other recipients of the email. The other recipients of the email are representatives of the various manufacturers, including DAF. We do not actually have the attachment to that. She then followed up with the manufacturers, but we can probably pick it up at {I2/122.1T}.

If we could just go to page 2, {I2/122.1T/2}, this is actually an internal email within Daimler, where it says:

"Hello all, the competition seem to be getting more confident... but please note: the price increases relate to list prices."

Ms Rothaker's attachment is at I2, outer confidential bundle, 448T, {I2/OC448T}.

THE EPE OPERATOR: Is it okay to display?

MR BEARD: I do not know whether we can. I think we cannot display this so I am going to have to pause in relation to that. Given the time, I will describe the document and give you the reference to it. It is {I2/OC448T} and it is a detailed table, headed "Delivery times and prices increases". It, as the heading suggests, contains delivery and price information broken down by manufacturer.

In relation to that, what you see when you go to it is each of the manufacturers described, and then, for DAF, it says "No price increase planned for [early] 2009".

If we can go to {I2/116/2}. Can we just go up to the top of the document, please? So this is an email from Ray Ashworth to someone else within DAF and it is a DAF email. What is said there -- well, actually, let us go down to the bottom of page 2 because this starts it off. This is from Ray:

"Ron.

"For info.

"We advised the Dealer Sales Panel last week that we would be taking a price increase to be applied in four weeks time.

"Today I have written to all Dealer Principals to advise them that we will implement a 7% price increase effective from Monday 23 February 2009."

So notwithstanding what DAF communicated to the others about no price increases in January, later on in January Mr Ashworth is just saying a 7% price increase is going to be communicated.

Then if we go back to page 1, {I2/116/1}, that is then confirmed in the email because that is the announcement to the DAF network.

THE CHAIRMAN: This is all internal to DAF?

MR BEARD: Yes, but what is happening is DAF has communicated -- as per the spreadsheet that is supposed to be the sort of stepped up infringement exchange activity, it said, "We are not intending to put in place any price increases in 2009". That is what is going on in Germany. That is what is communicated between the German subsidiaries. In the UK, later in the same month, Mr Ashworth is just saying, "We are going to move prices up by 7%".

THE CHAIRMAN: Right.

MR BEARD: Then just to complete that, at {I6/108}, that is actually the product information bulletin, PIB, indicating the 7% price list change. That is 29 January 2009, indicating when it is going to start: from February. So just a huge mismatch between information exchanged in the German subsidiaries and what is actually going on in the UK in relation to the same month.

Very briefly in relation to 2010, if we could go to {I2/346.1T/2}, please:

"Hi everyone,

"Please find attached the usual query about the aforementioned topic."

The subject is "Query of delivery times and price

increase ..."

"If you want to phone me and tell me that's fine.

"Best wishes from a sunny Berlin."

So this is Ms Rothaker gathering her information again, but in 2010.

If we can go to {I2/347T/1}, here you will see a spreadsheet that was produced, and you will see at the bottom "DAF" and then "Currently from delivery date October 2010 2% planned". That is for all the varieties of trucks. That was then rolled out in a product information bulletin.

The last document I was going to take you to is also a confidential document but I will give you the reference. I can take you to a document that deals with the point without getting into some of the confidentiality, {I2/360}. So it said they were going to increase prices by 2% from October 2010, was the communication, and then what we see, 4 October 2010, we actually see in "Key Points", first bullet:

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

So in Germany DAF is saying, "We are going to be moving prices up by 2%"; in the UK in October 2010 it is dropping them by 25%. Just for your notes, {I2/IC343.1/12}, this is part of an internal

presentation where it says that DAF is the first to lower list prices drastically and the competition will be confused and have to react. That is by reference to the 25%.

THE CHAIRMAN: 25% is a pretty huge reduction.

MR BEARD: Yes.

THE CHAIRMAN: Are you saying that is decided without reference to the Germans and what is going on in Europe?

MR BEARD: Certainly it is not what was communicated. Whether or not there was -- I do not think we are saying that DAF NV would be unaware of what was going on in relation to the change of 25% in relation to list prices -- no, we are not saying that. But what was communicated by the German subsidiary to the other German subsidiaries under the arrangements that form the basis for the infringement was an increase of 2%. What was actually being done in the UK was a drop of 25%. I completely accept that it may well be the case that DAF NV knew about both of those matters but I am not commenting on whether or not --

THE CHAIRMAN: I assume a reduction by 25% would be known by people quite high up.

MR BEARD: That may well be right, but the point I am making here is a simple one, which is when we are talking about the infringement arrangements that had been identified

in the Commission decision during the period 2009/2010, it is these exchanges through spreadsheets, through the German subsidiaries, and the point I am making is it bears no relationship to what is going on in the UK. That is all.

SIR IAIN MCMILLAN: Presumably the 25%, when implemented, would be seen by the ladder of senior management in the mandate.

MR BEARD: I think if orders were referred up through the mandate structure -- because it depends on that, and I think, as Mr Habets has said, when we are talking about corporate approvals, we are talking about 0.5 to 1% -- but, yes, the extent to which that list price information would go up would be something we would have to look at in relation to corporate approval memos, so ...

So I am focused on the UK. It may well be that 25% was an EEA-wide drop, but from the UK point of view that is the important position so far as we are concerned.

The point I am making --

MR RIDYARD: Mr Beard, that raises, does it not, a question about the currency of these price changes, and that is true of the 7% and the 0% one. One was presumably in pounds and one was in euros. The 0% would have been a pan-European, so presumably Euro economic --

MR BEARD: Yes.

MR RIDYARD: The other one was a communication to the UK business, so it could be different --

MR BEARD: Yes, I think, in fact, in relation to the 7%, the evidence we have suggests that it was concerns about exchange rate issues that contributed to that, but obviously those are long-term changes. Those are not flexi prices on a day-to-day basis at all.

MR RIDYARD: No, clearly.

MR BEARD: So far from me suggesting that exchanges rates are irrelevant to what might be going on here -- they may well be relevant, but they again indicate that the reaction to exchange rates is a broader reaction than it is --

MR RIDYARD: As regards list pricing because we are talking about list pricing here?

MR BEARD: Yes, absolutely. Absolutely.

So very quick remarks in relation to bodies, SPO, financing. We will obviously pick these things up.

THE CHAIRMAN: One minute on each.

MR BEARD: Yes, one minute on each. In relation to these matters, we will pick them up in closing.

THE CHAIRMAN: Okay.

MR BEARD: Bodies, three points. Just for your notes and in response to Mr Ridyard's question, the answer to how

many -- what percentage of trucks were sold without a body is 94% of all trucks in the regression data. That is in our skeleton, tab 3 at 55. DAF actually only started to manufacture bodies in 2007. It only in fact liaised with bodybuilders in relation to two customers, Royal Mail and Morrisons. It did not in relation to any others.

Of course BT does not make any claim in relation to body so there is a slight anomaly here, that the value of commerce is said to include bodies but not BT bodies, which is a strange approach, we say, and not correct. Furthermore, what we see is that the approaches to chassis price and body is to break those body prices out and there is no indication or consideration within the decision that the bodybuilders, who are the predominant provider of bodies for the 94% of trucks and indeed many of the trucks that were sold by us with bodies, were somehow party to the infringing behaviour. Therefore, including bodies is inconsistent in relation to claimants' own approach, does not fit with the decision and does not fit with the way in which bodies were pulled together.

The Landkreis Northeim case that was referred to, the Advocate General's opinion, that really does not assist. That was a tail wagging the dog attempt to say,

"Well, we have got specialist bodies on, therefore the truck, the basic truck, should be out because it should be treated a bit like a specialist military vehicle". The Advocate General was there saying, "No, no, no. The fact that you have a specialist body on the back does not matter at all". Indeed he talks about the fact that actually the inconsistency would arise where you would be excluding trucks that came naked effectively and had bodies installed later. He picks that up in paragraphs 70 to 73. So we say Landkreis Northeim does not assist them at all and the inclusion of bodies just makes no sense.

In relation to the SPO, we will come back to these issues in some detail. The key point is that these are very heavily regulated entities and therefore it is all about the price control and the refinement of the price control. It is not some generalised question about how costs are passed through in a general business sense. It is a much more refined analysis that is dealt with there.

In relation to the reliance on Sainsbury's that was put forward, the Supreme Court in Sainsbury's made clear under heading 4 that this was the sort of claim that could be proceeded with. The references that Mr Ward made to the CAT judgment were to do with a different

type of mitigation and therefore do not assist in any way in relation to SPO.

Used trucks, which is the other form of pass-on, it is plain that a used truck can be a substitute for a new truck. They do trucking. Now, it is clear that older trucks will lack some of the efficiency and refinement and perhaps reliability of new trucks, but the idea that there is not a chain of substitution from new trucks through to used trucks is something that we say is just not a coherent position to adopt and we will deal with it through the expert evidence.

Then in relation to financing losses, I will just pick up two points in relation to the law. Starting point, Sempra Metals, you have got to prove actual lost. Weighted average cost of capital is not actual loss. Sainsbury's v Mastercard Mr Lask referred to yesterday. I do not have time now to turn it up, but it rejected the use of the WACC. It was not just on the basis of the rejection of the use of the Modigliani-Miller theorem about efficient capital allocation; it was essentially saying, "Look, Sempra says actual losses. A weighted average cost of capital is not a real cost to you. Sainsbury's did not raise equity during the claim period". The same of course is true of Royal Mail Group Limited in this case. In those circumstances, it is

plainly on point, as is the judgment of the High Court in BritNed, where the WACC was again rejected. We will not go into that in detail. We will pick it up in closing.

Mr Lask mentioned the supplemental BritNed judgment. Just for your notes, {AU/7.101}. It is just worth noting that the conclusion of the court in BritNed was simple interest EURIBOR plus 1%. We say that is the right type of interest rate that you should be applying on a simple basis in these circumstances. That applies both to Royal Mail and to BT.

As for the Multi Veste case, the use of the WACC does not appear to have been the subject of argument. It is an obiter judgment and in fact what the use of the WACC was being referred to there was in a rather more complicated analysis about how future cash flows of a particular subsidiary should be calculated. It is not authority that cuts across Sainsbury's or BritNed at all. The WACC is wrong in law and, as Mr Delamer will spell out, using WACC as interest is also wrong from an economic point of view in relation to these matters.

So those, slightly longer than three minutes, cover the four additional topics, and I refer you otherwise to our flowchart in dealing with those matters.

Unless I can assist the tribunal further.

THE CHAIRMAN: You do not want to say anything about tax?
MR BEARD: The temptation is enormous but I will resist it at this moment.
THE CHAIRMAN: Well, we are grateful to you for that.
Right. Excellent. Well done. So we are going to start with the evidence tomorrow with Mr Peatey --
MR BEARD: Yes.
THE CHAIRMAN: -- who is attending via video.
MR WARD: That is right, yes.
THE CHAIRMAN: Is that going to be at 10.30?
MR WARD: That is fine for me.
THE CHAIRMAN: Yes? So we are okay on time for tomorrow with Mr Peatey and Mr Nicholson?
MR BEARD: Our currently thinking is yes, definitely.
THE CHAIRMAN: Okay, great. Thank you very much. 10.30 tomorrow.
(4.34 pm)
(The hearing adjourned until Thursday, 5 May 2022 at 10.30 am)

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