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

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

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 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**

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**A P P E A R A N C E S**

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

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

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

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

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

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

7           MR BEARD: I am most grateful.

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

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

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

21                               Opening submissions by MR BEARD

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

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

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

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

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

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

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

1 was that employees of DAF's headquarters in the  
2 Netherlands participated in unlawful exchanges between  
3 1997 and 2004, but, for most of that period, not only  
4 were customer prices, transaction prices, negotiated by  
5 DAF UK, but even list prices, the gross list prices,  
6 were set by DAF UK up until 2002.

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

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

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

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

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

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



1 a document that does not concern DAF.

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

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

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

1 two key questions.

2 So with those initial remarks, just let me lay out  
3 how I am intending to structure submissions today.

4 I want to deal with some of the relevant legal framework  
5 and some points on the nature of the decision and the  
6 case as it is put against us. Then I want to look at  
7 some of the material that Mr Ward directed you to, but  
8 actually to put it in context and show you a bit more  
9 about what was going on at the relevant time. Now,  
10 obviously, I cannot cover the whole period and every  
11 aspect, but I want to look at what was going on with  
12 price rises, gross list price changes and contracts with  
13 these claimants.

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

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

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

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

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

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

24          MR BEARD: No, it is not. {AU/3.9/1}, can we try that?

25          I am so sorry. {AU/3.9/19}. Thank you, 82:

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

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

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

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

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

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

1 effects ...

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

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

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

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

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

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

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

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

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

1           that that has caused?

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

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

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

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



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

4 Then:

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

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

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

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

24 SIR IAIN MCMILLAN: Thank you.

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

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

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

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

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

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

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

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

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

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

23 MR RIDYARD: Yes, understood.

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

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

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

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

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

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

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

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

1 a different infringement to infringement by effect?

2 MR BEARD: Yes. Sorry, we have not put in all the

3 background case law, but could we dig out --

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

5 MR BEARD: No, I will not go through the background case

6 law, I was actually going to pull up Article 101 itself.

7 {AU/31}, if we could.

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

9 MR BEARD: No, no, absolutely not.

10 So this is Article 101, ex Article 81:

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

1 direct link and that would still be an object case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 Breaches of statutory duty.

25 Then there is a discussion of Mallett v McMonagle,



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

5           THE CHAIRMAN: This was in the Chancery Division then.

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

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

14          THE CHAIRMAN: Paragraph 12?

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

1 is the gist of damage.

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

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

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

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

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

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

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

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

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

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

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

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

1 infringement, no doubt about that.

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

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

25 So he is just making life hard for himself by trying

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

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

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

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

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

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

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

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

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

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

25           The reason I emphasise it is because there is



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

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

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

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

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

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

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

25 THE CHAIRMAN: Is this the first instance decision?

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

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

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

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

15 THE CHAIRMAN: I think it is page 17 actually.

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

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

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

25 MR BEARD: Okay. I can move on.

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

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

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

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

23          Then it says:

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

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

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

8 Then if we carry on to 120:

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

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

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

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

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

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

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

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

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

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

1           restricting, preventing or distorting competition."

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

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

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

17       THE CHAIRMAN: Right.

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

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

1 the contrary.

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

6 THE CHAIRMAN: Right. You accept that?

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

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

13 MR BEARD: No.

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

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



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

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

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

18 MR BEARD: No.

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

22 MR BEARD: No.

23 THE CHAIRMAN: It is not for you?

24 MR BEARD: No, it is not for us.

25 THE CHAIRMAN: It is for them?

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

17 THE CHAIRMAN: Is that a convenient moment?

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

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

21 (11.51 am)

22 (A short break)

23 (12.02 pm)

24 THE CHAIRMAN: Mr Beard.

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

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

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

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

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

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

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

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

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

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

3 THE CHAIRMAN: You say they did not use it.

4 MR BEARD: Yes.

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

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

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

1 a damages case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

9 MR BEARD: Yes, of course.

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

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

17 SIR IAIN MCMILLAN: I see.

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

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

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

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

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

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

1 MR BEARD: Yes, you would.

2 THE CHAIRMAN: That is the normal use of the expression --

3 MR BEARD: Yes, I completely understand.

4 THE CHAIRMAN: -- like "gross profit" and "net profit".

5 MR BEARD: Yes, I completely understand that, sir.

6 SIR IAIN MCMILLAN: It is the application of other

7 information gathered through market intelligence applied

8 to the gross price which reaches the current net price.

9 MR BEARD: Yes. I completely understand how you would read

10 it like that and the only point I am making is --

11 SIR IAIN MCMILLAN: That is what it says.

12 MR BEARD: It says what net price is, and I understand the

13 natural assumption you make. All I am saying is that,

14 because you do not actually have specific transaction

15 prices, it cannot be to do with individual truck

16 transaction prices and therefore it must be at some sort

17 of other aggregate level, and at that point we struggle

18 to understand what they are actually talking about.

19 That is the difficulty. But the natural assumption you

20 are making we completely understand. We cannot cavil

21 against that.

22 THE CHAIRMAN: You understand what they are talking about

23 when they refer to "gross price lists"?

24 MR BEARD: Yes, we do.

25 THE CHAIRMAN: What is that?

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

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

9 MR BEARD: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Sorry. So I have inadequately answered the question

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

3 THE CHAIRMAN: You were going to the defence.

4 MR BEARD: I was going to the defence, yes. Bundle {B/2/8}.

5 So this is paragraph 17 of the re-re-re-re-amended  
6 defence, and it says:

7 "As to paragraph 18(2)

8 "The Defendants use the following terms for prices."

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

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

25 Then it goes on to deal in relation to the

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

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

7           So we start off with an admission in relation to  
8           18(2) which is to do with the exchange of commercial  
9           information but it is denied that they had an impact.  
10          Then (ii):

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

22          THE CHAIRMAN: What does "market intelligence" mean?

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

25          THE CHAIRMAN: Is that information that is available to

1           everybody?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 information is subject to whatever market intelligence  
2 was available?

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

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

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

1 THE CHAIRMAN: Pleading is not proof.

2 MR BEARD: No, no, but the question that we are dealing with  
3 here is whether we are entitled to plead to this. The  
4 question of the evidence that then arises --

5 THE CHAIRMAN: If you do not have the evidence to support  
6 the pleading, then you should not be allowed to plead  
7 it.

8 MR BEARD: Well, we have got evidence about what we knew  
9 about transaction prices and how we set out transaction  
10 prices.

11 THE CHAIRMAN: Yes, but you are relying on so-called  
12 exception in the decision for market intelligence which  
13 you say you did not have.

14 MR BEARD: Yes, and our witnesses --

15 THE CHAIRMAN: Well, where is the evidence to that effect?

16 MR BEARD: Well, it is proving a negative in these  
17 circumstances, that the witnesses are saying, "We set  
18 out transaction prices by these means", and we have  
19 actually got --

20 THE CHAIRMAN: They are saying, "We set the transaction  
21 prices without reference to the gross price lists".

22 MR BEARD: Yes.

23 THE CHAIRMAN: They do not refer to other market  
24 information.

25 MR BEARD: They do not specifically refer to other market



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

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

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

19 MR BEARD: Yes.

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

24 MR BEARD: Yes, that is exactly --

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

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

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

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

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

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

20          MR BEARD: Well, if we just read on:

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

1 Defendants and the Claimant."

2 That is exactly what our evidence goes to.

3 MR WARD: Sorry, Mr Beard said his evidence goes to this  
4 but, as far as we are aware, there is no factual  
5 evidence addressing these generalised assertions in  
6 19A(24) (b), which talk anyway about "a manufacturer".  
7 It must be read with his bare denial in 19(24) (a) which  
8 is specific to DAF.

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

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

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

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

9 THE CHAIRMAN: Information on what or from what?

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

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

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

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

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

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

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

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

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

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

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

1 information. In addition, between 1997 and 2004:

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

8           If we then go to our response to that, it is at

9           {B/2/16} --

10          SIR IAIN MCMILLAN: Can I just ask?

11          MR BEARD: Please. I am so sorry.

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

13          it reads:

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

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

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

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

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

16           (Pause).

17           THE CHAIRMAN: Yes.

18           MR BEARD: So there is an emphasis on the lack of clarity.

19           We are not in the territory of any sort of bare denial  
20           here because, in fact, as you see at the beginning of  
21           (a), there are admissions being made and indeed in (b)  
22           in relation to the second and third sentences. So we  
23           are not in that territory at all. There is a reference  
24           back to 17(a) of the defence, which was the paragraph we  
25           have already seen that was responsive in relation to

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

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

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

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

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

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

10 MR BEARD: I think it is for both.

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

13 MR BEARD: Generally. In the market overall.

14 THE CHAIRMAN: You are denying that though?

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

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

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

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

1 disagree with it being generally the case across the  
2 market.

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

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

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

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

9 MR BEARD: We say not in relation to DAF.

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

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

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

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

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

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

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

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

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

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

11 THE CHAIRMAN: All right.

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

15 THE CHAIRMAN: This is what you signed up to.

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

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

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

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

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

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



1 matters that this tribunal should have reference to.

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

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

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

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

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

3 MR BEARD: I am most grateful. Thank you.

4 (1.02 pm)

5 (The short adjournment)

6 (1.45 pm)

7 THE CHAIRMAN: Yes, Mr Beard.

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

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

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

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

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

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

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

8 SIR IAIN MCMILLAN: Thank you.

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

13 THE CHAIRMAN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 immediately and fully passing it through into the  
2 prices."

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

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

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

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

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

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

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

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

1 MR BEARD: Yes.

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

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

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

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

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

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

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

18 So, {E/62/29}:

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

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

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

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

9 So:

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

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

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

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

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

7           MR BEARD: Yes.

8           THE CHAIRMAN: So it takes the profit?

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

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

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

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

17          MR BEARD: Yes.

18          THE CHAIRMAN: -- the invoicing is in pounds.

19          MR BEARD: Yes.

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

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

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

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

8 THE CHAIRMAN: Right. It is not material.

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

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

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

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

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

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

11 MR BEARD: Yes.

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

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

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

18 MR BEARD: Yes.

19 MR RIDYARD: It would have to be --

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



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

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

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

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

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

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

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

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

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

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

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

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

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

1 which requires a control and he cannot introduce it.

2 But I will place a caveat on that response because

3 I think that is one for Professor Neven to answer.

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

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

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

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

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

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

25 But that question of what exchange rate you use for

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

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

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

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

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

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

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

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



1 overall analysis".

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

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

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

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

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

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

24 MR BEARD: Yes.

25 MR RIDYARD: Both lines show that margins were lower post

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

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

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

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

1 not be being charged absent the infringement?

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

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

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

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

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

1           enhancements that are brought to the truck as well.

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

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

10          MR BEARD: Sure.

11          MR RIDYARD: If you had a change in a product that makes it  
12          better, so let us say it costs £5 more to introduce  
13          these improvements but you think you can charge  
14          a premium of £10 for it, so when you are talking about  
15          willingness to pay, you are saying that the customer  
16          would be happy to pay an increased margin for this  
17          product, happy to pay £10 more, even though it only cost  
18          £5 more to achieve?

19          MR BEARD: Yes, in simple terms.

20          MR RIDYARD: But what does it say about competition if the  
21          market works in that way, that even -- if it only costs  
22          £5 more, all the producers in the market are able to  
23          charge £10 more for it. In a simplistic world  
24          competitor market that would not happen, would it? The  
25          competitor price would be £5.50 more or something,

1           would it not?

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

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

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

1           simplified one.

2       MR BEARD: I am not taking issue with that.

3       MR RIDYARD: But the point I wanted to ask you, I suppose,

4           was your -- DAF's contention is that it is a competitive

5           outcome, that margins increased for these products

6           because they improved them -- because they were

7           improved, even though the cost of improving was less

8           than the increase in the price.

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

10          yes.

11       MR RIDYARD: You are saying that is a competitive

12          phenomenon?

13       MR BEARD: Yes, that is perfectly -- given the sort of step

14          changes that you get in the market, yes, because you are

15          essentially -- you are getting a new product out there.

16          It is not just a --

17       MR RIDYARD: I understand.

18       MR BEARD: I understand your question.

19       MR RIDYARD: Just to make clear what it is you are saying

20          about willingness to pay.

21       MR BEARD: Yes, it has to be in relation to margins insofar

22          as you identify a premia accurately through the

23          regression analysis, and I do not want to lose sight of

24          the technical analysis.

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



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

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

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

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

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

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

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

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

17 MR RIDYARD: That could go either way, presumably?

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

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

1 use the before/during model --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MR RIDYARD: Thanks.

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

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

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

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

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



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

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

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

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

7           You will see at the top there:

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

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

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

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

25          "Those types of information exchanges [it is

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

7 So it goes into the monitoring.

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

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

20 So this is information exchange facilitating  
21 coordination.

22 "This can occur through different channels.

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

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

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

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

1           The reason why --

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

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

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

12       MR BEARD: Sorry?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

1 just provide you with the references.

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

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

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

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

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

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

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

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

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

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

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

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

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

4       THE CHAIRMAN: The agreement was to share information.

5       MR BEARD: Yes, share information on gross list pricing.

6           Yes, we have that.

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

9       MR BEARD: No, that is not what Professor Neven is doing.

10           He is asking whether or not the characteristics of the  
11           market that exists for trucks actually bought are such  
12           that you could expect or believe that there would be an  
13           adverse effect due to that infringement in relation to  
14           gross list prices. That is what he is asking about. He  
15           is asking about: are the characteristics of the market  
16           effectively conducive to the passing-through of some  
17           kind of adverse coordination arrangement in relation to  
18           transaction prices? He is concluding that does not work  
19           because of the -- or, more exactly -- I do not want to  
20           overstate his position -- that the market  
21           characteristics are not such that any sort of stable  
22           coordination of transaction prices would be likely to be  
23           expected here. So he is testing, looking at the  
24           characteristics downstream, whether or not these gross  
25           list price exchanges are problematic.



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

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



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

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

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

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

22 THE CHAIRMAN: Is that redacted?

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

25 THE CHAIRMAN: This is in the outer confidential or inner

1 confidential?

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

3 THE CHAIRMAN: Figure 6 is that?

4 MR BEARD: Yes, figure 6. It is a very simple point that

5 I just want to identify from this, which is what you are

6 seeing is the average list price being the blue line --

7 sorry, I will just pause in case Sir Iain... (Pause)

8 THE CHAIRMAN: All right. We are there.

9 MR BEARD: Great. I promise I will not go to any more

10 confidential diagrams. Well, I hope. I was going to go

11 to a couple but I will just refer to this one. What it

12 is looking at is the evolution of a chassis price over

13 time and what it is doing is looking at the average list

14 price, which is the blue line and the average

15 transaction price.

16 Now, bearing in mind what we are talking about here

17 is an information exchange or an agreement or some sort

18 of price fixing in relation to list prices, gross list

19 prices, what you are seeing is increases in those list

20 prices over the period from 1997 through to 2002 and yet

21 falls, consistent and substantial falls, in relation to

22 the average transaction price, so you are getting a vast

23 divergence.

24 Obviously, that is just a snapshot and

25 Professor Neven's analysis is carrying out much more

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

11 THE CHAIRMAN: Can I just ask what the list prices were?

12 Were they UK list prices or were they --

13 MR BEARD: Yes, this is all UK.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10           If we go on to page 5, if we could, {I1/11/5}, you  
11           will see that the truck specified here is actually  
12           an FT 85.330. At this stage there was in fact no  
13           380-horsepower truck. You will see on the far side  
14           a price excluding VAT. So this is in fact a tractor  
15           unit and it has a sleeper bit in it, so it is in the top  
16           of the cab so you can actually sleep if you are on long  
17           journeys. You can do that. As I indicated, it is  
18           a Euro 2 truck. So that is the start of this  
19           contractual process and you will see what the price is  
20           there, 39,995.

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

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

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

9 "Leyland DAF Trucks FT 85 ..."

10 "340" has actually been crossed out and it has been  
11 turned into "380" at this point.

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

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

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

18 THE CHAIRMAN: That was in the original contract?

19 MR BEARD: Yes.

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

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

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

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

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

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

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



1 as compared with the original contract.

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

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

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

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

16 So the heading "CF85.380", 1997 through to 2006, so  
17 it is nine years we are covering here. If you just look  
18 at what we have, we have obviously dates and months in  
19 yellow running along, starting in June 1997. Underneath  
20 that, in light blue, are the details of the contracts.  
21 So I took you to the first of those, which was for the  
22 85.330 Euro 2, price 39,995. Then I have come to the  
23 contract I was just looking at, the next in from the  
24 right, price from 27 March 1998, 40,975, and I am going  
25 to just work through these other contracts, if I may,

1 quickly.

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

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

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

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

25 THE CHAIRMAN: Did they announce it? Not publicly

1           presumably?

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

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

18                 "An Additional Quantity of:

19                 "72 ... Motive Units ..."

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

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

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

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

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

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

15          MR BEARD: Yes.

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

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

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

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

1           Then if we move on, if we go to tab {I1/124}, again  
2 we are still under the same contract number, we are in  
3 amendment 6 now and there is an additional quantity of  
4 102 motive units wanted.

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

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

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

19           If we could just go to that document just to remind  
20 the tribunal, {I1/41}. Mr Ward took you to this  
21 yesterday, but what you have there is an exchange  
22 occurring which Mr Ward relies upon. We see there is  
23 also a DAF UK increase in price in September 1998 but we  
24 are not seeing any change in the price of these  
25 100 trucks that are being ordered by Royal Mail under

1 amendment 6.

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

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

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

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

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

1 under the previous contracts, 40,997.

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

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

1 standards.

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

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

18 Now, this contract had a term of one year to  
19 April 2002, with the capacity to extend it for up to  
20 24 months. Now, on this timeline we have an empty blue  
21 box, you will see. We cannot find quite what happened  
22 in relation to that period because, in theory, the  
23 contract came to an end and then there is an amendment  
24 to it that is entered into in August 2002, so we assume  
25 actually people just let that drift.



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

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

14          Then in June 2022 --

15          THE CHAIRMAN: You mean 2002?

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

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

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

6 Then if we go on from there to the contract which  
7 was in fact won, that is at {I1/312.31}. So this is the  
8 contract dated 8 August 2003. If we could just go to  
9 page 9, {I1/312.31/9}, the penultimate column there --  
10 I do not know if you can read it -- is "4x2, DAF, FT  
11 CF 85.380", and although the chassis price is 30,301, if  
12 we scroll down, we will see the bottom price there is  
13 £35,050, which we think is the relevant comparator here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 with the gross list prices which are being moved up.

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

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

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

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

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

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

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

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

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

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

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

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

20 THE CHAIRMAN: Yes, fine.

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

25 The third set of documents I want to go to actually



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

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

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

18 "I wish you all a healthy and successful year in  
19 2009.

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

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

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

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

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

17          THE EPE OPERATOR: Is it okay to display?

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

1           In relation to that, what you see when you go to it  
2           is each of the manufacturers described, and then, for  
3           DAF, it says "No price increase planned for [early]  
4           2009".

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

11          "Ron.

12          "For info.

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

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

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

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

1 THE CHAIRMAN: This is all internal to DAF?

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

11 THE CHAIRMAN: Right.

12 MR BEARD: Then just to complete that, at {I6/108}, that is  
13 actually the product information bulletin, PIB,  
14 indicating the 7% price list change. That is  
15 29 January 2009, indicating when it is going to  
16 start: from February. So just a huge mismatch between  
17 information exchanged in the German subsidiaries and  
18 what is actually going on in the UK in relation to the  
19 same month.

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

22 "Hi everyone,

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

25 The subject is "Query of delivery times and price

1           increase ..."

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

3                    "Best wishes from a sunny Berlin."

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

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

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

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

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

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

5 THE CHAIRMAN: 25% is a pretty huge reduction.

6 MR BEARD: Yes.

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

9 MR BEARD: Certainly it is not what was communicated.

10 Whether or not there was -- I do not think we are saying  
11 that DAF NV would be unaware of what was going on in  
12 relation to the change of 25% in relation to list  
13 prices -- no, we are not saying that. But what was  
14 communicated by the German subsidiary to the other  
15 German subsidiaries under the arrangements that form the  
16 basis for the infringement was an increase of 2%. What  
17 was actually being done in the UK was a drop of 25%.

18 I completely accept that it may well be the case that  
19 DAF NV knew about both of those matters but I am not  
20 commenting on whether or not --

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

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

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

5 That is all.

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

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

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

20 The point I am making --

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

1 MR BEARD: Yes.

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

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

9 MR RIDYARD: No, clearly.

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

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

17 MR BEARD: Yes, absolutely. Absolutely.

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

20 THE CHAIRMAN: One minute on each.

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

23 THE CHAIRMAN: Okay.

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



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

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

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

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

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

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

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

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

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

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

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

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

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

25 Unless I can assist the tribunal further.

1 THE CHAIRMAN: You do not want to say anything about tax?

2 MR BEARD: The temptation is enormous but I will resist it  
3 at this moment.

4 THE CHAIRMAN: Well, we are grateful to you for that.

5 Right. Excellent. Well done. So we are going to  
6 start with the evidence tomorrow with Mr Peatey --

7 MR BEARD: Yes.

8 THE CHAIRMAN: -- who is attending via video.

9 MR WARD: That is right, yes.

10 THE CHAIRMAN: Is that going to be at 10.30?

11 MR WARD: That is fine for me.

12 THE CHAIRMAN: Yes? So we are okay on time for tomorrow  
13 with Mr Peatey and Mr Nicholson?

14 MR BEARD: Our currently thinking is yes, definitely.

15 THE CHAIRMAN: Okay, great. Thank you very much.  
16 10.30 tomorrow.

17 (4.34 pm)

18 (The hearing adjourned until  
19 Thursday, 5 May 2022 at 10.30 am)

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25

INDEX

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

Housekeeping.....1

Opening submissions by MR BEARD.....3