

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 23 June 2022

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

BETWEEN:

Royal Mail Group Limited
BT Group PLC and Others v DAF Trucks Limited and Others **Claimants**

v

DAF Trucks Limited and Others **Defendants**

A P P E A R A N C E S

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

Thursday, 23 June 2022

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

(10.30 am)

THE CHAIRMAN: Good morning.

MR WARD: Good morning, sir.

I feel we have returned like a bad penny. After each time we go away, we come back again.

THE CHAIRMAN: Yes, with more and more stuff!

Well, thank you very much for all your hard work in producing those written closing submissions. Thank you to all your teams. It must have been a hell of a lot of work. They are very voluminous and I think it is fair to say that we have not got through it all but we have tried to focus on what we anticipate will be dealt with today. Yes, so I would urge you -- you have two days now, I think, for the first stage of your closings so we need to focus on the big issues, I imagine.

MR WARD: Yes.

THE CHAIRMAN: We have got all the sort of extra issues fully dealt with in the closings so I think we would benefit from concentration on the few big issues.

MR WARD: Well, sir, thank you. That is what we intend to do. We do not intend to go through it line by line but I actually do intend to use it as a framework for my submissions and, if it is of assistance, I will be going through it, obviously not in its maximum detail, but in

1 order to anchor my oral submissions against what we have
2 put on in writing.

3 What I am hoping to do is today to deal with legal
4 framework, causation and overcharge and then next week
5 to deal with the remaining issues and, of course,
6 Mr Lask is going to address finance, tax and timelines.
7 I hope you will not feel he always gets the short
8 straw --

9 THE CHAIRMAN: I hope he does not.

10 MR WARD: -- but that will come at the end.

11 THE CHAIRMAN: The one further thing I should say,
12 I understand that the transcriber needs to leave by 4.20
13 because of travel issues, so it may be that we could
14 have a slightly shorter lunch break to account for that.

15 MR WARD: Thank you, sir.

16 Closing submissions by MR WARD

17 MR WARD: Just by way of some general remarks to begin, we
18 opened this trial eight weeks ago with the observation
19 that DAF's position in this case was an extreme one. It
20 had admitted to participating in a 14-year cartel with
21 the object of restricting price competition, it paid
22 752 million euros in fines, it carried on with the
23 cartel until the Commission conducted its dawn raids
24 and, of course -- I am afraid I am going to come back to
25 this a lot -- but it has given no explanation of how it

1 used the fruits of the cartel or indeed why it
2 participated in it at all.

3 We come here facing a case from DAF that it is not
4 even plausible it had any effect on prices or that the
5 overcharge, if there was one, was zero, but we do submit
6 that, after eight weeks of evidence and argument, it is
7 clear that DAF's case is wrong, despite the extreme
8 lengths it has gone to to make it good. We have been
9 faced with a range of arguments, some of which have been
10 complex and artificial, as DAF has put forward objection
11 after objection, but DAF puts its case extraordinarily
12 high and there have been many times when the arguments
13 have needed a reality check.

14 The reality starts with the basic inescapable fact
15 of the cartel itself, but we also made some very
16 important discoveries in the course of the trial, not
17 least about the role of list prices. What I want to do
18 now is start with the legal framework and the *BritNed*
19 case because it is common ground that the legal
20 framework for a case of this kind is set out by
21 Mr Justice Marcus Smith in *BritNed* and, as you will
22 appreciate from our opening, he found that the
23 actionable harm must be established on the balance of
24 probabilities in order to perfect the tort, but after
25 that damages are assessed on a broad axe basis.

1 I would like to just remind you of what Mr Justice
2 Marcus Smith said and then explain why we say we have
3 indeed perfected the tort even before you get to our
4 econometric analysis. It is in authorities 7.1 and the
5 relevant passage starts at 144. We have summarised this
6 in our written closing but I would rather go to the
7 text, if I may, {AU/7.1/144}.

8 I should say generally I am going to try to stay
9 within the closing document where things are quoted
10 quite fully. So on page 144, Mr Justice Marcus Smith
11 says at 422:

12 "The first question that I must consider is what
13 constitutes the 'gist' or actionable damage to complete
14 the cause of action of breach of statutory duty ...

15 "This is, I understand, the first claim for damages
16 arising out of a restriction of competition contrary to
17 Article 101 ..."

18 Then at 424:

19 "Although it is possible that, in order to make good
20 the cause of action and show actionable damage,
21 a claimant must have to show that he, she or it has
22 sustained some monetary harm by reason of ... breach of
23 statutory duty, it seems to me most unlikely that that
24 should be the case for this cause of action."

25 Pausing there, of course claimants are typically in

1 a situation that we find ourselves in. They are seeking
2 to prove the monetary harm through econometrics in
3 a situation of high asymmetry of information dealing
4 with a secret cartel.

5 If we turn to the next page, please, {AU/7.1/145},
6 at 425, after considering some authority, *Forster v*
7 *Outred*, he says:

8 "This point is that it is necessary to be
9 exceedingly careful in framing or defining what
10 constitutes actionable harm."

11 Then at 426:

12 "Article 101 TFEU prohibits 'all agreements between
13 undertakings [et cetera] ... which have as their object
14 or effect the prevention, restriction or distortion of
15 competition ...'. The provision is aimed at preserving
16 or protecting competition and maintaining the consumer
17 benefit of having a competitive market.

18 "When seeking to articulate what constitutes
19 actionable harm, it is necessary to have regard to the
20 object and scope of the statutory duty imposed. In this
21 case, the object and scope ... is the preservation and
22 protection of competition from collusive efforts to
23 undermine it. This purpose must inform the 'gist' ...
24 that a claimant must show ... More specifically:

25 "Cartel cases do not, by definition, involve

1 a single actor. Cartel cases involve two or more ... by
2 agreement or concerted practice, acting with the object
3 or effect of preventing, restricting or distorting
4 competition. It is not possible, in cartel cases, to
5 identify the act of a single person that can be tested
6 as being the cause of the claimant's harm."

7 That is very important -- we are going to come back
8 to that a lot -- the lack of a specific link between the
9 conduct and the harm.

10 {AU/7.1/146}:

11 "It is the collective failure to compete that is the
12 wrong ..."

13 Then at (3):

14 "What the collusive misconduct of cartelists does is
15 prevent, restrict or distort competition. To require
16 a claimant to show monetary harm in order to found
17 a cause of action is to ignore the purpose of
18 Article 101 ... and to impose too great a burden on the
19 claimant. Rather, what the claimant must show, as the
20 'gist' ... is that the unlawful conduct of the defendant
21 has, on the balance of probabilities, in some way
22 restricted or reduced the level of the claimant's
23 consumer benefit. In other words, that the claimant has
24 suffered as a result of the prevention, restriction or
25 distortion of competition created by the cartel. Such

1 a restriction or reduction of consumer benefit might
2 take the form of an increased price payable, but equally
3 it might take the form of a reduction in the number of
4 suppliers properly participating ... I regard consumer
5 benefit as a broad concept, and there will be many ways
6 in which conduct infringing Article 101 ... will
7 adversely affect it."

8 Then he talks about the facts of *BritNed* which were
9 much, much simpler than ours. It was one negotiation
10 over one contract and it was effectively a form of bid
11 allocation. If we look at (2), he says:

12 "That transaction was entered into, in the form that
13 it was, by reason of the Cartel. But for the Cartel,
14 *BritNed* would ... have been presented with a different
15 commercial environment, with different tenderers
16 tendering on different terms."

17 Now, here we do not have the kind of detailed
18 evidence that Mr Justice Marcus Smith had in *BritNed*
19 because we do not have a single contract we can look at
20 and we know there were a myriad of negotiations over
21 time, and one of the themes I am going to come back to
22 is the lack of detail or clarity about those.

23 What we do have, nevertheless, is a different
24 commercial environment to use Mr Justice Marcus Smith's
25 words. If you put yourselves in the shoes of a buyer

1 who is trying to buy trucks by competitive tender, the
2 basic idea, obviously, is to get independent bids. But
3 imagine if such a buyer had been shown the decision,
4 just the decision and nothing else, what they learn is
5 that all the major manufacturers have entered into
6 a cartel with the object of restricting price
7 competition that is EEA-wide, including the UK, and they
8 would have been as astonished, as Mr Ashworth was when
9 he found out about it.

10 But we also know more than what is just in the
11 decision, as we are going to come on to. We have seen
12 examples of UK collusion, like the so-called peers group
13 meeting, if you recall -- just for the note it is
14 {I6/127} -- and then it was implemented through
15 a product information bulletin at {I6/100}. That
16 involved DAF's UK CEO. Then we took Mr Ashworth through
17 some examples where he was involved in collusion, and
18 that is paragraph 177 of our written closing.

19 THE CHAIRMAN: Sorry, just back on Mr Justice Marcus Smith's
20 case, *BritNed*, he found the cause of action to be
21 established without looking at the econometrics?

22 MR WARD: Yes, even though again, like our case, it was
23 a case of financial harm flowing through the cartel
24 proved through econometrics.

25 What I am saying is that -- we are going to see all

1 of the bits and pieces we know about causation shortly,
2 but one thing Mr Beard says in his closing is, "Well,
3 you cannot say, though, that the cartel actually had any
4 effect on the UK market because you have not got the
5 facts about the other manufacturers, about how they use
6 the information. So when *Daimler* was bidding, you do
7 not know what they were doing". But, again, what
8 I invite you to do is to consider how much comfort that
9 would actually be to a company that is trying to let
10 a contract. They have actually found out that all the
11 major manufacturers are in the cartel. They have to
12 completely rethink their commercial strategy at that
13 point to avoid even the risk -- even the risk -- that
14 they are tainted by it.

15 Now, in this case, of course, the cartel was secret,
16 as they usually are, so my clients and the others did
17 not know anything about it, but they were proceeding on
18 a false premise; but if they had known that there was
19 not independent conduct between the manufacturers, they
20 could have taken steps to prevent themselves. I mean,
21 they might have had to buy trucks from Daewoo, for
22 example, one of the small players in the market that we
23 saw referred to.

24 The short submission that we are making is that
25 carrying out what looked like independent tenders in

1 this shadow of a secret cartel is an obvious commercial
2 detriment. If they had known, they would have run
3 a mile.

4 So that is why we say, on these facts, the *BritNed*
5 test is satisfied, but I do want to re-emphasise a very
6 important point: we are not betting the farm on this
7 argument. We do say, if we have to prove monetary loss
8 on the balance of probabilities, then we have done.
9 That is for reasons that I am going to come on to and
10 that are explained in detail in the written closing.

11 My next topic is to address something which plays
12 a major role in Mr Beard's closing, which is loosely
13 under the heading of "Top down or bottom up", if I can
14 put it that way. I think it would be convenient now, if
15 you would, to pick up our closing, where we have
16 encapsulated quite a lot of these issues and I am going
17 to speak to them. I do not know if you are working off
18 the paper copy or --

19 THE CHAIRMAN: I think it is a mixture.

20 MR WARD: Well, luckily the references are the same. It is
21 under S9 in Opus and it is page 4 I want to go to, where
22 we have quoted from what we have called the CAT's
23 disclosure judgment at paragraph 11, {S/9/4}. You will
24 recall this from opening. This is a ruling by the CAT,
25 the president and the chair, on dealing with the way

1 forward in all of the *Trucks* cases, including these.

2 What he says at 40(6), which we have quoted at 11:

3 "These actions seek damages for loss on many
4 hundreds of transactions ...", and so forth.

5 Then in bold:

6 "The approach to proof of causation and
7 quantification [those are very important words that we
8 will be coming back to], both as regards any overcharge
9 and as regards pass-on, will ... be very different from
10 that which can apply where the claim is for loss on one
11 or two very large transactions ..."

12 Like *BritNed*.

13 "It is unlikely to be realistic in these cases for
14 the issues to be approached by examining each price
15 charged for each transaction subject to the claim and
16 seeking to ascertain how any antecedent exchange of
17 information or coordination between the OEMs may have
18 influenced that price ..."

19 Then over the page, {S/9/5}, at 41 he says:

20 "We would wish to hear submissions on this at the
21 next CMC but our present view is that we doubt that the
22 issues can be approached from the 'bottom up' on the
23 traditional evidential basis of witness statements from
24 the various key employees regarding the numerous
25 contemporary emails, notes of meetings and telephone

1 conversations, and so forth ... Instead, it seems to us
2 that the issues will probably have to be approached by
3 the analysis of large amounts of pricing and market
4 data, using established economic techniques to determine
5 what, if any, was the effect of the infringement on
6 prices and any pass-on through the relevant period."

7 Broadly, that set the course for this case. There
8 is more detail in one of the annexes to our closing
9 which Mr Lask is going to go to, but what I observe at
10 this stage is that this was obviously appropriate in
11 this case. We had a complex chain of dealing. The
12 cartel ran for 14 years. Records, memories, available
13 witnesses, are bound to be incomplete. So what the
14 claimants did was provide a general description of its
15 procurement processes and the economists assessed the
16 overcharge on a market-wide basis, which I am going to
17 come to in a moment as well.

18 THE CHAIRMAN: In this it was quite a sort of -- was there
19 an actual ruling to this effect? I mean, he is just
20 sort of saying, "We doubt whether it can be dealt with
21 any other way", but I know that then shaped the
22 disclosure that was ordered.

23 MR WARD: Yes, these were observations which shaped the way
24 forward, including, for example, the authorisation to
25 call experts on various topics and so forth. I am not

1 saying he was saying, "I categorically shut out
2 any other kind of evidence". He is saying, "This is the
3 way ..." -- I say "he" because it was the president in
4 the chair but it is a ruling of the CAT. The CAT is
5 saying, "This is the right approach to these kind of
6 cases". But I do not say this somehow estops Mr Beard
7 from his timelines. It is just context.

8 It is important context for what follows because
9 what we have seen -- if we look at page 6 of our
10 closing, {S/9/6}, we quote from a line in DAF's skeleton
11 which is emblematic of their approach and is still there
12 in their closing, that they say, well, even if
13 a well-specified regression analysis showed a marketwide
14 overcharge, it was incumbent on the claimants to prove
15 the infringement "affected specifically the prices which
16 they paid".

17 On one hand, that is obviously true. We have to
18 show an overcharge. But the problem is, if the
19 suggestion is we have to link it to particular acts of
20 collusion, some meeting that took place in the
21 Netherlands flowing through to a product information
22 bulletin flowing through to a particular price
23 negotiated on a particular day by Mr Shadwell, well, it
24 is just wrong.

25 THE CHAIRMAN: I am not sure they are saying that, are they?

1 They are saying one can look at the actual contracts and
2 see what did actually happen in relation to these
3 claimants and it shows that prices did not actually
4 increase.

5 MR WARD: Well, I am going to come on to why that is not
6 illuminating either. We are not actually sure how high
7 they are putting it, but we do think that this is highly
8 problematic because, of course, if you were going to do
9 this, you would have to have full access to the
10 negotiations and the contracts. You would have to have
11 witnesses who could actually speak to what happened and,
12 of course, DAF, understandably, they have not called the
13 two employees who handled the accounts on day to day,
14 Mr Shadwell and Mr Tyler. What we have got instead is
15 some very general high-level evidence from Mr Ashworth
16 which is not very different from the kind of evidence
17 that my clients put in.

18 But then, of course, you will recall there was
19 extended cross-examination of Mr Giles and Mr Peatey on
20 contractual documents that they were mostly unfamiliar
21 with. We have set some observations out about that at
22 D7 of our closing. But what is really important now is
23 that this is linked to the fact that the experts have
24 adopted a market-wide approach to the overcharge. If we
25 can jump forward in the documents, the written closing,

1 we deal with this in fact at page 155, so this is back
2 in S/9, {S/9/155}.

3 What we see is there are two important propositions
4 here. The first is it has always been common ground
5 between the experts that it is inappropriate to seek to
6 draw conclusions on the level of any overcharge caused
7 to the claimants by simply comparing prices in the
8 absence of controlling for other factors. That is, of
9 course, exactly what the econometrics does. You do not
10 just look at the price; you control out factors such as
11 demand. We have got the quotes on the next page, just
12 some key propositions, including at the top from
13 Professor Neven, {S/9/156}:

14 "In order to make a meaningful comparison of invoice
15 prices between these periods, determinants of truck
16 prices that are not related to the infringement need to
17 be controlled for."

18 So a sort of simple timeline or looking at the
19 actual prices paid is not informative. Then if we go to
20 page 157, {S/9/157}, we get the second proposition,
21 which is:

22 "It has also been common ground between the experts
23 since at least the service of their first expert reports
24 that the most appropriate way to measure the level of
25 any Overcharge suffered by the Claimants is to use

1 a market wide regression analysis."

2 Then at 408 we observe, with some important
3 transcript references:

4 "This common ground was re-affirmed by the experts
5 in the hot-tub. The experts agreed that the available
6 data did not allow for a robust analysis of
7 a Claimant-specific Overcharge ... Professor Neven made
8 plain that he did not think a Claimant-specific
9 Overcharge could be estimated empirically. He accepted
10 that it was sensible to estimate the Overcharge on
11 a market-wide basis and to apply the results to the
12 Claimants ..."

13 One thing he said is, "I do not think the data
14 allows us to estimate a BT/Royal Mail-specific effect".

15 If we look now just briefly at DAF's written closing
16 at {S/10/114}, please, we can just see -- this is just
17 a sample of their approach. This is paragraph 319,
18 please. Having looked at some of the contractual
19 material on one particular type of truck, they say:

20 "This demonstrates that even if DAF's list prices
21 were set higher because of the Infringement -- or,
22 indeed, DAF sought generally to raise its transaction
23 prices above the competitive level through any other
24 mechanism -- it did not cause any increase in the
25 transaction prices paid by [Royal Mail]. [Royal Mail's]

1 ... prices did not increase."

2 But the fallacy in that submission lies in what
3 I have just shown you. It is argued we have to prove
4 there was an actual price rise in an actual contract,
5 but, of course, DAF has no idea what the counterfactual
6 would be in that particular contract, for example.
7 Professor Neven has accepted he is in no position to
8 calculate it.

9 MR RIDYARD: Does that mean that you cannot countenance the
10 possibility that the cartel was effective for most
11 customers but was ineffective for some big customers?

12 MR WARD: At a theoretical level one can obviously
13 countenance that possibility, but I am starting with the
14 proposition that the econometricians have not been able
15 to assess that. You will recall Mr Harvey did
16 a sensitivity on buying power, in fact, in his
17 regression, but Professor Neven did not do that at all,
18 presumably because he did not think it was going to be
19 informative.

20 So we are in a position where the experts agree that
21 the market-wide approach is the only approach, not
22 a position where -- for example, DAF have adduced expert
23 evidence that says, "Well, Royal Mail would have only
24 got half or a quarter or 1%". It is being treated as
25 a sort of out-and-out impediment to claiming the

1 overcharge because, they say, "Well, these are big
2 customers who would have got lower prices and look how
3 low the prices were that they actually achieved".

4 I am going to show you in a minute, though, what
5 Mr Ashworth actually said about those prices.

6 THE CHAIRMAN: Are you saying it is not only the experts for
7 which it was common ground that it had to be determined
8 on a market-wide basis but it was also common ground
9 between the parties following the ruling of the --

10 MR WARD: I am not going to go that far. I am not going to
11 argue that. But I am saying there is absolutely no
12 evidence in front of you that suggests that there is
13 a way to do an econometric analysis and then somehow
14 ratchet it down for BT and Royal Mail. Obviously they
15 had buying power, but the critical question is whether,
16 nevertheless, they were paying more than they otherwise
17 would have. That is the issue.

18 If we just go back, if you would not mind, to our
19 written closing at 158, which is {S/9/158}, we make some
20 further observations that are relevant here. At 409 and
21 410:

22 "Neither expert considered ..."

23 Sorry, that is not going to help us. But 410:

24 "Moreover, as Mr Harvey explained, there was no
25 reason to believe that the Overcharge ... would be

1 systematically higher or lower than for the rest of the
2 market. Professor Neven said the intuition that larger
3 customers might have more bargaining power was [as he
4 put it] a 'soft intuition' and was not one that he was
5 very comfortable with. That was, no doubt, why he did
6 not address this in ... his reports."

7 But Mr Harvey also makes the point that:

8 "... a large customer could be just as likely to be
9 more affected by the Infringement than less affected."

10 The infringement might actually serve to diminish
11 his bargaining power because, when you have a lot of
12 power, you could have more luck getting lower prices
13 because you are not bargaining against a cartel.

14 Sorry, I am told, in fact, that DAF did endorse the
15 market-wide regression approach, and that is in annex 1
16 to our closing on paragraph 16. So that is the joy of
17 having a team. I am grateful --

18 MR BEARD: (inaudible) endorsed market-wide regression
19 approach in relation to the econometrics.

20 MR WARD: Fine. Well, I am quite carefully not suggesting
21 that Mr Beard was estopped from taking some other
22 approach, but I am saying there were very good reasons
23 for taking this approach that has been taken, the
24 market-wide approach, and very good reasons why the
25 experts have concluded that is the only sensible

1 approach here.

2 MR RIDYARD: Well, it was the only practical approach
3 because there were not enough data observations to do
4 a good job on just one or two customers.

5 MR WARD: Exactly. As I understand DAF's case, as we see
6 it, they just think this is a knock-out blow because,
7 even if there is a cartel --

8 THE CHAIRMAN: No, I think they are using it as some sort of
9 sense-check on the figures. On the figures they come
10 out no overcharge and they say, "Well, look at the
11 actual contracts and that sort of makes sense, it fits
12 with that".

13 MR WARD: Well, with respect, sir, the no overcharge
14 according to them is market-wide. It is not only no
15 overcharge for BT and Royal Mail.

16 THE CHAIRMAN: I agree.

17 MR WARD: So they are saying, "Well, there is no overcharge
18 and, anyway, you chaps would never have got one if there
19 was one". But if you assume that Mr Harvey is right for
20 the moment -- countenance that possibility -- and the
21 overcharge is, let us say, 10%, the question is: where
22 do we go from there with DAF's submissions because,
23 according to DAF, well, we were getting these very low
24 prices.

25 But I want to show you, if I may, what Mr Ashworth

1 actually said about this. This is {D/22/27}. Towards
2 the bottom of the page, at 98, he says:

3 "As a result of the competitive tender process set
4 out above, Royal Mail was able to obtain what
5 I considered were rock bottom prices ..."

6 But then let us look at what he says he means by
7 that:

8 "What I mean by this is that the prices we agreed
9 were lower than would have been agreed with any other
10 customer (with one possible exception)."

11 So it is very notable that it is not suggesting for
12 a minute these were the lowest possible prices, and we
13 have seen, of course, from a table in Mr Habets' witness
14 statement, that DAF [sic] and BT did get contracts with
15 low margins, particularly during the GFC, but higher
16 margins in other periods. This is all set out in our
17 closing.

18 Of course, there were very good reasons why DAF
19 might choose to give very good prices to these customers
20 and one of them is just that they are very high profile.
21 If people are driving round with BT or Royal Mail logos
22 on your DAF vans, that is good for business. That is
23 not me making that up. That is Mr Ashworth. He says
24 that at paragraph 24.

25 THE CHAIRMAN: The difficulty, I suppose, with DAF's

1 position is that the most important evidence might be,
2 well, on what basis were these approved by DAF NV,
3 because I think all these contracts actually went to
4 DAF NV and we simply have no evidence as to why they
5 agreed the prices that they did.

6 MR WARD: In fairness, we have some product approval memos
7 that go -- "corporate approval memos", they are called,
8 and what they say typically is there is a balance of
9 factors. So they say, "Look, the margins are very low
10 here but we might make up some other things like factory
11 absorption or on after-sales support", or they say,
12 "Royal Mail is a fantastically important contract and,
13 what is more, there are some higher-value trucks round
14 the corner". "We want to keep them sweet" is
15 effectively what they are saying. Well, that is just
16 business. There are always commercial reasons for doing
17 deals.

18 But the question we are grappling with is: does this
19 somehow negate -- if there is an overcharge,
20 a market-wide overcharge, does it negate its application
21 to BT and Royal Mail? Well, no, it does not.

22 Mr Beard's great deal of energy on exactly what prices
23 were paid under exactly what contract just does not give
24 us the answer because it does not control out the other
25 factors. It is the econometrics that controls out the

1 other factors and, if you agree with Mr Harvey that
2 there is an overcharge, none of this takes DAF anywhere.

3 We do also urge some caution here. I am sorry to be
4 moving around in the document a little bit but it is
5 going to become a bit more linear in a moment. We raise
6 a point about the principle of effectiveness at page 25,
7 {S/9/25}, of our written closing, where we say -- I am
8 so sorry, that looks like the wrong page. It is page 9,
9 {S/9/9}:

10 "The principle of effectiveness ..."

11 It started in European law and post Brexit, my Lord,
12 Lord Justice Green, has declared its in the common law.
13 It says that the evidential and procedural rules "should
14 not be applied in such a way that the very right sought
15 to be enforced is undermined"; in other words, is DAF
16 setting us up in a way that makes it just too difficult
17 to ever succeed in a case of this kind?

18 I am afraid here we emphasise some points you have
19 heard from us rather a lot. At 25, the bullets:

20 "The Cartel took place in secret and, as is
21 invariably the case ... the documentary record is
22 sparse. The decision makes clear [it] was a 'ongoing
23 process and did not consist of isolated or sporadic
24 occurrences' and that contracts included meetings, phone
25 calls and emails.

1 "As [it] goes back 25 years, both sides have been
2 unable to construct a full record of the transactions or
3 negotiations ..."

4 25.3. The Settlement Decision is in summary form,
5 providing only an outline ..."

6 Then, of course, 25.4, {S/9/9}, our favourite
7 submission:

8 "DAF itself has chosen to adduce no witness evidence
9 on the nature of the Cartel or its implementation."

10 What we have to keep in mind here is that DAF is of
11 course facing rather a lot of claims for trucks and
12 indeed, while we have been pursuing this one, there is
13 now a new class claim that has been certified.

14 So it is entirely understandable in its commercial
15 interests to set the bar as high as possible and,
16 ideally, to make these cases impossible to bring. That
17 is the very likely outcome if the court were to conclude
18 or the tribunal generally to conclude that this kind of
19 highly granular approach to the actual transactions
20 25 years ago is really required. But it is also why the
21 tribunal, with Mr Justice Roth in the chair, concluded
22 that the top-down approach was actually appropriate.

23 MR RIDYARD: Are you actually saying -- suppose
24 hypothetically we found that there was a 10% cartel
25 effect across the market, are you saying that it is then

1 impossible for us to conclude that -- because of some
2 factors that we do know about these particular
3 transactions, that it did not apply to Royal Mail and
4 BT?

5 MR WARD: Let me avoid the word "impossible" and say on the
6 evidence, no. The evidence which you have, which is the
7 expert evidence conducted at a market-wide level -- the
8 acknowledgement that that is the only appropriate
9 approach and then the various somewhat piecemeal
10 contractual and tendering information that has been put
11 before you -- Mr Lask is going to talk about how it is
12 very incomplete, but that just does not tell you. If
13 you have a contract for an LF 55 signed on 1 June 2003
14 and the price is £30,000, it just does not tell you
15 anything, even if the previous contract was £32,000,
16 because it is not controlling out the other factors.
17 That is what the econometrics is there to do. So I do
18 not take the bait of "impossible", I think was your
19 word, sir, but I do take the bait of on the facts, no.

20 So with that, if I may, I want to turn to the very
21 closely linked topic of causation, how are we putting
22 our case on causation, because we do not accept we have
23 to do the impossible but what we have done is build it
24 on a whole series of factors. At the heart of it,
25 undoubtedly, is the cartel itself and a series of

1 mechanisms that we show by way that the cartel either
2 did or would have or could have had an effect. We do
3 not have to prove precisely exactly what happened, how
4 it applied to our particular transactions, but at the
5 end of the line what we have is the econometrics. That
6 is also important for causation, even though we accept,
7 on its own, as *BritNed* says, it can only ever give rise
8 to an inference.

9 I am going to come to that in due course and exactly
10 what role the econometrics is, but what I would like to
11 do just firstly is show you some of the strands in our
12 causation case. We can see it summarised if we go over
13 to the closing document on page 10, {S/9/10} -- I think
14 we are already there. Marvellous -- and at paragraph 28
15 we enumerate the strands. I am going to deal with only
16 a few of them in any detail just because of time.

17 You will see that we rely on the following matters
18 and they are all developed in here, but obviously
19 I cannot go through it all. The first one is object
20 infringement. Mr Beard, in opening, tried to suggest
21 this was just a matter of form. It is not. It is
22 a matter of substance.

23 Then the aim of the cartel being to distort price
24 competition. On DAF's case it was a complete failure.

25 The third bullet point, there is a whole series of

1 types of collusion in the cartel. They are all
2 complementary means to restrict price competition.

3 The fourth one:

4 "The information ... was of real practical value to
5 the Cartelists in planning their ... behaviour."

6 This is a reference to recitals 27 and 47 in
7 particular, which, you will remember -- 27 and 48, I am
8 so sorry. If we can just turn to page 18, {S/9/18},
9 just to remind you what they say. They are important.
10 These are admitted to by DAF but they have not been
11 willing to accept that they are binding. I just remind
12 you what they say:

13 "The pricing mechanism in the truck sector follows
14 generally the same steps for all of the Addressees.
15 Like in many other industries, pricing starts generally
16 from an initial gross list price set by the
17 Headquarters."

18 Then skimming down:

19 "The final net customer prices will reflect
20 substantial rebates on the initial gross list price."

21 We have very important new evidence about the role
22 of list prices which I am going to come to.

23 Then Recital 47:

24 "By exchanging [this information] ... the Addressees
25 were better able to calculate their competitors'

1 approximate current net prices -- depending on the
2 quality of the market intelligence ..."

3 I am not going to take up time now, but we deal in
4 detail with the arguments advanced by Mr Beard in
5 opening as to why this is not binding on him or an abuse
6 of process to resile, I should say.

7 MR BEARD: I am sorry, I think we have accepted (inaudible).

8 MR WARD: We were not absolutely sure. We were hoping that
9 was the case. But that is very important too because we
10 fought this case for five years in the face of their
11 opposition, but the closing at paragraph 6 says you can
12 take the decision at face value.

13 MR BEARD: No, these paragraphs have been specifically
14 identified as binding previously. There was a whole
15 spiel up to the Court of Appeal about this.

16 MR WARD: I am so sorry. Perhaps I have not put my case
17 precisely enough. We have argued that they have
18 abusedly tried to depart from that. You are quite
19 right, Mr Beard, that is in fact the issue. In any
20 event, we have explained why, in closing, their attempts
21 to resile from them are indeed abusive.

22 Now, the next topic, though, in our taxonomy of
23 causation is -- we can pick it up at page 25,
24 {S/9/25} -- a very, very important concession made for
25 the first time by DAF in these proceedings, which is

1 that the information was actually taken into account.

2 It is based on what is often called the "Anic
3 presumption", which is at 66, that it is:

4 "... a well-established presumption in competition
5 law that undertakings who take part in collusive
6 arrangements 'take account of the information exchanged
7 with their competitors in determining their conduct on
8 that market'."

9 We had a lot of resistance over that over the years
10 but it changed dramatically on Day 2 of the trial, where
11 Mr Beard made an unheralded but highly significant
12 concession, which we have quoted:

13 "So in relation to the gross list price exchanges,
14 it has never been part of our case that we just ignored
15 them. So we have never put forward evidence that we did
16 not take them into account ..."

17 Of course they never put forward evidence at all.

18 "We accept that in relation to gross list
19 pricing information that these matters were taken into
20 account. We are not saying we ignored the information
21 we received ..."

22 Well, this is, despite how he put it, a very, very
23 important new development in the case, and we summarise
24 where it takes us at paragraph 69 on the next page,
25 {S/9/26}. So we know -- the first thing we know is DAF

1 obtained from its competitors the most commercially
2 sensitive information over a period of 14 years,
3 including gross list price information, which was also
4 the subject of agreement, it should be said. We are
5 going to see shortly what Mr Ashworth said about how
6 those were actually used to drive price increases.

7 Then the information provided DAF with valuable
8 insight into competitors' pricing strategies and enabled
9 it to better calculate approximate net prices. Those
10 are the recitals we have just seen and Recital 75. Now
11 Mr Beard tells us DAF admits it took into account the
12 information when determining its conduct on the market.

13 Then, 69.4:

14 "The law regards [the] conduct as so likely to have
15 negative effects on prices that it can be sanctioned
16 without any assessment of those effects ..."

17 That is object. Then, of course, we have the
18 regression, which shows that, we would suggest, the
19 cartel did in fact give rise to an overcharge.

20 Then we also have the mechanisms of control by
21 DAF NV, which I am going to talk about in a moment,
22 about the mandate system and so forth.

23 Then I am afraid I might be already repeating myself
24 a lot here, but what remains missing from DAF's case is
25 any account of how the cartel operated; any explanation

1 of how the information it obtained from its competitors
2 was used or transmitted; any explanation of why DAF took
3 part in the cartel, devoting significant time and
4 resources to the collusion and taking significant legal
5 risks if, as DAF insists, it had no effect and indeed
6 was incapable of having an effect.

7 As I think you put it, sir, we are still completely
8 in the dark as to why they did it for 14 years. There
9 is, to put it at its mildest, a bit of a puzzle as to
10 why you would carry on doing this. Of course it remains
11 the case that DAF has never answered this point, but,
12 quite remarkably, in DAF's written closing there is
13 indeed some speculation on this -- not fact but
14 speculation -- and we can see it, if we could please
15 turn it up, at {S/10/138}, paragraph 404:

16 "DAF recognises that there is, in the absence of
17 evidence, scope for speculation as to the reasons why
18 the people who participated in the Infringement might
19 have perceived that the information obtained ... was
20 useful, and how they might have used it."

21 Well, I certainly endorse that.

22 Sorry, sir, you look like you are leafing.

23 THE CHAIRMAN: No, I am there.

24 MR WARD: Thank you. Then it says:

25 "Perhaps information about their counterparts' plans

1 gave them more confidence about DAF's own products and
2 pricing. Perhaps they found the information useful to
3 better understand the relative positioning in the market
4 of DAF's products as compared to those of its
5 competitors. Perhaps they used the information to try
6 to improve DAF's offering ... Paragraphs they did not
7 realise what they were doing wrong ..."

8 Well, with respect, it is remarkable to be here, in
9 week 9 of the trial, being offered further speculation
10 by DAF about what happened in lieu of actual evidence
11 about what happened.

12 THE CHAIRMAN: Well, then 406, what they are also
13 speculating is it may be used to increase transaction
14 prices.

15 MR WARD: Maybe, indeed. But the point is simply this: they
16 have not chosen to tell us. Obviously Mr Beard is
17 without instructions or no doubt he would do as well.

18 Of course it is also important, while we are here,
19 just to look at paragraph 403, where they remind you
20 that there was explanation given by Mr Beard -- when we
21 were talking about the M&S directors, who we will come
22 back to, we are told that two of them left in 2001 and
23 one left in 2007. But DAF has not come to the court to
24 say, "There is just nobody we can speak to about this.
25 There is no institutional knowledge at all of any of the

1 things you are talking about". That is not the case.
2 They have not said that.

3 That is why we submit we are in the territory of
4 *Prest v Petrodel*, in which the tribunal can and should
5 make an adverse inference here. The adverse inference
6 that we say should be drawn is there in paragraph 71 of
7 our closing -- sorry, we need to go back to that now.
8 That is {S/9/27}. At the bottom of the paragraph we
9 say:

10 "Thus, the obvious inference is that DAF carried on
11 with the cartel for so long ... because the collusion
12 enabled it to sustain higher prices than would otherwise
13 have been the case."

14 Indeed we put it in our opening in paragraph 95 in,
15 I have to confess, slightly different terms, I now
16 realise, but to the same effect, {S/1/37}:

17 "... the cartel was ... given effect so as to cause
18 an increase in the prices paid by the Claimants."

19 Would it be of assistance, sir, to just look briefly
20 at *Prest v Petrodel*? I am sure it is familiar. I will
21 take you to it. It is in your authorities at 3.5 and I
22 would like to go to page 24, {AU/3.5/24}. This is
23 Lord Sumption. At paragraph 44, he recalls the very
24 famous old case of *British Railways Board v Herrington*,
25 where Lord Diplock:

1 "... dealing with the liability of a railway
2 undertaking for injury suffered by trespassers on the
3 line ..."

4 He essentially says:

5 "'The appellants, who are a public corporation,
6 elected to call no witnesses, thus depriving the court
7 of any positive evidence as to whether the condition of
8 the fence and the adjacent terrain had been noticed by
9 any particular servant of theirs or as to what he or any
10 of the other of their servants either thought or did
11 about it. This is a legitimate tactical move under our
12 adversarial system of litigation. But a defendant who
13 adopts it cannot complain if the court draws from the
14 facts which have been disclosed all reasonable
15 inferences as to what are the facts which the defendant
16 has chosen to withhold.' ..."

17 Then at the bottom of this quotation he makes some
18 observations described as "rather fierce" below, where
19 he says:

20 "A court is ... entitled to infer from the inaction
21 of the appellants that one or more of their employees
22 decided to allow the risk to continue of some child
23 crossing the boundary and being injured or killed by the
24 live rail rather than to incur the trivial trouble and
25 expense of repairing the gap in the fence."

1 Lord Sumption says with understatement:

2 "The courts have tended to recoil from some of the
3 fiercer parts of this statement, which appear to convert
4 open-ended speculation into findings of fact. There
5 must be a reasonable basis for some hypothesis in the
6 evidence or the inherent probabilities, before a court
7 can draw useful inferences from a party's failure to
8 rebut it. For my part I would adopt, with
9 a modification ... the more balanced view expressed by
10 Lord Lowry ...

11 "'In our legal system generally, the silence of one
12 party in face of the other party's evidence may convert
13 that evidence into proof in relation to matters which
14 are, or are likely to be, within the knowledge of the
15 silent party and about which that party could be
16 expected to give evidence. Thus, depending on the
17 circumstances, a prima facie case may become a strong or
18 even an overwhelming case. But, if the silent party's
19 failure to give evidence (or to give the necessary
20 evidence) can be credibly explained, even if not
21 entirely justified, the effect of his silence in favour
22 of the other party may be either reduced or nullified.'"

23 We respectfully submit we are precisely in this
24 territory. We definitely have a prima facie case based
25 on the range of matters that we have put before you.

1 The silence is glaring and it is unexplained.

2 THE CHAIRMAN: I seem to remember Professor Neven had some
3 difficulty coming up with an explanation as to how it
4 would have worked.

5 MR WARD: We are coming to that. We are coming to that.

6 But I wanted to just pick up one other point that is
7 remarkable, in our submission, in DAF's closing. There
8 is quite a lot of criticism of the claimants for not
9 asking questions of DAF's witnesses in and around these
10 issues, but it is, of course, not our job to ask
11 questions of DAF's witnesses in the hope of filling gaps
12 that DAF has deliberately left in its evidence. You
13 will recall Mr Borsboom, Mr van Veen, Mr Ashworth, all
14 saying they knew nothing at all about the cartel. What
15 we are submitting is that DAF must bear the legal
16 consequence of the strategic choice it has made. We
17 have done enough to discharge the burden in *Prest v*
18 *Petrodel*.

19 Now, the next topic which I will try and deal with
20 briefly, just because of time -- we can stay in our
21 written closing at page 28, please. Go back to that at
22 {S/9/28}. We deal with a whole series of mechanisms by
23 which we say -- in fact if we go to page 29, {S/9/29} --
24 by which there was the means for DAF NV, the cartelists,
25 to control or influence prices in the UK. We summarise

1 them in paragraph 78 and I hope this will all seem
2 familiar from the evidence, but all the detail is in the
3 closing, where he say:

4 "DAF NV was heavily involved in the setting of
5 transaction prices to DAF UK's customers. As
6 Mr Ashworth explained DAF NV placed 'big demands on
7 DAF UK to get higher prices'."

8 It did this in a variety of ways:

9 "Through the setting of list prices, which it used
10 to drive increases in the transaction prices ...

11 "Through margin targets, which were binding on
12 DAF UK's sales team and were fixed by reference to ...
13 (IKP) that was in fact another device for driving higher
14 transaction prices;

15 "Through the ... mandate structure, which required
16 that certain proposed transactions were referred by
17 DAF UK to DAF NV ([or even] PACCAR) ..."

18 Then, of course, through "the price premia that it
19 expected DAF UK to achieve on new emission standard
20 Trucks".

21 What we say is that these mechanisms -- "these
22 systems, provided DAF NV with an obvious and effective
23 means for utilising the Cartel information ... to drive
24 the attainment of higher transaction prices ..."

25 What DAF says about this in its closing -- I will

1 just read it out but it is at paragraph 240, page 86,
2 {S/10/86}:

3 "... it is very far from clear that a strategy
4 artificially to increase transaction prices using one or
5 more of these mechanisms could have been successfully
6 and consistently deployed through the cartel period."

7 Well, it is far from clear because they have adduced
8 absolutely no evidence about this. What we are
9 suggesting is that these are potent mechanisms through
10 which the cartel could in fact have been transmitted.

11 If we go to page 30, please, of the written closing,
12 {S/9/30}, we remind you, at the bottom of the page, of
13 Mr Ashworth's evidence about the role of list prices in
14 particular. This has been a bone of contention
15 throughout. Mr Ashworth said the only role of list
16 prices was to create a relative internal
17 list-price-positioning hierarchy. We recall that DAF
18 has put a lot of energy into disputing that Recital 27
19 really applies to it. Even if it is somehow said to be
20 binding, they nevertheless seek to dispute there is any
21 connection between their list prices and their
22 transaction prices.

23 But this is where the position moved really quite
24 dramatically, in our submission, when we heard
25 Mr Ashworth's evidence. We showed him a whole range of

1 documents that showed the connection between list prices
2 and transaction prices, and it is encapsulated on
3 page 31, {S/9/31}, with an exchange between me and
4 Mr Ashworth, where I said -- we have been working
5 through a great deal of this material and I say:

6 "Mr Ashworth, is not the simple and plain obvious
7 meaning of all of this that DAF NV wanted more money out
8 of the UK and for that reason they wanted a list price
9 increase, and that means the list price increase was
10 expected to drive higher transaction prices? Would you
11 accept that?

12 "Answer: So I agree that the list price increase
13 would drive or could drive increased transaction
14 prices."

15 Then on the next page, {S/9/32}, we set out some of
16 the most important evidence which was put to Mr Ashworth
17 and which makes this proposition good. So that was
18 another moment where the game changed dramatically in
19 the course of this trial. We have the connection
20 between the list prices and the transaction prices.
21 Mr Beard accepts that the list price collusion
22 information was taken into account. Mr Ashworth accepts
23 that the list prices influenced transaction prices.
24 There is your connection. What is missing, of course,
25 is DAF's evidence about exactly what they did with those

1 list prices. They took them into account but Mr Beard
2 did not really tell us how.

3 THE CHAIRMAN: What do you ask us to infer from that?

4 MR WARD: Well, that list price -- we do not need to infer.
5 It is a fact: list prices influence transaction prices.
6 The cartel influenced list prices and we accordingly do
7 ask you to draw the inference between the two. So there
8 is a collusion as to list prices, both information
9 sharing and agreements, and we now know that list prices
10 influence transaction prices.

11 The only inference you need to make is that, after
12 they had been taken into account, in Mr Beard's phrase,
13 that somehow impacted on the list prices that were
14 actually offered, but that is --

15 THE CHAIRMAN: Transaction prices?

16 MR WARD: Both list and transaction prices. So we have
17 collusion, so they agree the list prices or they at
18 least exchange information. Then you have that
19 information being taken into account, according to
20 Mr Beard. Then --

21 THE CHAIRMAN: Although they do not agree the list prices.
22 They agree a percentage increase to the list prices,
23 I think.

24 MR WARD: Well, we cannot do better than what the decision
25 tells us. We can look at that again if it is of

1 assistance.

2 THE CHAIRMAN: No.

3 MR WARD: It is both, I think. Where we end up, though, is
4 list prices coming down from DAF NV, production
5 information bulletins giving instructions about what
6 should happen to list prices and Mr Ashworth accepting
7 that those list prices influence transaction prices. So
8 the only missing sliver is the bit between taking it
9 into account and setting the list prices. That is the
10 bit that DAF has not given any evidence about.

11 THE CHAIRMAN: Setting the list prices?

12 MR WARD: Yes, the list prices. So where there is
13 agreement, that is straightforward. But if there is
14 just broader forms of collusion ...

15 So, in our respectful submission, it makes a plain
16 and obvious case that the cartel has had influence
17 through this primary channel.

18 THE CHAIRMAN: Right. I mean, Mr Ashworth -- I see
19 Mr Ashworth's evidence is -- it was in really quite sort
20 of general terms, was it not? It was in quite general
21 terms.

22 MR WARD: Yes, of course.

23 THE CHAIRMAN: He came up with a proposition that they would
24 expect to get half of the price increase.

25 MR WARD: He did.

1 THE CHAIRMAN: Yes.

2 MR WARD: Yes, so it was in general terms, but that is part
3 of a top-down analysis of this cartel. What we do not
4 accept is we have to show that on 1 March 2003 the price
5 increase that was actually agreed on that occasion
6 filtered through directly to the contract that was then
7 negotiated on 1 June 2003. This is a single and
8 continuous infringement. The decision says the
9 contracts work on an ongoing basis, a continuous basis.

10 What we have learned is the general proposition that
11 the list prices influence the transaction prices. That
12 is good enough in a case where we are proving our case
13 ultimately with the econometrics. I am not trying to
14 prove a case that on 1 June 2003 that contract went up
15 3% because of something that was said in the Netherlands
16 a month earlier. I am not trying to and I do not need
17 to. That is the essence of the top-down approach that
18 we have taken.

19 MR RIDYARD: Do you have a need to go a little bit further
20 and show how that feeds into a coherent theory of harm?

21 MR WARD: Oh, yes, but that is part of it as well. Theory
22 of harm is part of this, for sure, but I would
23 respectfully submit, though, if we have got plausible
24 routes for causation, which we do, which are indeed the
25 foundation of the theory of harm, and we have an

1 overcharge, if you accept Mr Harvey's evidence that
2 there is one, that is sufficient. That is sufficient.
3 I do not rely on the overcharge on its own -- the
4 econometrics on its own and I do not rely on these
5 factors on their own because I am doing it top-down.
6 I am not showing that there was a memo that went from
7 Mr Ashworth to Mr Tyler, saying, "Look, Geoff, I have
8 just heard from HQ that we have got to go plus 3, so
9 could you go plus 3 on those Royal Mail contracts?". We
10 do not have that evidence. It is not that granular.
11 That is precisely why the bottom-up approach is wrong in
12 this kind of case.

13 But there were other mechanisms here as well that we
14 dealt with which I want to just touch on briefly, which
15 were IKP itself, of course, which we can see -- we pick
16 that up at page 40, {S/9/40}. The important thing about
17 IKP is that there is a hidden margin in it. We see
18 at 97:

19 "Mr Ashworth said it was 'absolutely correct' that
20 margin targets were yet another way in which DAF NV ..."

21 Sorry, I am sure he did not say "yet another way".

22 "... another way in which DAF NV sought to drive the
23 attainment of higher ... prices by subsidiaries such as
24 DAF UK."

25 The crucial thing is that IKP is calculated through

1 the application of a surcharge to MLO costs, which were
2 thought to be a fair representation of the costs, but,
3 as Mr Habets explained:

4 "IKP cost was no longer a reflection of the costs
5 that DAF NV actually incurred: it became an instrument
6 by which DAF NV tried to steer local sales units to
7 negotiate higher ... price."

8 You will recall, at 101, {S/9/41}, it became
9 a one-way bet:

10 "I recall that at a certain point, IKP cost could
11 only be increased, because any increase in MLO cost
12 would be reflected in an increase in IKP cost, but if
13 there was a decrease in MLO cost, we would offset it by
14 increasing the IKP Surcharge."

15 So it is in a sense an obvious place where one
16 could -- obviously DAF NV is influencing the prices and
17 DAF NV is of course the body in the cartel.

18 There are just two points of detail I wanted to pick
19 up from DAF's closing about this and we do not need to
20 go to it, but I just want to put our answers to these
21 points on the transcript. Firstly, they say neither IKP
22 nor indeed target margins were known to dealers, and
23 that is 242(c) and 243(c) of the closing. But, of
24 course, that is irrelevant because what these things are
25 doing is influencing the prices charged to dealers by

1 DAF UK. But, secondly, there is a criticism of
2 Mr Harvey for not carrying out an empirical test of
3 changes in IKP or indeed target margins. This is
4 another theme, that Mr Harvey should have done more and
5 more and more and more work in this case, and I am going
6 to come back to that. On that one, our simple
7 observation is we cannot imagine how this could possibly
8 have been done, how could we have ever worked out what
9 the counterfactual was of the mysterious IKP margin or
10 what target margins would have been set in the absence
11 of the cartel.

12 THE CHAIRMAN: Sorry, the IKP targets, that was not
13 available to dealers is what they say?

14 MR WARD: No, because the dealers negotiate with DAF UK and
15 DAF UK charge them -- so there are parallel
16 transactions --

17 THE CHAIRMAN: But DAF UK have the IKP targets, so they
18 would know --

19 MR WARD: Exactly. It is driving the prices that DAF UK
20 would charge. That is the purpose --

21 THE CHAIRMAN: Okay. That affects what prices they charge
22 to their customers?

23 MR WARD: Exactly. That is exactly it.

24 We get then to another point, which is a strand in
25 our observations here, which is that we know -- and we

1 see this at page 42, {S/9/42}, paragraph 106 -- the M&S
2 director, the marketing and sales director, was closely
3 involved in the setting of IKP targets. He is an
4 important figure in all of this and we are going to come
5 to that in a moment.

6 Just to move on, if I can, as quickly as I can, we
7 have got the mandate structure which we talk about at
8 paragraph 44, which is the measure -- it is the level of
9 control, if you like, that is exercised by DAF NV and
10 that is set, in fact, using IKP to set the levels.

11 Then we see emission standards, page 46, {S/9/46} --
12 we see emission standards, again, prices set by DAF NV,
13 M&S director involved. Then if we jump on, please, to
14 page 54, {S/9/54}, we summarise the role of the M&S
15 director. This has taken on significance, the M&S
16 director, because he has -- this position has a central
17 role in pricing for DAF NV as it would apply for DAF UK.
18 Of course, although DAF has not told us much about the
19 cartel, one thing they have admitted is that three
20 successive M&S directors during the cartel did
21 participate in the cartel in at least some respects and
22 were also directors of DAF UK. So they are actually an
23 important link between DAF NV and DAF UK. Of course
24 they are not a complete description of --

25 THE CHAIRMAN: Were they participating in the cartel whilst

1 they were directors of DAF UK --

2 MR WARD: Yes.

3 THE CHAIRMAN: -- or did they move -- they moved on,
4 I thought.

5 MR WARD: At the same time.

6 MR BEARD: They were statutory directors.

7 THE CHAIRMAN: I do not think that makes a difference.

8 MR WARD: I hope we are not going to get fresh evidence at
9 this stage about something that has never been the
10 subject of evidence.

11 But what we see is the importance of the M&S
12 directors' role at 138, please, on page 54, {S/9/54}.
13 We are just summarising what is in more detail in the
14 closing elsewhere:

15 "The M&S Director was the ultimate decision maker in
16 relation to DAF NV's list prices."

17 That came out of Mr van Veen's evidence.

18 "The M&S Director was closely involved in the
19 setting of IKP and the related margin targets."

20 That came out of Mr Habets' evidence.

21 "The M&S Director played a key role in the mandate
22 structure, through which DAF UK transactions were
23 referred to DAF NV for approval. [He] was 'always'
24 involved in Royal Mail deals and played a 'active role'
25 in formulating proposals ..."

1 That came out of the disclosure and the witness
2 evidence.

3 Then over the page, {S/9/55}:

4 "The M&S Director was ultimately responsible for
5 signing off the prices increases ..."

6 Then finally -- for emission standards, very
7 importantly, sorry; involved in signing off the prices
8 increases in emission standards.

9 Then:

10 "The Managing Director of DAF UK (Mr Ashworth)
11 reported (only) to the M&S Director."

12 Then at 139:

13 "Mr Borsboom explained the M&S Director was involved
14 in board level discussions on the timing for the
15 introduction of trucks [as read]."

16 So we do not know exactly how this cartel operated.
17 We have spent time on the M&S director because we happen
18 to know that three of them are implicated in the cartel,
19 but that is not the entirety of our case or anything
20 like it. It is just an important strand while we are
21 trying to work our way round the blanket silence from
22 DAF about how the cartel actually operated.

23 Another element just to touch on briefly is: what is
24 the true relevance of the fact that BT and Royal Mail
25 exercised -- sent prices out to tender?

1 Of course, as I said earlier, we do not know exactly
2 how the other manufacturers priced or what they were
3 doing. We do not know any of that. It is not before
4 the court. But what we do know is that they are all in
5 the cartel and it is at the very least plausible that,
6 when they are pricing in the UK, they are making use of
7 the fruits of the cartel. Why on earth else were they
8 doing it? So it is certainly not an answer to our case
9 to say, "Oh, well, there was a tendering exercise here".
10 The tender is full of cartelists.

11 So now what I want to do is talk about really the
12 role of the overcharge in all of this. I can see the
13 time, sir. Is this convenient or should I --

14 THE CHAIRMAN: If you are moving to a new topic, maybe we
15 should have a ten-minute break.

16 MR WARD: Thank you.

17 THE CHAIRMAN: All right. Thank you.

18 (11.37 am)

19 (A short break)

20 (11.49 am)

21 THE CHAIRMAN: Mr Ward.

22 MR WARD: Thank you. I was reminded in the break that there
23 was one further point I meant to make about the
24 tendering exercises that Royal Mail were involved in.
25 I was talking about the fact that obviously it concerns

1 the role of the other cartelists, but, with thanks to
2 those behind me, what DAF have said in their skeleton --
3 I think paragraph 353 -- is that you must decide the
4 case on the basis of evidence about DAF alone.

5 Now, it is obviously true that you only have
6 detailed evidence from DAF, but what we also have is the
7 decision and the decision is full of admitted facts,
8 admitted by the other cartelists, including Recital 27
9 and Recital 48 that we have already talked about. It is
10 not the case that you approach this with a blank page.
11 You have got all of that information to bring to bear on
12 the question of whether it is at least plausible -- at
13 least plausible -- that the other cartelists' prices
14 were influenced by the infringement and that that in
15 turn influenced the market in which DAF were bidding.

16 THE CHAIRMAN: Okay.

17 MR WARD: I was going to move on from that to the role of
18 the overcharge because we have been talking about the
19 different strands in causation and, if we could, we
20 could please pick this up at page 79 of the closing, so
21 that is {S/9/79}. We make the point that of course
22 causation is ultimately a matter for the court but, at
23 the bottom of the page:

24 "It was common ground between the experts that
25 a regression analysis served, not only to quantify any

1 increase in transaction prices, but to help establish
2 whether any ... increase was caused by the Infringement.
3 ... Professor Neven agreed in principle [as I put to
4 him] that a well-specified regression analysis coupled
5 with a plausible theory of harm [he said it] could be
6 'useful for causality'."

7 The way Mr Harvey explained it we quote below from
8 his report, {S/9/80}:

9 "In principle, because it is able to disentangle the
10 impact of the Infringement from other factors that
11 affected Truck prices, a well specified econometric
12 model provides an estimate of the causal effect of the
13 Infringement on Truck prices.

14 "The Theory of Harm helps to confirm that any
15 overcharge found in the regression model is attributable
16 to the Infringement rather than to another identified
17 factor."

18 Then we quote a line from Oxera's well-known study,
19 "Quantifying Antitrust Damages":

20 "To sum up, econometrics can help address the issue
21 of causation because it can take into account all (or
22 most) possible explanatory factors (subject to data
23 availability)."

24 So we think, with respect, that this much is trite
25 and this is why, in the tribunal's disclosure judgment

1 we were looking at earlier, it envisaged the approach to
2 prove -- of causation and quantum, causation and
3 quantum, would be through established economic
4 techniques to determine what, if any, was the effect of
5 the infringement on prices.

6 We remind you of something I have already said, at
7 paragraph 208, four lines down:

8 "In *BritNed*, the Court explained that a regression
9 analysis could form the basis of an inference of
10 causation."

11 But we are not relying on the econometrics on its
12 own. We rely on it with a plausible theory of harm, and
13 the theory of harm is founded in the facts of the
14 decision that we, as lawyers, have been able to, if you
15 like, fortify through what has been discovered from the
16 file and through the cross-examination that we have
17 pursued of Mr Ashworth and Mr van Veen and so forth.

18 But our respectful submission is that all of that,
19 taken cumulatively, is more than sufficient to show
20 causation. If you are with us on *Prest v Petrodel*,
21 there is a very considerable short-cut, without a doubt.
22 In the really unusual situation that we find ourselves
23 in in this case, we think that inference is entirely
24 justified and indeed made out. But we do not fail on
25 causation because we cannot prove collusion A affected

1 price B.

2 I was then going to show you a little bit of what
3 was said about the role of the theory of harm, if I may,
4 which we have again summarised some of the evidence in
5 the closing at page 97, {S/9/97}. There may be a little
6 repetition here, I fear. Forgive me. I do not know how
7 that crept into a 500-page document, but I will do my
8 best to compress it.

9 We say at 268:

10 "Mr Harvey explained that the [theory of harm]:

11 "'confirms that it is plausible that the
12 Infringement led to a restriction in price competition
13 and ...

14 "... [it] helps [us] to confirm that any overcharge
15 ... is attributable to the Infringement ..."

16 Professor Neven, in one of his reports, described it
17 as "a useful complement to the econometric analysis of
18 effects".

19 Then we quote slightly fuller the passage that we
20 quoted rather briefly a moment ago, when we talk about
21 causation, and he says, at the top of page {S/9/98}:

22 "I think that if I had an econometric model in which
23 I was confident about the identification strategy of the
24 overcharge and if I had a theory of harm that was
25 validated by the data that supports the estimates of

1 the infringement, I think it would be useful for
2 causality ..."

3 Then he entirely fairly says:

4 "... as you pointed out, causality is not an issue
5 for economists. It is ... for this court."

6 So "useful complement" is right and we do submit
7 that the threshold for establishing whether there is
8 a plausible theory of harm is not high. It is certainly
9 not that we have to prove the theory of harm on the
10 balance of probabilities in a way that is suggested by
11 the defendants both in their skeleton and in their
12 closing at 171.

13 This is just another attempt by them to mount a --
14 put up an insurmountable barrier to success.

15 THE CHAIRMAN: You have to prove as a matter of law
16 causation on the balance of probabilities?

17 MR WARD: We do -- well, yes, allowing for the *BritNed*
18 point, which would take us straight to quantification.
19 But yes.

20 THE CHAIRMAN: The *BritNed* point is that you have to show
21 the gist of damage and --

22 MR WARD: Yes, to get quantification.

23 THE CHAIRMAN: -- then when you are into quantum it is broad
24 axe.

25 MR WARD: Yes.

1 THE CHAIRMAN: But where the causation -- is causation part
2 of quantum or part of the cause of action itself? Yes.
3 So it is --

4 MR WARD: I meant causation in my cause of action.

5 THE CHAIRMAN: So that has to be proved on the balance of
6 probabilities?

7 MR WARD: Yes, but it is an inferential -- I fully accept it
8 is largely an inferential case.

9 THE CHAIRMAN: Yes, and you get to it by various means,
10 using various different factors. So the theory of harm,
11 even though you cannot prove that on the balance of
12 probabilities or you may not be able to, you say is
13 enough of a factor there to --

14 MR WARD: The way I put it is we have a whole series of
15 strands. I have been through them at high speed. The
16 theory of harm reflects those strands to a significant
17 extent, no question, but the econometrics has genuine
18 explanatory power in terms of causation.

19 If we were here with an econometric analysis on its
20 own, I might be having quite an uphill struggle to
21 persuade you that that was enough to discharge the
22 burden, although, as *BritNed* says, it can be the basis
23 of an inference of causation precisely because it
24 controls out the other factors that would otherwise
25 explain what is the overcharge.

1 However, we are not that complacent. We have done
2 an awful lot of work to show why, in fact, the correct
3 interpretation of the overcharge is that it was indeed
4 caused by the cartel. That is how we put it. We do not
5 say we have the kind of simple line of causation that
6 you would expect in a case about, say, why a factory
7 burned down, was it due to an electrical fault where you
8 would expect a very, very tightly drawn line of
9 causation. We are in the territory of a secret cartel.
10 We are in the territory of trying to identify a quite
11 subtle economic effect on prices.

12 THE CHAIRMAN: Do you need a theory of harm? You do not
13 necessarily do.

14 MR WARD: I am not sure we do. It partly depends on what
15 you mean by "theory of harm".

16 THE CHAIRMAN: Yes.

17 MR WARD: I mean, do we need a very refined economic model
18 like Harrington? No. Do we need to fit it into some
19 tightly drawn rubric like Professor Neven seeks to? No.
20 Do we need a plausible reason to supposed that the
21 overcharge was caused by the cartel? Yes, we accept
22 that is very helpful in interpreting the econometrics.

23 THE CHAIRMAN: I do not think Mr Harvey started with any
24 sort of theory of harm. He went straight into the
25 econometrics really, did he not?

1 MR WARD: No. We have extensive analysis by Mr Harvey of
2 the theory of harm. He has presented both in his
3 overcharge reports. So they are complements to each
4 other --

5 THE CHAIRMAN: I thought it was more of a response to
6 Professor Neven's theory of harm.

7 MR WARD: In terms of the reports that is not right in the
8 sense that -- exactly what happened back in the mists of
9 time and who decided to do what in what order, there may
10 have been some cross-examination on that, but I confess
11 I have forgotten and I submit it is just totally
12 irrelevant. The question for you is to decide the issue
13 of causation. We accept the theory of harm is relevant
14 to that but it is not the only thing and, indeed,
15 Mr Harvey's theory of harm does build on the decision
16 and indeed some of the other elements that we have
17 explored.

18 But what has happened through the course of this
19 trial is that some of those elements have really
20 crystallised in the claimants' favour, including what we
21 learned about list prices, including Mr Beard's
22 concession about taking into account list prices and the
23 cartel information and various other important
24 revelations which we have itemised in the document.
25 I am reminded that Mr Harvey's first overcharge report

1 deals with theory of harm in section 2, so that is
2 tab E/1, if that is helpful.

3 So that is the role of the theory of harm and I was
4 going to say a bit about the theory of harm, but, before
5 doing, I am afraid I was going to turn to the
6 regrettable topic of Professor Neven's independence, if
7 I may.

8 THE CHAIRMAN: Yes.

9 MR WARD: I am going to take this almost entirely from the
10 written closing and it starts on page 81, {S/9/81}.
11 I shall not go through it line by line but I do want to
12 pick out some of the most important strands in this. As
13 we say at paragraph 211:

14 "[We] have serious concerns about DAF and
15 Professor Neven's failure to comply with the rules
16 governing the preparation of expert evidence and ...
17 Professor Neven's independence ..."

18 These things are closely linked, closely linked. We
19 see at the bullet points in this paragraph what the
20 essence of the concern is. That he:

21 "has been working for DAF since 2013 and began his
22 work on a consultancy basis in respect of the Commission
23 investigation that led to the Decision."

24 We also know he is:

25 "[working] for DAF on an extraordinary number of

1 cases and has the prospect of many more years of work to
2 come [for himself and his consultancy]; and

3 "has had access to a range of information of obvious
4 relevance to the issues in dispute between the experts,
5 which was not disclosed or even referred to until it
6 emerged during his oral evidence."

7 Having said I want to focus on this document, I want
8 to take you to one external document immediately, which
9 is {G/IC37}, although we do not need to see anything
10 confidential. This is the first witness statement
11 prepared for Professor Neven in this litigation and he
12 has given a series which were on various disputed
13 procedural matters.

14 In this witness statement he sets out his experience
15 and qualifications, and we can see he explains he is
16 a Professor of Economics and then from 2006 to 2011 he
17 was chief economist at DG Comp. Then at 2(b):

18 "I provided direct advice to the Competition
19 Commissioner, and was ... involved in a number of key
20 policy and case assessment developments including ..."

21 If we can go down, various matters, TomTom/Tele
22 Atlas, Google/DoubleClick, Intel and Velux, Aer Lingus.

23 Then, {G/IC37/2}:

24 "I promoted the adoption of the Guidelines ...

25 "I oversaw the Commission's ... analysis of ...

1 Oracle ... Billiton ... MasterCard ... Olympic ..."

2 Then he says:

3 "I have been instructed as the Defendants'
4 economic expert in these proceedings. I am [part] of
5 the team ..."

6 What is absent from that is any explanation at all
7 that he was doing any other work at all for DAF, either
8 now or earlier, and his other witness statements do not
9 advance on that --

10 THE CHAIRMAN: Well, he is being put forward as DAF's expert
11 so obviously he is doing quite a lot of work.

12 MR WARD: Obviously he is working for DAF here, but it is
13 the other work he has done for DAF. So he lists his
14 professional experience but tells us nothing about the
15 other work that he has done. We find out about that
16 other work for the first time in a footnote to his first
17 report on plausibility. We talked about this a lot in
18 cross-examination and I can just show you where it is
19 quoted at 216 --

20 THE CHAIRMAN: Sorry, by this stage he was already the sort
21 of -- he was the appointed expert for DAF.

22 MR WARD: In this case, yes.

23 THE CHAIRMAN: Well, this and all other cases.

24 MR WARD: Well, I do not know about any others. I only know
25 about this one.

1 THE CHAIRMAN: Right, okay.

2 MR WARD: If we just perhaps keep in mind the date of that
3 statement, if we can just find it.

4 THE CHAIRMAN: November 2018, I think.

5 MR WARD: November 2018. Then there were various later
6 statements as well which we have given the references to
7 here in the closing.

8 If we go back to the closing document at page
9 {S/9/83}, this is the famous footnote which gave us the
10 first inclination -- understanding that he had done
11 other work for DAF other than these proceedings. He
12 said:

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

22 Then you will recall there was vigorous
23 correspondence on this topic --

24 THE CHAIRMAN: He says "Nevertheless".

25 MR WARD: In other words, "Well, I am doing all this other

1 work but I am confining myself to annex B", is what he
2 is saying, as I read it.

3 Then we find out from DAF's solicitors that, in
4 fact, as we say at 217, they are facing 1,700 claims
5 across 19 jurisdictions and that Professor Neven was
6 assisting with all of them, even though he was not
7 a court-appointed expert. As we note at the bottom of
8 that paragraph, he said the work was "of a constant
9 nature" since 2016.

10 THE CHAIRMAN: Sorry, when you say he was not the appointed
11 expert, what do you mean?

12 MR WARD: Well, he was not actually yet appointed as
13 independent expert witness but that he was helping --
14 assisting with the claims is what he is saying here.

15 THE CHAIRMAN: Is that what DAF's solicitor said?

16 MR WARD: No, that is how he explained it in his evidence.

17 THE CHAIRMAN: I mean, you have far more experience about
18 these sorts of cases, but I would have thought, where it
19 is the same client dealing with the same cartel, you
20 would probably have the same expert.

21 MR WARD: The issue here is not that in itself. It is just
22 the sheer scope and scale of what is going on. So it is
23 actually in DAF's letter. I will read it to you:

24 "Professor Neven has not been named as an expert in
25 each claim or in each jurisdiction but would have

1 contributed, at least at a high level, to the analysis
2 in each jurisdiction and claim [as read]."

3 Of course we do not object --

4 THE CHAIRMAN: They may be at different stages and they have
5 not yet appointed an expert.

6 MR WARD: We just do not know. We do not know. We can only
7 go on what we have managed to find out and what we have
8 managed to find out through cross-examination.

9 MR BEARD: Mr Ward actually asked about this because
10 Professor Neven referred to his position in relation to
11 a case in Norway.

12 MR WARD: So the first thing I want to go to is -- we do not
13 actually have an instruction letter for the first phase
14 of this work, but at paragraph 219, {S/9/84}, we quote
15 from what Travers Smith said in their letter to us,
16 where it says:

17 "We understand that Professor Neven was instructed
18 in February 2013 to consider potential economic
19 arguments that might be advanced by the Commission and
20 lines of enquiry that DAF might pursue in order to
21 address them."

22 I cross-examined him on this, you might just
23 recall -- it was a long time ago -- and he explained at
24 that stage he was given an explanation of DAF's pricing
25 and the link or absence of link between list price and

1 transaction prices. We are going to come back that. He
2 accepted that his role involved considering the theory
3 of harm issue that we are also debating today. So he
4 was there acting in respect of one of the issues he has
5 acted on in these proceedings.

6 I put to him -- and he accepted -- that the role
7 described in the letter amounted to helping them
8 formulate a defence. Then we had a rather
9 unsatisfactory exchange about whether or not he really
10 agreed with that wording, but he accepted in the end
11 that he had seen the letter in draft and had not
12 disagreed with it.

13 What we do submit is that it is clear that, at that
14 stage, he was in effect acting as a consultant.
15 Advising on lines of defence is not the role of an
16 independent expert. It is a legitimate function of an
17 economist acting as a consultant.

18 Then there is a second phase of the work which we
19 can see at 222, which is:

20 "... [considering and giving] his economic opinion
21 on the potential theories of harm and objections put
22 forward by the Commission following its investigation."

23 That letter, you might remember, contained a fee
24 structure, which we talked about, involving many, many
25 different levels of seniority.

1 Just for the transcript it is {J4/354/6}.
2 Professor Neven confirmed there was a team of probably
3 20 to 25 persons at Compass Lexecon working under its
4 terms.

5 THE CHAIRMAN: When it says "The next stage of his
6 engagement", what period are we talking about there?
7 That is post-decision --

8 MR WARD: I think that is what emerged from the
9 cross-examination, yes.

10 THE CHAIRMAN: -- but before his specific engagement
11 in August 2016?

12 MR WARD: No, I think in fairness from then is probably the
13 gist of the cross-examination.

14 THE CHAIRMAN: Right.

15 MR WARD: The letter of engagement -- we have quoted from
16 the letter of engagement at 225, {S/9/85}, where he
17 says:

18 "... provide expert consulting services ... may
19 include providing expert testimony."

20 Then in fairness it does say:

21 "Expert understands that Client is
22 interested in obtaining Expert's objective and
23 independent analysis ..."

24 Of course the real question is whether we can have
25 confidence that really is the case given where we have

1 reached.

2 On the next page, {S/9/86}, we quote from an
3 extremely famous dicta on this topic, *Ikarian Reefer*,
4 where Mr Justice Crestwell summarised the rules on
5 expert evidence. I am sure it is familiar, sir.

6 THE CHAIRMAN: Yes.

7 MR WARD: The crucial point is:

8 "... expert evidence presented to the court should
9 be, and be seen to be, the independent product of the
10 expert uninfluenced as to form or content ..."

11 With respect to Professor Neven, appearances do
12 matter here and that is really the focus of our
13 concerns.

14 Then things get quite complicated and we tried to
15 plot a thread through the cross-examination.

16 Professor Neven initially denied he had been given
17 access to any file documents or, most importantly,
18 factual instructions from his clients -- the transcript
19 references are all there -- but it is now clear it is
20 incorrect. Not only did he get the Commission file,
21 but, much more significantly, having elicited this
22 answer from him, that he had not received factual
23 instructions, we then get the memorable -- two memorable
24 things. One is he explains:

25 "They explained to me, I mean, what they thought

1 this -- what the Commission had uncovered did not lead
2 to anti-competitive effect, so I heard, you know, from
3 the very beginning why they thought that there was no
4 effect, that the conduct uncovered by the Commission did
5 not lead to anti-competitive effect ... this narrative
6 has been constant throughout."

7 So this is very, very significant, in our respectful
8 submission, that Professor Neven has been fed some kind
9 of narrative which is telling the story of no effect --
10 no effect -- and he says he has had this from the outset
11 and whatever it is has never been disclosed.

12 THE CHAIRMAN: I seem to remember from his evidence he said
13 that he did not initially come to his theory of harm
14 back in 2013, it was only after, but this rather
15 suggests otherwise, does it not?

16 MR WARD: Well, this is what he is being given by the
17 client. That is the point.

18 THE CHAIRMAN: What he has been given by the client, but
19 also --

20 MR WARD: This is not talking about his view. It is talking
21 about how he is being fed a view by his client.

22 THE CHAIRMAN: Well, going back to 220 in your thing,
23 talking I think about 2013, {S/9/84}:

24 "He ... accepted that his role involved considering
25 'the theory of harm issue that we are also debating

1 today'."

2 MR WARD: And helping them to formulate a defence.

3 THE CHAIRMAN: I do not know what the actual timing of that
4 is, but --

5 MR WARD: It is all very imprecise, sir. We were doing our
6 best. I am sure Professor Neven was doing his best to
7 remember as well. But this is in the first phase,
8 before the Compass Lexecon letter. He says he is
9 helping them formulate a defence. He is explaining he
10 got some sort of instructions from them. Then this
11 paragraph we have quoted in paragraph 230 is really,
12 really important. He is being fed a line by his clients
13 that they -- he says, {S/9/86}:

14 "... from the ... beginning ... they thought that
15 there was no effect, that the conduct ... did not lead
16 to anti-competitive effect ... this narrative has been
17 constant throughout."

18 That is very important. Whether or not even
19 Professor Neven explicitly relied upon it in formulating
20 any of his views, it is impossible to rule out the
21 possibility that this has been influential.

22 THE CHAIRMAN: Well, it is difficult to see how it could not
23 have been influential on his theory of harm.

24 MR WARD: Respectfully, yes. But of course we are all
25 struggling here because whatever it was has never been

1 disclosed. Then things took a turn for the unexpected,
2 I think it is fair to say, when if we go to
3 paragraph 233, {S/9/87} -- this is a moment I suspect
4 I will never forget, when I said to him:

5 "But you have never asked DAF any questions about
6 why it carried out this cartel --"

7 He said:

8 "I did."

9 I said:

10 "Oh, you did?"

11 "Answer: I did, and actually I have had sort of two
12 answers about, you know, why it took place at all."

13 I think it is just worth briefly turning up that
14 transcript, actually, because it is useful to see how he
15 put it the first time. It is {Day10/112}. Oh, dear,
16 this looks like a wrong reference, is it? Oh, no, I am
17 in the wrong ...

18 Yes. So "I did", then he gives some explanation
19 relating to *Scania*, and then down at line 11,
20 {Day10/112:11}, he says:

21 "So they were interested in the list prices
22 themselves and in the structure of the list prices."

23 I hope we can be forgiven for thinking that that
24 seems like he is getting concrete information from the
25 client about what they were doing it for at the time,

1 which is just what I have asked him. Then I say,
2 {Day10/112}:

3 "... this is not something we can see in your
4 instructions [or] your report ..."

5 Then Mr Beard interrupted. I cannot quite remember
6 now why.

7 THE CHAIRMAN: Because you had interrupted him, probably.

8 MR BEARD: You interrupted the witness. You stopped him
9 finishing his answer.

10 MR WARD: There we are. Then he was entirely justified.

11 So at that stage it seemed as though what he was
12 saying was he had concrete information from the client.
13 Then, in fact, what we see if we go on to page 114,
14 after a lot more rather lengthy exegesis, he used the
15 words "ex post [facto] rationalisation" at line 21,
16 {Day10/114:21}. I think it is fair to say at this point
17 it was a bit confusing.

18 THE CHAIRMAN: Well, whose ex post rationalisation, was it?

19 The client's or --

20 MR WARD: He is been talking to the clients. He has got
21 this explanation from the clients. By this stage he
22 seems to be saying that it is some form of ex post
23 rationalisation. When I say -- I actually ask the
24 question, "By you?", {Day10/114:22}, and he said,
25 {Day10/114:23}, "Not only by me".

1 I said, {Day10/114:24}:

2 "Sorry, let me be clear about the question ...

3 "You said it is ex post rationalisation. Is it
4 factual instructions from DAF about why they were doing
5 it --

6 "Answer: No.

7 "Question: -- or is it what you think would make
8 sense of what they were doing?

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

16 "I see that in the witness statement of
17 Mr Ashworth ..."

18 Of course one could say in parenthesis that is
19 exactly the bit of Mr Ashworth's statement that we
20 successfully cross-examined.

21 So it is pretty unclear. But what it is saying is,
22 "I had conversations with DAF which were the foundation
23 of this". We went from him saying he had no
24 instructions, then to saying "I talked to them", then to
25 saying it was ex post facto [sic] rationalisation and

1 then at least confirming he had conversations with DAF.

2 I put to him -- despite what is suggested in the
3 closing of DAF, I put to him that this was information
4 that was obviously relevant to the matters before the
5 tribunal.

6 THE CHAIRMAN: Well, he goes on -- I am just looking at 19,

7 {Day10/115:19}:

8 "What I am saying is that, as an economist, I can
9 develop an economic theory in which this makes sense."

10 Ie, in relation to what he has been told by DAF.

11 MR WARD: Yes, absolutely. Then I [sic] say,

12 {Day10/115:22}:

13 "Have you said this in any of your reports?"

14 He said "No".

15 In other words, he may well have baked it into his
16 thinking but none of this information is set out in his
17 reports.

18 Actually it gets worse because if we look -- if we
19 could now -- if we can put the transcripts away and go
20 to bundle {E/61}, which is Professor Neven's reply
21 report, page 23 -- sorry, supplementary report on
22 overcharge. If we go to page 23, {E/61/23}, he picks up
23 this topic. Can we go down a little bit more, please,
24 to 5.3? Thank you. He makes the point that:

25 "Throughout Harvey 2, Mr Harvey draws inferences

1 from the observation that the infringement lasted for
2 fourteen years. He finds that because the infringement
3 lasted for so long, it is plausible that it has had
4 anti-competitive effects (as in the absence of effects,
5 the practices would have been discontinued)."

6 So similar to the points I have been making.

7 "It is entirely possible that infringing conduct was
8 found to be useful by the manufacturers without
9 necessarily affecting customers through systematically
10 higher prices and profits. This is particularly
11 relevant in the context of the theories put forward by
12 Mr Harvey. As discussed above, exchanges of information
13 on cost and demand conditions ... can bring benefits in
14 terms of better pricing strategies without leading to
15 systematically higher prices. Exchange of information
16 on list prices ... can be understood as conveying
17 information on demand or cost and the exchange of such
18 information, while useful for setting prices, does not
19 necessarily lead to higher prices."

20 We cross-examined him on this and Mr Ridyard asked
21 him some questions on it. I think in the end he pretty
22 much backed away from it. But I am not really concerned
23 with the substance at this point. The point is he is
24 putting forward this hypothetical explanation without
25 any acknowledgement at all that he has been talking to

1 his clients about it and that he has been fed this
2 narrative, to use his word, for years about why the
3 cartel has no effect.

4 MR RIDYARD: What is the nature of your concern here? Is it
5 the fact that -- it cannot be the fact that he spoke to
6 clients because obviously the experts must speak to
7 their clients. Is it the fact that they told him things
8 that would have polluted his approach to the problem or
9 is it --

10 MR WARD: Two different strands. One is we say the rules on
11 governing experts have not been complied with. I am
12 going to come to that. The other -- you have asked
13 a very good question, sir -- cutting to the chase what
14 we are saying is that all of this informal conduct which
15 is fed in is all the product of his enmeshment with the
16 client and it is part of why we say that there are real
17 concerns about his independence.

18 We are going to see this is exactly what the expert
19 guide cautions against, so that is, if I may, a preview
20 of where I am going with this, if that is helpful.

21 THE CHAIRMAN: What, and so we should apply less weight to
22 his opinions as a result?

23 MR WARD: Yes, that is where we end up, sir, exactly. If
24 I may, I will follow this through and then you will see
25 why we say this.

1 At 237 on page 88, if we can go back to now, of S/9,
2 {S/9/88}, we summarise what came out through the course
3 of the trial, where he says at point 1:

4 "[I had] a lot of interactions with DAF in order to
5 understand what this data is ... and how to interpret
6 it."

7 That he had communications with them about the
8 involvement of the German subsidiary and what they
9 understood about the law. Then he told us that he had
10 asked DAF about whether it had any experience of
11 a complements effect, although it seemed that he did not
12 get useful answers. He further gave an explanation
13 about the passage of information from Germany to the
14 Netherlands, but in fairness to him he was unclear about
15 the source.

16 But what we are submitting is that all of this is
17 highly concerning and really the most important of all
18 is the underlying narrative that he is being fed and, as
19 you said, sir, a few moments ago, we just cannot
20 conclude with any confidence that this has not
21 influenced his approach, even if he says his expert
22 opinion is confined to the matters referred to in his
23 annex.

24 Of course, we also say that if all of these things
25 had been made known to us, it might have impacted

1 Mr Harvey's analysis. It might have prompted further
2 requests for disclosure. But what we say here is that
3 these demonstrate that, as part of his very longstanding
4 and wide-ranging relationship with DAF, Professor Neven
5 has apparently had access to information of obvious
6 importance that has not been shared and its existence
7 has really just slipped out in the margins of the oral
8 evidence rather than being systematically provided, and
9 this leads to another important point, that neither the
10 tribunal nor the claimants can have any confidence that
11 these disclosures were exhaustive.

12 Now, I should say that in DAF's skeleton argument --
13 sorry, I call it that -- closing, page 92, they have
14 a footnote which refers to various denials from
15 Professor Neven that there was more, but those denials
16 come very early on and in fact the information kept
17 coming.

18 Now, at paragraph 240, {S/9/89}, we go to a recent
19 case, *Good Law Project*, where permission to rely on an
20 expert report was actually refused and some core
21 propositions of the law are set out. I think in the
22 interests of time we will perhaps just try and take it
23 from the skeleton --

24 THE CHAIRMAN: Yes.

25 MR WARD: -- but this is Mr Justice Fraser:

1 "Experts owe an over-riding duty to the court, above
2 any duty that they owe to the parties [obviously] ...
3 The basic and underlying theme to the use of experts is
4 ... independence and fairness.

5 "An important component of that duty is that experts
6 for both parties must have access to the same material.
7 Expert evidence cannot fairly be considered by the court
8 if one expert has an unfair advantage, or access to
9 material to which an opposite number has no comparable
10 access. Equally, in order properly to consider expert
11 evidence, the court ought to be able to consider the
12 material upon which the expert's conclusions are based,
13 and an opposing expert is entitled to consider that same
14 material ...

15 "These requirements are not optional extras, only to
16 be complied with by a litigant and their expert if the
17 court states in a specific case that they are to apply.
18 They apply in all cases."

19 Then he refers to the Guidance for the Instruction
20 of Experts in civil claims, and this is in our
21 authorities bundle under tab 33. We have set out the
22 relevant passages here, {S/9/90}:

23 "Experts should try to ensure that they have access
24 to all relevant information held by the parties, and
25 that same information has been disclosed to each expert

1 in the same discipline."

2 Then this, very importantly, at paragraph 55:

3 "The mandatory statement of the substance of all
4 material instructions should not be incomplete or
5 otherwise tend to mislead. The imperative is
6 transparency. The term 'instructions' includes all
7 materials that solicitors send to experts. These should
8 be listed, with dates, in the report or an appendix.
9 The omission from the statement of 'off-the-record' oral
10 instructions is not permitted."

11 What we have here, in our respectful submission, is
12 a very large amount, we now know, of informal -- we
13 think informal but some sorts of ongoing interactions
14 between Professor Neven and DAF. We do not know the
15 limits of it. It all came out almost by accident from
16 the cross-examination.

17 THE CHAIRMAN: I mean, that refers to information and
18 instructions from the solicitors, which is the normal
19 route to experts. But, I mean, obviously,
20 Professor Neven suggested that he had had actual
21 conversations with the clients themselves.

22 MR WARD: But that does not somehow absolve him of the need
23 to explain it. In my submission, it is actually very
24 telling because really the point we put at 247, over the
25 next page, {S/9/91}, this is all linked to how enmeshed

1 he is with DAF. He has been receiving instructions and
2 information from them since 2013. He is working with
3 them on a vast number of different cases. It is not at
4 all surprising, as a result of that, that he has had
5 access to information outside the confines of the
6 strictly defined briefing materials that Travers Smith
7 put in his instructions. So that is our real concern
8 here.

9 MR RIDYARD: If you were talking about cost data or
10 something or some input to the econometrics, I can see
11 obviously it would be very unfair for Professor Neven to
12 have had it and Mr Harvey not to have had it, but,
13 I mean, conversations with DAF about how the cartel
14 could have been pro-competitive, is that going to be
15 helpful to Mr Harvey if he had had those conversations?

16 MR WARD: On the question of theory of harm? Sir, what we
17 have is Professor Neven being fed a narrative over years
18 and years. He said that the narrative has remained
19 constant throughout as to why they say it has no effect.
20 We have Professor Neven coming along and advising them
21 on their defence in the initial stages and then advising
22 them on theory of harm since 2016 or something, and,
23 like it or not, unless he has an information barrier in
24 his head, he has got this narrative running from DAF,
25 telling him that in fact there is no effect. We do not

1 know what it said, we have had no access to it, we do
2 not know if it stands up to scrutiny. He may say,
3 "Well, I took no account of this", I am willing to
4 assume that is his position, but actually what we are
5 concerned with is whether in fact what this means is, as
6 a result, we cannot be confident that his evidence has
7 been truly based on the materials that have been shared.

8 THE CHAIRMAN: You are saying that he should have set out in
9 his report, "I was told X, Y and Z by the clients as to
10 how the cartel operated and -- but I disregarded this
11 for the purposes of my opinion"?

12 MR WARD: Well, yes, because, of course, if there really are
13 conversations going on with the client and this
14 narrative -- this narrative -- it is very, very
15 concerning that he has had, to use the language of the
16 expert guide, off the record -- I do not know if it is
17 oral or if it is even a document -- off the record oral
18 instructions should not be omitted.

19 THE CHAIRMAN: It certainly would have been evidence that we
20 might quite like to have seen but we do not have. But
21 whether -- I mean, just looking at one of the aspects,
22 for instance, in 237.3, asking DAF about whether they
23 had any experience of a complements effect, you would
24 think that might have been quite interesting for
25 Mr Harvey to see.

1 MR WARD: Yes, of course, because of course one of the
2 questions about the complements theory is whether it is
3 actually grounded in reality, and this came out when
4 I was saying to Professor Neven that he had not actually
5 asked them about whether they had any practical
6 experience of this, if you recall. That is how this was
7 elicited, almost by accident, because his reports said
8 nothing at all.

9 When we looked at his report, we thought, "Here is
10 a very technical regression analysis with its main
11 regression analysis, its auxiliary regression analysis.
12 We see there is a theory that there is a complements
13 effect because he says they are perfect complements, but
14 is anyone in the world actually saying that this is
15 happening?", and given that his client was DAF, that
16 seemed like a question he could have asked them. So
17 this arose because he said, "Well, actually I did ask
18 them". So that is the problem here really.

19 The way we put this, though, is this is all
20 concerning because of the closeness of his relationship
21 with DAF and the extensiveness of that relationship.
22 That is why we say this does go to the question of
23 weight as well.

24 THE CHAIRMAN: You say if this had emerged at an earlier
25 stage, the tribunal would have refused permission --

1 MR WARD: I think we would have --

2 THE CHAIRMAN: Is that really --

3 MR WARD: If we had known then what we know now about both
4 the degree -- the fact he had been working with DAF as
5 a consultant in 2013 on the decision, then I think we
6 would have robustly opposed him being an expert in this
7 case. That is what I am saying. Obviously we were not
8 there, it did not happen, because we did not know. I am
9 not inviting you at this stage to say, "We are throwing
10 Professor Neven's evidence out", like they did in the
11 *Good Law Project*, of course I am not --

12 THE CHAIRMAN: You had issues about -- it is not as though
13 this just emerged at the trial. You had concerns from
14 at least the PTR stage because that was an issue that
15 you raised then. You wanted there to be
16 cross-examination on it.

17 MR WARD: Exactly, but all of this emerged from this
18 footnote which was in his first plausibility report.
19 That was the first we knew of any of this and then we
20 pursued it through cross-examination. We mentioned this
21 at the PTR because we thought it was an important
22 issue --

23 THE CHAIRMAN: There was correspondence between solicitors.

24 MR WARD: The correspondence went on and then the most
25 important letter is the letter of 22 April. So that is

1 why it came to the boil in the way that it did.

2 THE CHAIRMAN: Yes.

3 MR WARD: Then we do pick up the other -- so there are two
4 more threads really in this application, I am almost
5 done with it, I am sure you will be pleased to know.
6 The next one is really just the sheer scale of the work
7 he is doing, and we make this point at 248. He is
8 acting -- he is assisting them in 1,700 claims and, as
9 I put to him, there is a very large amount of work that
10 went into this -- is going into this for
11 Professor Neven. We quoted some of the
12 cross-examination and we make the point at 250,
13 {S/9/92}, that we do not even know whether all of this
14 work is being done to standards of independence that the
15 court would require in the UK. I accept the retainer
16 says "independent expert evidence".

17 But then the other thing in our application is at
18 251, which is his striking lack of curiosity. We put
19 some of the points down here but we are going to see
20 more of them in a minute when we get on to the theory of
21 harm, where we just list some of the things he has not
22 asked any questions about.

23 "He indicated that he had not asked his clients
24 [about] how cartel information had been used within DAF,
25 what DAF understood the meaning of recital 47 ... to be

1 (despite stating that 'he never understood' ...),
2 whether DAF [would have] access to feedback allowing it
3 to calculate competitors' approximate net prices or ...
4 the nature and extent of the collusive exchanges. When
5 asked by Mr Ridyard why he had not asked his clients
6 about how the cartel operated, he conceded he could have
7 done ... When asked by the Chairman, he further
8 confirmed that he had not sought to test the facts that
9 were put before him by DAF."

10 Then we have further examples of theories of harm.
11 I can show you now -- we will look at them shortly.

12 What we do say, with respect, at 253, {S/9/93}, is
13 that this lack of curiosity is itself irreconcilable
14 with his duty to the tribunal and the duty to make
15 enquiries which arises under the guidance for the
16 instruction of experts. We do respectfully say that all
17 of this undermines the confidence the tribunal can have
18 in his evidence or whether his evidence can be seen to
19 be as independent as it needs to be.

20 Then, at 256, {S/9/94}, really this just is the law
21 that pins what I was just saying about what should have
22 been declared. We do say:

23 "A party that wishes to call a potentially
24 conflicted expert must reveal a potential conflict of
25 interest that is not 'obviously immaterial' ..."

1 I say we think we would have succeeded -- perhaps we
2 would, perhaps we would not have -- but in our
3 respectful submission, there was a clear failure here to
4 draw these matters to the attention of the tribunal at
5 the time permission to call Professor Neven was granted
6 and of course the duty to establish there are no
7 potential conflicts is one that does apply to legal
8 advisers as well.

9 So, in our submission, sir, there are real grounds
10 to be concerned about the weight that can be attached to
11 Professor Neven's evidence. We are not asking you to
12 throw it out. We do say it goes to weight and we
13 respectfully submit that this does have a bearing on the
14 decisions you have to make. But beyond that we simply
15 put this aside and make our submissions without
16 prejudice to these contentions.

17 THE CHAIRMAN: I mean, it is, I thought, quite a striking
18 feature of this case that Mr Harvey and Professor Neven
19 have had to consider a whole range of issues and, on
20 every single issue, they have come out in favour of
21 their client. There has been no sort of compromise by
22 either of them on anything. It is just that is the way
23 it works.

24 MR WARD: I have two observations about that. One is that
25 really, whatever Mr Harvey said, Professor Neven came

1 back with more and more analysis, is the reality.
2 Mr Harvey has in fact made some quite significant
3 concessions, but I do accept that that is not an
4 unfamiliar experience in adversarial litigation
5 involving experts.

6 THE CHAIRMAN: Independent experts assisting the court, yes.

7 MR WARD: I can think of other memorable occasions.

8 THE CHAIRMAN: Right.

9 MR WARD: Sir, with that, can I move back to the substance?

10 MR RIDYARD: Sorry, one very specific question: why have we
11 not -- why do we not have the 2013 engagement letter?

12 MR WARD: We wrote to DAF about that or Travers Smith,
13 I should say, saying -- in fairness to them quite
14 recently. At that stage Professor Neven was working for
15 a different consultancy and they confirmed they have not
16 actually asked that other consultancy for the letter.
17 But it is of course going back a very long way because
18 Professor Neven's engagement in this has been ongoing
19 since 2013.

20 THE CHAIRMAN: Does DAF not have that letter or whoever was
21 acting for them?

22 MR BEARD: I would take the tribunal to it, but, no, the
23 files that came across with Professor Neven have been
24 searched. That has not been identified. It is not with
25 DAF either. But I will take you to the letter. But,

1 yes, searches have been undertaken. So the expectation
2 of where it would be, given Professor Neven moving from
3 one consultancy to the other, we have not been able to
4 identify.

5 MR RIDYARD: Was it a different law firm as well?

6 MR BEARD: No, I do not think it was a different law firm
7 but I think another law firm in the Netherlands was also
8 involved, so they have searched their files too,
9 De Brauw. So I think there have been checks wherever it
10 would have been expected to be found or transferred, but
11 I will confirm that and go back to the letter. So we
12 have looked.

13 MR RIDYARD: It seems strange, does it not?

14 MR WARD: Well, it is unfortunate. All we can go on is what
15 was in the letter coupled with Professor Neven's --

16 THE CHAIRMAN: Travers Smith's letter?

17 MR WARD: Yes.

18 With that, if I may, I will turn back to the
19 substance --

20 THE CHAIRMAN: Sure.

21 MR WARD: -- which is theory of harm, which I will try to
22 deal with quite shortly. In our written closing it is
23 pages 100 onwards for a while. But the short point
24 I would make about this is that Mr Harvey's theory of
25 harm is based on what the decision actually said. It

1 reflected the nature of the collusion that was involved,
2 which was not generally about transaction prices. It
3 was on some occasions, but generally, of course, it was
4 not. But we also know, as Mr Harvey's theory reflected,
5 the information was of real value in that the recitals
6 tell us it was actually of assistance in calculating
7 approximate list prices -- sorry, transaction prices.
8 But it was imprecise in the sense that it was not
9 collusion over specific transaction prices and that is
10 easy to understand given the nature of the product
11 because one of the points DAF has repeatedly emphasised
12 is that trucks are highly customised, so it is not easy
13 to understand the transaction price on an individual
14 Mercedes truck sold on a particular occasion.

15 But this is, again we submit, where DAF's failure to
16 explain how the cartel operated and how they use the
17 information matters because that itself makes it much
18 more difficult to establish a theory of harm because we
19 do not know exactly how it worked. But, to accept DAF's
20 case, you would have to conclude it essentially failed
21 in its aims.

22 Now, one thing that DAF say in their closing is that
23 Mr Harvey's theory is no more than a theory of
24 difference, in other words that there would have been
25 different decisions. But Mr Harvey did explain why he

1 thought the result could at least plausibly lead to an
2 increase in prices. There was quite a big debate about
3 the nature of his theory of harm and at page 106,
4 {S/9/106}, we have set out some key extracts, but really
5 there are just two things. One is he explained it was
6 essentially unilateral, albeit founded in the collusion
7 that was the basis of the decision, and it was just far
8 less demanding an approach than Professor Neven's.

9 Just to remind you, at the top of page 110,
10 {S/9/110}, after quite a long exchange with
11 Professor Neven and indeed Mr Ridyard, we say -- I said:

12 "In your answer there somewhere, Professor Neven,
13 you said that under these kind of unilateral effects the
14 prices could be higher or could be lower. So does that
15 entail that you accept it is at least a possibility that
16 the price would be higher?"

17 He said "Of course". So there is a bit more
18 agreement here than one might have otherwise hoped. But
19 it does not depend on a highly formalised economic
20 model; it depends in part on economic intuitions about
21 what would be profit-maximising behaviour.

22 Of course there is a common sense point here which
23 is about would prices be higher or would prices be
24 lower. Well, we have a 14-year cartel. This just would
25 not have carried on if there had really been a sort of

1 bloodbath of undercutting by the cartelists gaining
2 information. There is just enough time and enough
3 feedback to know that is not the case. Of course part
4 of the feedback is: what are the prices that the
5 cartelists are getting in the market? So if you go
6 along and you agree a list price increase and you find
7 that all of your competitors have just used it to cut
8 their prices or to take advantage of the fact you are
9 increasing your list prices, you are going to find out
10 very quickly.

11 So the idea that the only purpose of this cartel
12 information -- or it might be just used to undercut or
13 cheat is just not borne out by the fact that the cartel
14 persisted for 14 years.

15 THE CHAIRMAN: Because you have market share information and
16 things like that?

17 MR WARD: Well, there is market share information and there
18 are changes in market share over the years, but we do
19 come back to this -- I am sure the eyes roll on the
20 other side every time I say this -- but the cartel
21 lasted for 14 years and did not stop until the
22 Commission broke it up. There was something good in it.

23 MR RIDYARD: Where is this going? Are you saying this would
24 be the mechanism that would enable a theory of
25 coordination to work or are you just being agnostic

1 about whether it is coordination or unilateral effects?

2 MR WARD: Well, I am being agnostic and I hesitate to put
3 gloss on what Mr Harvey said about it when you asked him
4 questions about it. As I understood what he was really
5 saying is it was, if you like, predominantly a theory of
6 unilateral effects, is I think where we came out.

7 MR RIDYARD: He was sort of backing both horses and was not
8 apologetic about that. He was sort of saying he did not
9 need to come up with the details, either one would work,
10 and that is your position?

11 MR WARD: It is. All we require is sufficient plausibility
12 to give you another layer of comfort that the overcharge
13 that he identified is properly attributable to the
14 cartel, and that does not require a highly stylised
15 economic model like Professor Harrington and it does not
16 require the kind of restrictive approach that
17 Professor Neven took, which I am coming to in a second.
18 On Harrington, of course, the debate became admirably
19 refined and I am not going to enter back into it at the
20 moment, but we do submit it is at the very least
21 a useful illustration of how this could have worked.

22 Now, Professor Neven, in our respectful submission,
23 set the claimants up to fail. We will just deal with
24 this briefly if we go to page 118 of our closing,
25 {S/9/118}. He says -- this is paragraph 317:

1 "Professor Neven considered a theory of harm ...
2 under which, in order for the Infringement to have
3 increased transaction prices, the Cartelists need to
4 have been able to identify, monitor and maintain
5 a common focal point for transaction price increases."

6 Of course it is a cartel at the level of gross list
7 prices among many other things. He says, "Well, it just
8 cannot work unless you can have a focal point for
9 transaction prices, and that requires you to monitor
10 transaction prices and you will never be able to do that
11 and therefore there are plenty of opportunities to cheat
12 and therefore the cartel will not lead to sustainably
13 higher prices". In our respectful submission, this is
14 set up to fail because, of course, he is pointing to the
15 one thing that is absent from this collusion. Despite
16 its apparent success for 14 years, of course they cannot
17 monitor these transaction prices with that precision.
18 But we do know from Recital 47, the admitted and binding
19 recital, that they were better able to monitor
20 approximate transaction prices as a result of the
21 cartel.

22 So it may be a less precise form of collusion than
23 Professor Neven is contemplating here. You put the
24 point to him, sir, Mr Ridyard, "Cartels do not have to
25 be perfect to have some effect". Of course, you know,

1 one of the things Professor Neven said is, "Well, the
2 ability to have effective feedback depends on repeated
3 interactions". Well, this was continuous contact for
4 14 years. Of course we only know what we are told in
5 the high-level description in the Commission decision
6 and the documents that are on file, but the continuous
7 contact is not all of a nature that is going to be found
8 on the file.

9 MR RIDYARD: Sorry, the Recital 47, there is another bit at
10 the end of that, is there not, which says, "Subject to
11 the quality of the information", or something like that.

12 MR WARD: Of course. But, look -- I am sorry to harp back,
13 but carrying on for 14 years? It probably was useful.

14 MR RIDYARD: So this sounds like -- excuse me for trying to
15 pigeon-hole these things, but I would like to be clear
16 what the theory of harm is. This sounds like you are
17 supporting a theory of coordination, saying that there
18 would be coordination. Even though you could not check
19 on transaction prices, you can check on outcomes of
20 competition, like market shares and maybe some actual
21 prices, and that is good enough to give you enough
22 information to check on whether your co-conspirators are
23 playing ball or not. So this would be you saying that
24 the theory of coordination could work, where you
25 coordinate on list price increases and you check not on

1 actual transaction prices, because that is virtually
2 impossible, but on the consequences of sticking to or
3 not sticking to that agreement to raise prices by an
4 agreed amount?

5 MR WARD: Yes, plus the fact that we just do not know what
6 kind of feedback was going on in the market and what was
7 going on. We can see from DAF, the DAF evidence is that
8 they did take into account market feedback in various
9 ways and kinds. Mr Ashworth said that. Mr van Veen was
10 a bit more resistant, but the resistance was at least
11 qualified. Of course, it is unsurprising. So they know
12 what is going on in the market. Their sales teams,
13 who -- like Mr Ashworth said he was oblivious to the
14 cartel -- are nevertheless getting feedback about what
15 is going on. Then the people in DAF NV who are agreeing
16 these price increases and are trying to drive prices up,
17 using the gross list prices and all the rest of it, can
18 see what is actually happening.

19 If they go to the next cartel meeting, they are
20 going to say, "Well, look, it is all very well, but I am
21 being killed by you guys. My people are telling me on
22 the ground that they are getting undercut by you by 10%.
23 What is going on?". That would be where we would be.
24 But of course what DAF has not done is put forward any
25 evidence from the file or otherwise to say there was in

1 fact a problem of persistent cheating here. We draw the
2 opposite inference from the fact that it carried on.

3 THE CHAIRMAN: Well, you say that one can assume it was
4 working for all the participants because it carried on
5 for 14 years.

6 MR WARD: Yes.

7 THE CHAIRMAN: I mean, why else would you carry on?

8 MR WARD: I suspect you will start playing Bingo against me
9 if I keep saying "14 years" this afternoon. I fear it
10 is going to feature heavily in my submissions.

11 THE CHAIRMAN: Well, I think it was "14" with an exclamation
12 mark in it.

13 MR WARD: In my submissions, yes. I hope we deleted those!

14 THE CHAIRMAN: I think it was in the other side's
15 submissions actually.

16 MR BEARD: We wanted to capture the tone.

17 MR WARD: Well, I think I was accused of being both poetical
18 and theatrical in their submissions at some point.
19 I take those as a compliment.

20 THE CHAIRMAN: I suppose it is working out how it was
21 working for the participants --

22 MR WARD: Of course.

23 THE CHAIRMAN: -- and it clearly was working in one sense or
24 another.

25 MR WARD: To go back to another one of my leitmotifs, if

1 only they had told us, that would have helped. So we
2 just say we cross the plausibility threshold, whether it
3 is coordination or unilateral effect, these less precise
4 formulations from Mr Harvey are sufficiently plausible.
5 Professor Neven tries to force the case into
6 a straitjacket -- I am sorry, I am going to mix my
7 metaphors, I will try and avoid it -- a straitjacket
8 that just cannot be broken free because of the fact --
9 of course he is he right, this is the one thing we do
10 not have, is the ability to systematically monitor
11 individual prices.

12 I was just going to go back to my other favourite
13 theme about lack of curiosity because that is also very
14 important here. We can pick it up at page 122,
15 {S/9/122}, where, when you are formulating the theory of
16 harm, there are lots of things that one could ask about
17 that would help that Professor Neven showed no apparent
18 interest in at all. I am afraid there is a little
19 repetition perhaps of what I have already read out, but
20 we have nine bullet points here:

21 "Failed to ask DAF how it used the huge amount of
22 information that it received from its competitors ...

23 "Failed to consider the oral evidence provided by
24 DAF's factual witnesses, in which they discussed the
25 mechanisms [of the way the cartel could have been

1 communicated] ...

2 "Failed to ask DAF about its ability to calculate
3 its competitors' approximate net prices based on
4 information [it did receive] ...

5 "Failed to ask DAF about the nature or extent of the
6 exchanges of other commercially sensitive information in
7 which it was involved ..."

8 Because of course it was not just gross list prices.
9 Then {S/9/123}:

10 "Failed to consider the extent to which the
11 Cartelists would have been able to assess the success of
12 the Cartel in raising prices through feedback on their
13 own prices."

14 The point we have just been discussing. {S/9/124}:

15 "Failed to ask DAF whether there was a 'free rider'
16 problem with the Cartel ..."

17 Where he referred to "theoretical studies".

18 "Failed to examine whether any documents from the
19 Commission file evidenced 'cheating' by any of the
20 Cartelists."

21 Something we just discussed.

22 "Failed to ask DAF about the way the cartel actually
23 worked; [and]

24 "Failed to carry out any assessment of the risks of
25 participating in the Cartel as against the benefits ..."

1 We relied there on an observation from you, sir,
2 Mr Ridyard:

3 "One of the reasons why it might be worthwhile
4 incurring these costs would be enormous benefits of
5 raising margins above competitive level ... So I would
6 have expected maybe to have seen that discussion in the
7 report, even if only to say that it does not apply here
8 because no one knew what was going on."

9 Professor Neven said that would have been useful.

10 But where we are left with, then, is a theoretical
11 model coupled with some generalised features of the
12 market. So he says there is a symmetry in the market.
13 He says there is a lack of transparency in the market,
14 even though of course the Commission decision itself
15 says the market was highly transparent. Then a whole
16 series of things that, had he been willing to look at
17 the facts, could have informed him but which he ignored.

18 So, in our respectful submission, Mr Harvey's theory
19 of harm is sufficient for our purposes; Professor Neven
20 is unduly pessimistic and has erected unduly onerous
21 obstacles for us to cross before we can reach the finish
22 line.

23 Now, with that, I was going to move on to another
24 topic which I can deal with quite briefly. I think
25 I can deal with this before lunch and that is value of

1 commerce. There is really only one issue, at least one
2 principal issue for you to decide -- I hesitate ever to
3 say there is one issue in this case -- and that is the
4 question of whether bodies are included in the scope of
5 the decision when it talks about trucks. We are talking
6 about bodies being supplied by DAF to Royal Mail. This
7 is not an issue for BT because they did not buy any
8 trucks with bodies at all from DAF. It is
9 a Royal Mail-only point.

10 We ran through these points in our opening so I am
11 going to take them quickly. However, there is just one
12 point I want to pick up because we think there is
13 something in DAF's skeleton we would possibly like to
14 comment on now. We have, I think, five points and we
15 start on page 136 {S/9/136}. I will be brief.

16 First, the decision refers to "trucks", not
17 "chassis" or "naked truck" or anything of the kind.
18 A "naked truck" is of course a term of DAF's creation
19 and indeed we actually saw it for the first time very
20 late in this litigation because it was five years into
21 the litigation before this naked truck argument
22 materialised in correspondence -- itself surprising, we
23 would say, if this had any organic roots.

24 Secondly, the decision is clear the collusion
25 extends to truck options.

1 Then this is really the point we want to pick up,
2 which is at 357 of our closing, {S/9/137}, where we say:

3 "It is also clear that for DAF customers at least,
4 the supply of bodies was a 'factory-fitted option'.
5 Mr Ashworth made clear that Royal Mail was supplied with
6 a 'complete product' and that, in reference to bodies
7 and tail-lifts, 'we would fit these items in our
8 factory'. He explains that the Truck were sold as
9 a bundle and that in the case of Royal Mail 'negotiation
10 would come down to the price the customer was willing to
11 pay for the ... truck'."

12 The reason I draw attention to this is there is some
13 criticism here of Mr Harvey in DAF's closing which we
14 respectfully submit perhaps does not take this into
15 account. I am just going to turn it up, if I can. Yes,
16 if we could go to volume 2 of DAF's closing which
17 I suspect is S/11 and if we go to page 10, {S/11/10}, at
18 paragraph 26 DAF says:

19 "... the argument has been put forward in ignorance
20 of the evidence. Mr Harvey asserted to Sir Iain that
21 the price of the bundle -- ie the Truck and the body --
22 was 'negotiated as one'."

23 Of course that is not an unfair paraphrase by
24 Mr Harvey of exactly what Mr Ashworth had said, which
25 was: negotiation will come down to the price the

1 customer is willing to pay for the whole truck. So it
2 is a little harsh to criticise him.

3 Then what we see is another example of the problem
4 of the bottom-up approach:

5 "Had he looked at them, Mr Harvey would have
6 realised that RM and DAF did not in fact negotiate
7 a price for the whole bundle, but rather ... separate
8 prices ..."

9 Then they give an example which comes from one
10 particular contract.

11 So in our respectful submission, it is not
12 unreasonable of Mr Harvey or indeed the claimants to
13 rely on this general proposition in Mr Ashworth's
14 evidence.

15 Then the rest of the argument is really as we made
16 in opening and as has, in our submission, not been
17 answered by DAF which is, in a nutshell -- going back to
18 our closing, 138, so back to {S/9/138} -- we make the
19 point that certain things are expressly excluded but not
20 bodies. Then, fourthly, very importantly:

21 "DAF and the other Cartelists agreed to the facts
22 contained in the Decision."

23 It is inconceivable that they would have agreed to
24 these words if, as now claimed, it actually thought it
25 was only truck chassis. This is particularly so given

1 the obvious potential of this decision to give rise to
2 claims as indeed has turned out to be the case.

3 Then we address you on the Advocate General's
4 opinion in the *Daimler* case, and that really is just
5 material we have been over before.

6 THE CHAIRMAN: Can I just ask, going back to the decision,
7 you say that in the decision, when it refers to
8 "trucks", it means trucks plus bodies and all the other
9 options?

10 MR WARD: Yes. If it wanted to carve out bodies, it would
11 say so.

12 THE CHAIRMAN: But what does that actually mean? That
13 therefore they are deciding that the whole thing was
14 subject to an overcharge?

15 MR WARD: No, they are not deciding --

16 THE CHAIRMAN: They are not deciding effects.

17 MR WARD: They are not deciding effects but they are
18 saying: was it within the scope of the decision? The
19 question we are asking is: is the collusion that the
20 Commission identified confined to the naked truck
21 chassis, this term that emerged from DAF in 2021?

22 THE CHAIRMAN: They probably did not consider that one way
23 or the other, did they?

24 MR WARD: But the indicia we rely on in the decision are
25 that it is clear that the collusion extends to options.

1 A body is a form of option, it is optional, and there
2 are certain very specific carve-outs in the decision
3 which would have been an excellent place -- let us
4 remember, this was agreed, the facts were agreed. If
5 the cartelists including DAF had thought, "Oh, goodness,
6 no, you should not include the bodies", then that would
7 be an excellent time to mention that to the Commission,
8 just as they did exclude certain things which it might
9 be easiest just to show you.

10 THE CHAIRMAN: I am not sure how relevant it is to the
11 actual decision.

12 MR WARD: It is absolutely critical for the defendants. It
13 is not very important to the Commission but for the
14 defendants it is critical precisely because -- for the
15 reasons why we are standing here today.

16 So when they are settling the decision, one of the
17 things that is inevitably in their minds is the question
18 of follow-on damages. So there is, with respect,
19 generally, something of a tension between the
20 Commission's desire to say what it wants to say and the
21 defendant's desire to make it as, shall we say,
22 unproblematic as possible. Of course.

23 Now, we cannot open the black box of exactly what
24 was said during the settlement process, it is not
25 accessible to us or the court, but our proposition is

1 really one founded in common sense which is, if the
2 truck manufacturers are supplying these expensive
3 bodies -- because they are, that is why it matters to
4 value of commerce -- if they are supplying them and
5 really they think that what they are admitting to is
6 naked trucks and that bodies are nothing to do with it,
7 it is, in our submission, inconceivable that they would
8 have agreed to this for precisely the reason why they
9 find themselves here today.

10 DAF, from 2007, was selling about 1,000 bodies
11 a year out of its LF factory in Leyland. I think that
12 figure comes from a footnote in the pricing statement.
13 There is big money at stake in this point and of course
14 we do not know what the position is of the other
15 manufacturers but it is just, in our submission,
16 unimaginable that they would not have carved this out if
17 they thought it was actually outside the scope of
18 infringement.

19 THE CHAIRMAN: Can I ask: the prices of bodies, are they in
20 the gross list prices?

21 MR WARD: Well, I do not know whether they are generally or
22 whether --

23 THE CHAIRMAN: I mean, it is quite an important fact --
24 option, is it not?

25 MR WARD: What we have is two clear examples of documents on

1 the file which came from one manufacturer and found
2 their way into another manufacturer's possession, which
3 do refer to bodies. They are mentioned in our closing
4 and we showed them to you in opening. But, of course,
5 I do not know whether generally they were but, of
6 course, again, the file is itself not a complete record.
7 It is just the documents they have obtained when they
8 seized them. So, in our submission, it is really just
9 a matter of interpretation and it is --

10 THE CHAIRMAN: What, it is just a matter of interpretation
11 of the decision?

12 MR WARD: Of the decision in effect, yes.

13 THE CHAIRMAN: Okay.

14 MR WARD: You do not look like you entirely welcome that
15 task, sir.

16 We have set out actually in the closing the not
17 especially illuminating dicta of the Advocate General
18 who considered this in the *Daimler* case, where she
19 says -- sorry, I will find it for you.

20 THE CHAIRMAN: I think you showed us that in opening.

21 MR WARD: Yes, with a heavy heart. It picks up at the
22 bottom of 138 on to 139:

23 "It is necessary to consider not only its wording
24 but the context and the objects of the rules of which it
25 is part and the court cannot interpret it provisionally

1 against this clear and precise wording [as read]."

2 I am laughing at that slightly as somebody who has
3 probably spent a bit too much time in the trenches of
4 European law, recognising that it is not fantastically
5 illuminating. But we do have, as I said, two clear
6 examples of collusion over these bodies and I think what
7 is much more important is the seeming acquiescence of
8 the manufacturers, including DAF, until, in 2001 [sic],
9 five years into this case, this argument pops up for the
10 first time. In our respectful submission, that is
11 itself a clue that it does not have deep roots in DAF's
12 thinking.

13 Sir, that does appear to be a convenient moment,
14 certainly in my argument, if it is for you.

15 THE CHAIRMAN: All right. Shall we have a slightly shorter
16 lunch break if that is convenient?

17 MR WARD: I feel as though I am largely on schedule but we
18 would still welcome an earlier start, of course.

19 THE CHAIRMAN: 1.45 we will resume?

20 MR WARD: Yes.

21 THE CHAIRMAN: All right.

22 (1.01 pm)

23 (The short adjournment)

24 (1.45 pm)

25 MR WARD: Thank you. Returning on now to the substance of

1 the overcharge and I just want to begin with a couple of
2 high-level observations. You will have seen that our
3 pleaded case relied on Oxera's cartel report, the one we
4 talked about earlier. We pleaded the percentage of 26%,
5 which is an average figure derived from Oxera pleaded
6 before we had any expert evidence. Of course Mr Harvey
7 has calculated a range that is approximately 10%, if one
8 holds that figure in mind. It depends on which period
9 and which emission standard. But you will have also
10 seen he ran a whole series of sensitivities in his
11 models, indeed including a claim of specific overcharge
12 sensitivity, and quite a lot of them actually suggested
13 higher numbers. But he did reject those sensitivities
14 as his primary case and indeed, from my clients' point
15 of view, they were gift horses but ones that Mr Harvey
16 was willing to look in the mouth.

17 On the defendants' side, their pleaded case is there
18 is no overcharge and Professor Neven's view remains
19 steadfastly at zero. Indeed almost all his
20 sensitivities are actually negative.

21 So there has been -- there are, of course, some very
22 core fundamental differences between them which I am
23 going to come to in a minute, but I want to start with
24 a proportionality point which arises out of DAF's
25 closing.

1 Now, of course, the tribunal has been faced with
2 thousands of pages of expert evidence here and
3 Professor Neven's approach to many of Mr Harvey's points
4 has been to run more and more analysis and indeed we
5 heard on two occasions during the trial that he had done
6 some additional sensitivities that were not even
7 included in his reports. We were a bit surprised to see
8 those relied on by DAF in closing, which is obviously
9 impermissible as we have never had a chance to address
10 them, but there is a broader point here as well which is
11 important. In annex 1 to the DAF closing is a long list
12 of additional analysis that they say Mr Harvey should
13 have run in support of various points. Our short answer
14 to that is: well, enough is enough. Perhaps that also
15 merits an exclamation mark.

16 This litigation has been litigated -- this case has
17 been litigated at an extraordinarily level of
18 complexity. Mr Harvey answered Professor Neven and
19 Mr Bezant's late innovations in the joint experts'
20 statement, where various things came up for the first
21 time, and we do respectfully submit we cannot be
22 required to do even more, even on proportionality
23 grounds or indeed effectiveness grounds. So that is
24 just by way of general framing remarks.

25 What I am going to do now is talk about before,

1 during and after, briefly, currency, global financial
2 crisis and emissions, which is where the issues really
3 crystallise; before, during and after, just very
4 briefly.

5 As you will appreciate, there is a division in
6 Mr Harvey's model because of the two different DAF
7 databases, AS/400 up to 2004 and MI database from 2004.
8 So the first period of the before/during model is
9 actually seven years of the cartel, so it is important.
10 It is an awful lot of the claim. We are fortunate,
11 given how old the cartel is, that there was indeed
12 a substantial amount of data.

13 The point we make and explain in more detail in the
14 closing is that, although that data had its
15 limitations -- we know, it had no truck-specific cost
16 data -- Mr Harvey tested it in various ways and found it
17 was robust. All of the details are in the closing, but
18 the one point I thought I would develop briefly now is
19 on page 152, please, {S/9/152}, where we just point to
20 the four key reasons why the before, during and after
21 analysis was inferior to Mr Harvey's before/during. The
22 first point is actually more of a negative:

23 "... as Mr Harvey explained in oral evidence [the
24 before, during, after] model did not [actually] solve
25 any of the limitations in the AS/400 data."

1 You combine the two, but you do not get something
2 new.

3 Secondly, the before, during and after analysis
4 becomes sensitive to the question of how to control for
5 the GFC, the global financial crisis, which we are going
6 to talk about.

7 Thirdly, we do not -- we are not able to identify
8 properly whether the overcharge is higher at the start
9 of the cartel period and, fourthly, we have the possible
10 overhang effect. The overhang effect is the possibility
11 that what we are treating as a clean period after 2011
12 is in fact partially tainted by the cartel. The reason
13 that is a possibility is that Euro 5 and Euro 6 trucks
14 were subject to collusion, as the decision tells us, but
15 Euro 5 was continued to be sold into the so-called clean
16 period and Euro 6 was only launched.

17 Now, in cases of this kind, as Mr Ridyard in
18 particular will know, people often make a claim for the
19 overhang period and say, "Well, actually we think there
20 was an overcharge on products we bought after the end of
21 the cartel". We have not done that. Mr Harvey has
22 proceeded on the basis that the post-2011 period is
23 clean, but that is actually a conservative assumption.
24 It is begging a question in favour of DAF.

25 Sir, shall I unpack that a little more? You look

1 slightly taken by surprise.

2 THE CHAIRMAN: I am just trying to work out why it is in
3 favour of DAF.

4 MR WARD: Because we are assuming that trucks purchased
5 after 2011 were actually untainted by the cartel so
6 represent a competitive price, whereas actually it is
7 possible that their prices were still inflated in part
8 because of the cartel. So it is conservative because it
9 runs the risk that we are actually understating the
10 overcharge when we compare the cartel period and the
11 after period. The after period may not be a fully
12 competitive price because they are still selling
13 vehicles that were subject to collusion. We are not
14 asserting that because we do not know. That is why it
15 is conservative.

16 THE CHAIRMAN: That provides a difficulty, then, for
17 comparing the after period with the during period.

18 MR WARD: It does. It just potentially understates it.
19 That is all.

20 That is all I was going to say about before, during
21 and after.

22 Now I want to turn to currency, where the closing
23 starts on page 161, {S/9/161}. The issues here are
24 undeniably complicated, at least to me. The starting
25 point, though, is a very simple problem which is

1 this: DAF's price and cost data are incurred in
2 different currencies. The model needs a single currency
3 to work in. That means that some form of currency
4 conversion is needed. That much at least is common
5 ground. It quickly becomes less than common ground.
6 What I am going to do is draw six points out of our
7 written closing in an effort to encapsulate the issues
8 and what we are saying.

9 The first one -- of course you appreciate --
10 sorry -- Mr Harvey conducted his model in euros;
11 Professor Neven in pounds. I wanted to start with
12 a point, which is really stepping back, about the
13 rationale for what Mr Harvey has done.

14 DAF NV, the cartelist, is a Dutch business and it is
15 an exporter into the UK, even though, as we know, it
16 manufactures vehicles in Leyland. DAF UK is its local
17 sales subsidiary and, in fact, it has sales subsidiaries
18 throughout the EU and indeed around the world. But what
19 is the purpose of DAF UK? It is to make money for
20 DAF NV. One of the things we talked about this morning
21 is how DAF NV itself actually drives pricing in the UK
22 through list prices, margin targets, all the rest of it.

23 Mr Ashworth was very clear that he was under
24 constant pressure from DAF NV to deliver euro returns.
25 So it is not just that DAF NV itself, as it were, called

1 in transactions at a certain level. So we know that
2 DAF NV looked at transactions that were beyond the
3 margin -- beyond the approvals thresholds, but the
4 purpose of all of this, the focus of it, is to drive
5 revenues for DAF NV, and DAF NV is interested in euros.
6 The name of the game for DAF NV is making euros.

7 In our closing at 168, {S/9/168}, we list at some
8 length the evidence about how real-time euro exchange
9 rates actually matter in what happens commercially.
10 I will not go through it all. It is all pretty
11 familiar.

12 Now, we then get on to the topic that one could
13 loosely describe as "restrictions", restrictions in the
14 model. I hope Mr Ridyard will not disagree, when we
15 talk about "restrictions", that is just another word for
16 "assumptions", in effect, in this context.

17 THE CHAIRMAN: Is this the second point?

18 MR WARD: Yes. Sorry.

19 THE CHAIRMAN: No, I was just keeping track.

20 MR WARD: It is the second point. Having promised six
21 points, I need to deliver and I will do my best. So we
22 are on page 172, {S/9/172}, and we can take this from
23 the text, I think:

24 "As Professor Neven ultimately accepted [because
25 there was a little tussle] the effect of Professor Neven

1 using the budget rate to convert costs incurred in euro
2 into pounds is to impose a restriction into the way in
3 which movements in the euro/pound exchange rate can
4 affect the prices paid for trucks ...

5 "[His] model assumes that the only way in which ...
6 exchange rates effect DAF's prices is with a strict one
7 year lag which is constant for the whole of the
8 before-during-after period."

9 So that is the use of the budget rate. So he
10 converts costs into pounds, using the budget rate, with
11 its built-in one-year lag.

12 "There is no flexibility in his main model to
13 account for the impact of exchange rate [changes] that
14 take place within a year and so ... the exchange rate of
15 today never has an impact on the price today, only on
16 prices in a year's time."

17 We had a bit of a debate about what this really
18 means, but we will see at 442.3, {S/9/173}, with the
19 transcript reference, he accepted eventually this is
20 a restriction built into his model. I am sorry I have
21 skipped over 442.2, but it is very important.

22 "It assumes that the use of the budget rate (with
23 a set one year lag) to convert DAF's costs incurred in
24 euro to pounds captures all of the impact of exchange
25 rate on DAF's prices."

1 So that is Professor Neven.

2 But of course the big difference with Mr Harvey, one
3 of them, is that Mr Harvey also converts costs, but he
4 does it into euros and he uses the market rate, as you
5 heard at the time. He does not use the budget rate --

6 MR RIDYARD: Prices.

7 MR WARD: Well, I am coming on to that.

8 THE CHAIRMAN: Well, also part of the costs.

9 MR WARD: Part of the costs -- sorry, I did mean costs and
10 I am going to deal with that. They are both elements.

11 So to this extent there is an analogy with
12 Professor Neven. It is not the same, it is going in the
13 other direction, so it is going from pounds to euros,
14 but we know that a minority of the costs that DAF incurs
15 are pounds in the Leyland plant. I think it is even
16 a minority of costs in the Leyland plant are incurred in
17 pounds actually.

18 But Mr Harvey converts that into euros and he does
19 it at the market rate, not the budget rate. So
20 Professor Neven has the one-year lag, Mr Harvey says,
21 "Well, I am doing it with the market rate", and that, of
22 course, reflects what the impact of this change of costs
23 will be on DAF NV. But then the additional point that
24 Mr Ridyard was rightly moving to -- it is captured in
25 the closing on page 175, {S/9/175} -- he also converts

1 prices into euros.

2 So why does he do that? Well, allow me to be less
3 than technical about this for a moment. He is following
4 the money. This is ultimately what this economic
5 activity is concerned with. It is the euro value of
6 this that is going to be important to DAF NV when it
7 makes decisions about pricing. We know that DAF NV is
8 driving prices in the UK and from DAF NV's point of view
9 it is the euro values that matter. We indeed saw
10 documents when DAF NV was expressing concern about the
11 euro value of pound prices.

12 So the way we look at it is that Professor Neven's
13 view of the world is a DAF UK-centric view. It is
14 a model looking at it from DAF UK's point of view but it
15 ignores the impact on DAF NV of the euro value of the
16 price, and that is going to become important when I get
17 to my sixth bullet point. But now I am on my third.
18 The heading for this one is "Fully flexible control".
19 Here is an area of rare agreement between the experts.
20 The experts agree that, in theory, it is desirable to
21 include an exchange rate control in the model, to
22 flexibly control for the impact of exchange rates. But
23 Professor Neven explained convincingly why this was
24 problematic. We set out the evidence on page 177 --

25 THE CHAIRMAN: Professor Neven? Did you mean

1 Professor Neven?

2 MR WARD: I do. I actually do. No, it is important to be
3 clear.

4 We quote from it on page 177, from paragraph 456,
5 {S/9/177}, and it is from his first report on this
6 topic. We can see just a sample of it. We need not
7 read it all out but we hope you will consider it all of
8 course. But 456.2, he explained that an exchange rate
9 control "might introduce a problem of identification of
10 the potential impact of the infringement (mostly due to
11 the absence of cross-sectional variability in the
12 exchange rate variable) ... there could be
13 a multicollinearity between the exchange rate and other
14 variables included in the model, such as the
15 infringement variable. In such a case, there could be
16 a difficulty in separating the effect of changes in the
17 exchange rate from the effect of the infringement or
18 other events occurring at similar times".

19 Mr Harvey agreed with all of this, that there is
20 a problem of identification. That is why both experts,
21 in their main models, did not include any such control
22 and instead introduced restrictions or assumptions, if
23 you prefer.

24 Then you might recall, although you might be trying
25 to forget, a cross-examination I did of Professor Neven

1 about various sensitivities he carried out both on his
2 own model and on Mr Harvey's model. The easiest way to,
3 as it were, refresh our memories about this point is
4 actually to go to Professor Neven's first report, if we
5 could, to {E/11/55}. This is a table that we spent time
6 on in cross-examination of exchange rate sensitivities
7 that Professor Neven had carried out. Column (a) was
8 his own main model; column (b) was converting using the
9 budget rate, which is his main model, but also including
10 a budget rate control; (c) was converting using the
11 budget rate but then including a control for the market
12 rate; (d) was just market rate, which is Mr Harvey; and
13 (e) is cost converted using market rate but also using
14 a market rate control.

15 What Professor Neven said in his cross-examination
16 was the one he liked was the middle one. You can see
17 why he liked it, because, of course, the others give
18 strongly negative coefficients whereas the one in the
19 middle is not that far off his main model. But what
20 becomes more problematic is he condemned Mr Harvey's
21 model on the basis of running a sensitivity on it
22 equivalent to column (e), because Mr Harvey is using the
23 market rate and Professor Neven ran a sensitivity on it
24 controlling for the market rate. We can look at that
25 very briefly as well. That is in {E/35}. All of this

1 is in the closing, by the way --

2 THE CHAIRMAN: Sorry, just explain to me, the figures in
3 there represent what?

4 MR WARD: These are overcharge coefficients once you control
5 for the exchange rate in these various different ways.

6 THE CHAIRMAN: Right.

7 MR WARD: So column (a) is his main model. These are three
8 different rows representing his three different demand
9 controls for which he gets slightly different answers.

10 THE CHAIRMAN: Okay.

11 MR WARD: You can see a lot of this is strongly negative
12 except for column (c). In particular, what is perhaps
13 worth dwelling on as well, it is strongly negative in
14 column (b), where he controls for the exchange rate
15 using the budget rate which is also the rate he uses to
16 convert currency. So budget rate plus budget rate minus
17 3.8 to minus 4.8; mix and match approach, as we call it,
18 control for the -- convert using the budget rate but
19 control using market rate, more respectable figures.
20 But column (e), which is convert with the market rate,
21 control with the market rate, very strongly negative
22 figures again.

23 THE CHAIRMAN: The negative figure represents what?

24 MR WARD: Well, the implication is -- if you take the
25 minus 4.0, the implication of that is the effect of the

1 cartel was to reduce prices by 4%. That is what that
2 would mean. Not even Professor Neven has argued that
3 the cartel saved my clients money. Mr Bezant has
4 actually but not Professor Neven.

5 THE CHAIRMAN: So it is too negative, you are saying?

6 MR WARD: Well, I think everyone would agree it is
7 implausible that the cartel actually caused prices to
8 fall.

9 THE CHAIRMAN: Yes, okay.

10 MR WARD: What Professor Neven then does, we will see in
11 a moment, is he runs a sensitivity equivalent to (e) on
12 Mr Harvey and complains that it is also strongly
13 negative. We see this at {E/35/16}. This is
14 Professor Neven's reply report. Can we scroll down
15 a little more to 2.18? He is talking about Mr Harvey
16 and he says:

17 "When the dependent variable is converted into Euros
18 [which is what Mr Harvey has done], there is essentially
19 only one way to isolate the impact of the exchange rate,
20 and that is by including as a control variable the
21 exchange rate that is used for the conversion."

22 In other words, convert with market rate, control
23 with market rate. He does that sensitivity on the next
24 page, {E/35/17} -- and this is on Mr Harvey's model --
25 from the during/after period.

1 If we scroll to the bottom of the page, if we see
2 the bottom of the table, he gets an estimated overcharge
3 that has shrunk from 7.1 to minus 5.7. So he says at
4 the bottom of the page, underlined:

5 "This suggests that the positive and statistically
6 significant infringement effect obtained in Mr Harvey's
7 model is attributable to the lack of a proper control
8 for the exchange rate effect."

9 The point we made to Professor Neven is that what he
10 has done here is the equivalent of (e) or (b) in his own
11 model, "in other words controlling for the same exchange
12 rate that you have converted for", where he also got
13 strongly negative coefficients. But he takes
14 a different view of this. If we go on to page 20, where
15 he says at 2.26 -- table 2, we will look at that in
16 a moment, {E/35/20}. He says:

17 "The table above shows how my model is robust to the
18 inclusion of the exchange rate variable. The results
19 are not affected materially when I add the market
20 exchange rate ..."

21 What we see there, in the final row, is the
22 sensitivity seen from his previous table, where he has
23 mixed and matched. He has done a during/after model
24 where he has used the -- he has converted with the
25 budget rate but then he has introduced a variable for

1 the market rate.

2 What Mr Harvey says is, "Well, if you take the same
3 approach to my model, you get the same result. You also
4 get what one might call seemingly respectable figures if
5 you take this mix and match approach". He worked out
6 that sensitivity. I just give you the reference. It is
7 referred to in paragraph 474 and it is {E/52/65}.

8 But the problem here, Mr Harvey says, is there is
9 still this identification problem, and mixing and
10 matching, where you actually control for the wrong
11 exchange rate controls, does not solve the
12 identification problem.

13 I am going to go to my fourth point now. The fourth
14 point is this. It is about counterfactual:
15 Professor Neven accepted that these sensitivities can
16 only measure the impact of exchange rates in the factual
17 scenario. They do not tell us anything, of course, by
18 their nature, about how DAF would have responded in the
19 counterfactual, in the competitive environment, so it
20 leaves unresolved the question of what might have
21 happened to prices in the absence of the cartel, whether
22 exchange rates might have actually had a different
23 impact. I am going to come back to that in more detail
24 when I get to my sixth point.

25 Now, the fifth point is under the heading of

1 "Immediate and full pass-on", and this is where things
2 get delightfully technical, but there has been a change
3 of -- there has been a criticism and we think it has now
4 been accepted it was wrong. We are at 479 in the
5 closing on page {S/9/189}, where we quote from
6 Professor Neven, who says at the bottom of 479 that
7 Mr Harvey's model assumes that "changes in the exchange
8 rate are immediately and fully passed on into prices".
9 Mr Harvey insisted that that was wrong and eventually it
10 was accepted that it is wrong.

11 In a nutshell, the restrictions Mr Harvey has
12 imposed do assume a high but not complete amount of
13 exchange rate pass-through and they are immediate
14 because he is using the real-time rate. But he says,
15 "I am using the real-time rate because that is what
16 DAF NV is going to be concerned with".

17 THE CHAIRMAN: It is not immediate because the -- sorry, it
18 is not full because some of the costs are incurred in
19 pounds?

20 MR WARD: Exactly. That is exactly it.

21 What I was going to say, just really for the
22 transcript, is that there are some worked examples in
23 DAF's closing at paragraphs 27 to 29 where we think in
24 fact they still seem to be based on immediate and full
25 pass-on. I am reminded it is actually weekly rates so

1 "immediate" is not quite literally true. Just for your
2 note, those examples are to be treated with caution.

3 Now, my sixth point --

4 MR RIDYARD: Mr Ward, are you going to address the factual
5 evidence on whether DAF's prices actually responded to
6 exchange rate changes week to week?

7 MR WARD: Yes, I am happy to. I actually gave you the
8 reference, but we have set it out and I will go back to
9 it. If you give me a moment I will just find the
10 reference.

11 MR RIDYARD: Because if -- the reason I ask, because if
12 DAF's prices are actually quite sticky in sterling terms
13 whilst exchange rates jump about, then that would be --
14 would that not indicate that Mr Harvey's assumption is
15 not allowing -- is not reflecting the reality of the
16 pricing?

17 MR WARD: To that extent Mr Harvey has said that there is
18 scope -- he has acknowledged some force in that
19 criticism, which is why he has sensitivities, which
20 I will come on to, which address that. But the answer
21 to your question about the evidence, if I can just find
22 it -- yes, here we are. So it is page 168 where we have
23 summarised it, {S/9/168}, because obviously you are
24 right, sir, that there is a question of how the prices
25 are set in the UK. The problem with this exercise is

1 you are faced with a choice. Do you go pounds or do you
2 go euros is the basic choice. What Mr Harvey has done
3 is sensitivities which he says slow down the rate of
4 pass-through. The evidence as to why real-time exchange
5 rates will matter he sets out at paragraph 432, so
6 perhaps I will just go through this briefly to remind
7 you.

8 MR RIDYARD: Yes.

9 MR WARD: He says that, of course, prices are considered --
10 we say, I should say -- this comes from Mr Habets
11 principally:

12 "Prices are considered in euro using actual exchange
13 rates (not DAF's budget rates) at DAF NV level and
14 PACCAR level for Truck sales that used corporate
15 approval memos."

16 That in fact included almost all Royal Mail and some
17 BT. Then we know:

18 "The Trucks Commercial Department and Financial
19 Controllers of DAF NV used a GBP-Euro exchange rate that
20 was set weekly ..."

21 That was again Mr Habets.

22 We also know, {S/9/169}:

23 "For at least part of the Infringement Period,
24 DAF NV's Trucks Commercial Department also considered
25 transactions themselves using actual exchange rates."

1 Then we have Mr Ashworth's evidence, which is that,
2 "He took into account the ... exchange rate when making
3 pricing decisions "as UK customers bought in Pounds
4 whereas DAF NV worked in Euro, the [actual] exchange
5 rate in force at the time of any tender could have
6 a real impact ..."

7 In fact we saw some of these corporate approval
8 memos talking about the exchange rates.

9 "In the financial crisis period, the value of the
10 Pound fell sharply ... DAF NV worked in Euro ..."

11 This caused severe issues because it is returning
12 a lower revenue.

13 Then we know:

14 "Transactions with relatively low margins had to be
15 considered by DAF NV."

16 Then after 2001 sales of 25 or more were considered
17 by DAF NV. Then finally, during the financial crisis,
18 all deals had to be considered by DAF NV.

19 Then we make further points that MLO costs are
20 calculated in euros and DAF records its profits in
21 euros. So, obviously, what we say is real-time exchange
22 rates did have an impact. Mr Harvey has acknowledged
23 that this immediacy -- the full sense of immediacy is at
24 least something that is open to consideration.

25 MR RIDYARD: I think it is worth just dwelling a little bit

1 on the reasons why we are asking. If you are producing
2 in euros and selling in pounds and sterling appreciates,
3 then there is an immediate kind of windfall gain to the
4 manufacturers. Suddenly your euro-denominated margins
5 increase though nothing real has happened. Just because
6 of the quirk of exchange rate markets, your margins have
7 increased. So the concern or this identification
8 concern is that the pound did appreciate against the
9 euro in the early part of the cartel period so there is
10 a danger that the so-called cartel effect is actually
11 just this windfall gain from the exchange rate change.
12 The answer to that is, well, no, because all the euro --
13 all the producers were producing in euros so they would
14 identify the prices that were profitable in the UK,
15 therefore they would reduce their pound-denominated
16 prices to bring them back in line with a competitive
17 euro exchange.

18 But to the extent that that process was delayed or
19 did not take place immediately, there is this danger
20 that Mr Harvey's analysis is picking up an exchange rate
21 quirk rather than a cartel effect, and that is something
22 which I think Mr Harvey accepts is potentially
23 a problem. So what we need to understand is how big
24 a problem that is.

25 MR WARD: Well, it is potentially a problem or it is

1 potentially a virtue of Mr Harvey's model, and that is
2 really the sixth point that I wanted to come on to
3 because, as you say, sir, it has been a core
4 criticism -- we can call the heading for this one
5 "Margins" -- it has been a core criticism of
6 Professor Neven that Mr Harvey's model is effectively
7 attributing the increase in margin caused by the
8 strengthening of the pound to the cartel. As you say,
9 sir -- you are recalling the same piece of transcript.
10 We talk about at 490 in the note -- Professor Neven said
11 he would expect prices to fall as a result of this.

12 But what we saw was that in fact they did not. That
13 is pound prices. There are some graphs that we showed
14 Professor Neven to establish this, which we can go to or
15 I will just remind you of the references, {E/28/74}. So
16 why is this not a product of some kind of identification
17 problem? Well, because we are considering the
18 competitive counterfactual. That is the precise
19 exercise that we are engaged in.

20 The critical point is that what Mr Harvey is saying
21 is that in the counterfactual on a competitive market,
22 these enhanced euro margins should not have been
23 possible for exactly the reasons you just gave, sir,
24 that you would expect them to be competed away between
25 rival manufacturers. But, of course, all the rival

1 manufacturers or almost all of them are actually in the
2 cartel so they are all exporting to the UK; they are all
3 enjoying this euro margin windfall. In fact, it is
4 sustained and Mr Harvey says, "Well, my model is
5 reflecting that and Professor Neven's is not".
6 Professor Neven treats this margin boom as nothing at
7 all to do with the cartel. So the issue here arises,
8 when one considers the factual against the
9 counterfactual, Mr Harvey says, "Well, that is actually
10 a strength of my model".

11 MR RIDYARD: So it comes down to interpretation of how
12 margins went up and then stayed up. It could be because
13 of the cartel or it could be because prices in pounds
14 are just sticky because of institutional factors or
15 other things. Professor Neven's -- I think it is worth
16 just exploring it. Professor Neven's take on that is
17 that it would only be under perfect condition and no
18 differentiation of products that you would get this
19 instantaneous kind of reverting of margins to where they
20 should be. Anything less than perfect competition --
21 after all, our benchmark case is not perfect
22 competition, it is ugly competition but without the
23 cartel. So then he would say there should be some --
24 you would expect some stickiness and therefore there is
25 a problem here. So maybe we are just arguing about

1 where the fault lies -- where the balance of the
2 explanations lies as between exchange rate quirks and
3 cartel effects.

4 MR WARD: Of course. Even at this level of refinement,
5 there are limitations in these models in terms of their
6 ability to deal with all of these phenomena. But of
7 course what Mr Harvey is emphasising is the sustained
8 nature of the margin decrease(?); whereas of course it
9 would be a different story if you could say, "Look, it
10 reverted over a short period", or something of the kind.

11 I do want to emphasise, though, two particular
12 points about this. There was quite a bit of
13 criticism -- Mr Harvey was challenged in
14 cross-examination about this. But two points I would
15 emphasise. Contrary to what is suggested in DAF's
16 closing, Mr Harvey is not saying that all of the
17 increase in margins is attributable to the cartel
18 because, of course, his model controls out all sorts of
19 other factors such as demand. But, secondly, what is
20 also important is that he ran a margin regression
21 analysis on his during/after model as a sensitivity, and
22 the references for that are on page 198 at
23 paragraph 503, {S/9/198}.

24 So what the regression analysis was doing was
25 testing the impact of the infringement on DAF's margins

1 in the model and what he found was broadly similar
2 coefficients. So he was not just relying on some line
3 on a graph that says, "Here is costs and here is
4 margins". He actually analysed it as a sensitivity.

5 We see in DAF's closing, they say, "Well, this is
6 all very well but of course that kind of regression
7 assumes a one-to-one relationship between costs and
8 prices". But, in fact, the cost coefficient of
9 Mr Harvey's during/after model is indeed very close
10 to 1.

11 So what we do respectfully say is that these are
12 real reasons to think that the margin gain that he has
13 identified is appropriately captured in the model rather
14 than, as Professor Neven would have it, a very glaring
15 defect in it.

16 Those were my six points, but at risk of having
17 a seventh, I have mentioned the sensitivities and you
18 will see them set out at 200 and 202, where he did
19 sensitivities on whether they were slower or lower rates
20 of pass-through.

21 They are somewhat stylised, but they offer ways of
22 thinking about his model which address those issues to
23 some extent, recognising at the moment you really are
24 facing a sort of binary choice between Professor Neven
25 in pounds over here with the budget rate and Mr Harvey

1 in euros over here with the immediate pass-through.
2 Obviously, for the tribunal, there may be middle ways or
3 combinations of these things that you end up concluding
4 are more appropriate.

5 THE CHAIRMAN: If you look at the start of the infringement,
6 which is when the pound was strengthening, if you are
7 using, as Professor Neven does, the budget rate, does
8 that mean that the effect of the pound strengthening
9 just has a sort of time lag and it only sort of comes
10 into play the following year?

11 MR WARD: Yes, so that is the first thing. But the second
12 thing is the logic of his model is the only way that
13 affects pricing, the only way, is because it will affect
14 the amount of euro cost that goes into his cost
15 coefficient, so all he is doing is converting the euro
16 cost and then the exchange rate is applied to the model
17 through the cost coefficient.

18 Mr Harvey is saying, in a nutshell, that that does
19 not capture the full impact of exchange rate changes
20 because you have to look at this also from DAF NV's
21 perspective and, ultimately, DAF UK is just a local
22 subsidiary of DAF NV and DAF NV is interested in the
23 euros.

24 THE CHAIRMAN: You said the MLO costs are in euros,
25 calculated in euros, but presumably the IKP targets are

1 converted into pounds for the UK subsidiary?

2 MR WARD: I hesitate to answer that question on my feet.

3 THE CHAIRMAN: It would have to be, would it not?

4 MR WARD: I am being told no, they are set as a percentage.

5 The IKP is set as a target margin percentage. Yes, that
6 is right. So someone in DAF NV, Mr McDonagh, is sitting
7 there, setting these margin targets, and they convert
8 it -- they articulate it into a percentage.

9 THE CHAIRMAN: Right.

10 MR WARD: There is a lot of different factors at play here
11 and this is why I say, look, it is presented as an
12 either/or but there may be different ways to cut this
13 cake.

14 THE CHAIRMAN: In a way, whichever you choose, whether to go
15 euros to pounds, pounds to euros, is it not sort of
16 swings and roundabouts? When it goes the other way, as
17 it did in 2008 and the GFC, would that then have worked
18 against --

19 MR WARD: It does, absolutely.

20 THE CHAIRMAN: -- your case?

21 MR WARD: The overcharge figures that Mr Harvey has are
22 averages, so the before/during model is an overall
23 average, I think of 11.6, and the during/after has
24 a lower average. He is controlling out the GFC, which
25 is what we are about to talk about, but even so, it is

1 a lower average, subject to emission standards, which is
2 then the third thing we are going to talk about.

3 So, yes, of course, these are movements and the
4 exchange rates were very volatile in the GFC period.
5 Indeed that is another thing that is relevant to
6 Mr Harvey's dummies.

7 MR RIDYARD: We are going to come on to GFC, but with his
8 GFC dummies, these things do not cancel out in the way
9 the chairman has just suggested because he has taken
10 them out of the equation, has he not?

11 MR WARD: Yes.

12 THE CHAIRMAN: Right. So that is his response to dealing
13 with the GFC, not with the fall in the pound?

14 MR WARD: Sir, I did not quite follow the question. The GFC
15 is one thing. Exchange rates is another. They do
16 overlap, but yes.

17 MR RIDYARD: By taking the GFC observation or putting
18 a dummy variable in for the GFC years, the reason for
19 that was because he did not think demand controls coped
20 properly with them --

21 MR WARD: That is right.

22 MR RIDYARD: -- but an effect of that was to remove from the
23 story the exchange rate effect the chairman just
24 mentioned?

25 MR WARD: Yes, that is right.

1 MR RIDYARD: So because he has got these GFC dummies in
2 there, you do not get this potentially compensating
3 effect on exchange rates.

4 MR WARD: Well, what Mr Harvey is saying is what you are
5 taking out of the picture, another aspect of the extreme
6 variation --

7 MR RIDYARD: No, I understand the reason for doing it, but
8 I am just saying a consequence of that happens to be
9 that -- what would otherwise have been an offsetting
10 exchange rate effect is taken out of the picture. We
11 can look into this in more detail.

12 MR WARD: We are going to come to this.

13 Yes, let us talk about -- that was all I was going
14 to say about exchange rates and then we are going to
15 move on to GFC. At this point we are at page 203 in the
16 speaking note, {S/9/203}.

17 Now, again, starting with the obvious, the GFC was
18 of course an unprecedented shock to the economy and the
19 evidence shows us that DAF was anything but immune.
20 There was a collapse in sales and indeed in prices.
21 Now, both Professor Neven and Mr Harvey have included
22 demand controls in the models, but there was clear
23 evidence that in the period of the GFC there was both
24 exceptional demand conditions but also other factors at
25 work.

1 The point of the GFC dummies was to test for those
2 effects and to see if there was something more than the
3 standard demand control would pick up. Professor Neven
4 accepted, at the third time of asking, that if there was
5 an effect on prices beyond demand, beyond what the
6 demand control would pick up, his model would not pick
7 it up. The references are there. It was a memorable
8 moment of cross-examining him over video but the
9 reference is in there somewhere.

10 What happened is, when Mr Harvey tested this, it
11 turned out the results were highly statistically
12 significant and we fully accept that statistical
13 significance is not self-justifying. It is that the
14 evidence gave a clear rationale for at least testing
15 this.

16 Now, there is a sort of process point to start with,
17 which is that DAF has tried to make a great deal out of
18 the fact that Mr Harvey first ran an analysis without
19 the GFC. Do you remember there was a lot of
20 cross-examination on this point? But it really does not
21 help very much because the short point is, as we say at
22 526 of the closing, Mr Harvey explained he was actually
23 concerned from the outset that the model could lead to
24 bias results if it failed to control for the GFC. That
25 is in a sense obvious. If you are running a model which

1 runs from 2004 through the GFC, that is something you
2 are going to need to consider.

3 At 209 we set out the evidence which we say
4 justified at least testing this. It does not guarantee
5 there is an effect, but it is worth testing. There is
6 a whole series of points and, again, there was quite
7 a lot of cross-examination on these points about just
8 how unique they are to the GFC and so forth. But we
9 submit that, cumulatively, they justify both testing it
10 and they explain the logic of the results that Mr Harvey
11 obtained.

12 There is just a couple that I would dwell on here,
13 rather than just reciting through them all. The first
14 one is 534.6, {S/9/210}, where Mr van Veen talked about
15 visibility information being particularly important in
16 unstable situations. It is said that in that situation,
17 {S/9/211}, "As the Tribunal noted, Mr van Veen's
18 evidence explained that DAF would not take the
19 visibility reports or order board information into
20 account at all when considering proposed transactions at
21 times when production was regular". We were criticised
22 for not cross-examining Mr van Veen about this, but we
23 fully accept Mr van Veen was not in post during the GFC.
24 This is generalised evidence. But the inference is, we
25 say, that this would have applied during the GFC period

1 because it is, perfectly obviously, an unstable
2 situation. There were not any useful questions to ask
3 Mr van Veen about this.

4 Then we talk about -- sorry, at 534.9, which is the
5 change in the approvals structure. Sorry, I should be
6 careful -- the change in who was conducting the
7 approval. Again, there was a lot of cross-examination
8 on, "Well, the approval structure itself had not
9 changed". But what changed is a lot more deals had to
10 be approved by DAF NV or even PACCAR. Real-time
11 exchange rates were used. IKP is out of the window.
12 MLO is being used. Indeed, at paragraph 562 we have
13 more detail about how the role of IKP changed. But the
14 important point is that, even if the structure was not
15 changed, more senior people using different criteria
16 were approving the deals.

17 Then, at 535, {S/9/212}, we deal with a competitor
18 meeting attended by Mr Ashworth which we cross-examined
19 Mr Ashworth about. You will recall this was an SMMT
20 meeting. Just for the transcript -- it is in the
21 footnote but the minutes of it are {I2/131.7}. We asked
22 Mr Ashworth about this passage which is quoted in 535,
23 {S/9/212}:

24 "They openly stated that they are on a mission to
25 liquidate current UK stocks and that they are in 'dealer

1 protection and survival mode'. DAF and Iveco confirmed
2 openly that they have made funds available and offered
3 dealers financial support."

4 We asked Mr Ashworth about this and he said:

5 "... at the time, as I have just explained, DAF was
6 a build to order company so we took orders and we built
7 trucks. Prior to the financial crisis what was
8 happening is customers started to cancel vehicles.
9 Another point that was relevant, that prior to the
10 financial crisis orders and -- I think we have seen
11 before -- lead times were becoming excessive, so we had
12 orders which were placed for trucks with extended lead
13 times. So what we were getting was long lead times with
14 confirmed orders that we were planning to build and then
15 suddenly what we had is cancellations at an exponential
16 rate so we ended up building lots of trucks with no
17 homes to go to, hence the reason for stock, which is
18 very unusual in our business ...".

19 Mr Harvey commented on the significance of this,
20 {S/9/213}:

21 "Mr Ashworth's oral evidence revealed for the first
22 time 'that production in some cases had already begun or
23 indeed completed for trucks that were then subsequently
24 cancelled'."

25 We see suddenly that DAF is faced with a completely

1 different situation, where it actually has stock that it
2 wants to offload. We are not saying all of this proves
3 that pricing was definitely different. What we are
4 saying is there was a compelling reason to test for it.

5 Now, I want to deal with Professor Neven's two main
6 criticisms of this and then we will look at his approach
7 to this issue. The first thing was -- and this is 546
8 in the closing, {S/9/218} -- he says, "Well, the problem
9 was this reduced the number of trucks in the model", and
10 there was quite a lot of discussion about this and
11 questions about what exactly was meant by this
12 criticism. But where we ended up is it is common ground
13 that the trucks stay in the model but they are not
14 directly used for the estimation of the infringement.
15 They are used for the estimation of other variables in
16 the model.

17 So the question is: does this really matter?
18 Because what we have done is taken out 10% of the total
19 number of trucks in the model for the purpose of
20 estimating the infringement, but our answer to it is
21 given at 546.2. Bluntly, Mr Harvey did not think this
22 was a problem. He still had 12,000 Euro 5 trucks sold
23 during the infringement period that were used in his
24 analysis and 22,000 trucks from the post cartel period,
25 Euro 5, used directly to estimate the infringement.

1 Mr Harvey thought this was sufficient and you can see as
2 well there we have quoted from -- or rather referred to
3 paragraph 4.79 of his first report, where he says the
4 overcharge result identified was highly statistically
5 significant at the 99% confidence interval. There is
6 also a sensitivity he did, which is to test the smaller
7 sample of only Euro 5 trucks which show a similar but
8 statistically significant result to his main model. So
9 it does seem, with respect, that this is a problem in
10 theory but not actually in practice.

11 Now, the second issue is whether or not this somehow
12 unhelpfully interfered with the operation of the demand
13 controls. This one is I think perhaps more technical.
14 What Professor Neven did was a sensitivity which showed
15 that the demand coefficient was much higher with the GFC
16 dummies removed. For your further transcript, that is
17 E35/26 at table 3.

18 What Mr Harvey said is, "Well, this is not
19 surprising because the effect of the GFC is strongly
20 atypical". The dummies allow the model to pick up those
21 atypical effects and, without them, what you have is
22 a demand control for the entire period which is
23 distorted by this exceptional period. We quote at 549
24 a point you made to Professor Neven about this,
25 {S/9/220}, which is:

1 "... if you believe those observations are tainted
2 for some reason, they are not representative of what is
3 going on elsewhere, might that be a good thing [to take
4 them out]?"

5 That was indeed what Mr Harvey was saying, that it
6 is a virtue of his approach. You have a coefficient
7 that represents the average across the whole period.
8 You have a period like the GFC with a very different
9 level of demand effect that can skew it. If you apply
10 it across the whole period, that can bias the effects.
11 So the dummies have two virtues. They pick up the
12 additional effect on prices during the GFC and you end
13 up with a demand coefficient which is not skewed by it.

14 Another point I want to make, just one more
15 relatively narrow point before we go on to
16 Professor Neven's approach, at page 221, {S/9/221} --
17 this is where we deal, at 550, with another one of
18 Professor Neven's criticisms. Professor Neven said,
19 "Look, the GFC effect is particularly sensitive to
20 whether the second half of 2010 is included or not".
21 But Mr Harvey said he had done a sensitivity -- in fact
22 he did not just say it, it is in his report -- which he
23 carried out with respect to the second half of 2010
24 which showed significant effects on prices over and
25 above demand in the second half of 2010. The references

1 are there in the footnotes.

2 We do also point out that, in Professor Neven's own
3 alternative approach, he identified January 2009 to
4 November 2010 as a period of extreme low demand. So
5 they are included in his 25th percentile dummy.

6 At 554, {S/9/222}, we make the point I have already
7 alluded to, that Professor Neven did accept that if the
8 GFC had effects on prices other than by changes in
9 demand, his model would not capture those effects. He
10 tried to reduce all of the factors we have talked about
11 to pure willingness to pay and a pure demand effect. We
12 do respectfully say that is simply begging the question
13 and is not reflective of the evidence.

14 As I mentioned a moment ago, at 562 we set out the
15 evidence of the -- for example, the changing role of IKP
16 in the financial crisis. I will just run through it.
17 Because this is still contested, it is just worth seeing
18 exactly why we think it matters. At 562.1, {S/9/225}:

19 "The Trucks Logistics Department which Mr van Veen
20 worked in between 1999 and 2007 ... considered IKP
21 [generally] ..."

22 Then 562.2, {S/9/226}:

23 "At least until 2007 when Mr van Veen left ... IKP
24 was the only cost metric visible to the sales units ...

25 "MLO was more frequently referred to within the

1 Marketing and Sales Department of DAF NV 'sometime after
2 the financial crisis of 2008 ... including by less
3 senior employees' as 'it had become necessary to justify
4 to more senior management ... why ... tiny margins were
5 being [approved] ...'

6 "As a result of margins being so low, from ...
7 2008 ... more ... had to be approved by DAF NV ... by
8 reference to MLO rather than IKP';

9 "'When OMS was first introduced [around 2003], those
10 ... reviewing and approving proposed transactions within
11 DAF NV typically only had access to IKP ..."

12 But that shifted as a result of the GFC.

13 So that is part of why we say there is an effect
14 here to test. There were changes in DAF's approach to
15 pricing. The structure might have been the same but
16 there were changes. They do not prove there was an
17 effect. They raise a question about whether there was
18 an effect. Professor Neven's model simply did not test
19 for it.

20 MR RIDYARD: It depends what you mean by "test", I suppose.

21 Yes. Just to be clear on what you are saying here, you
22 are saying that you think -- your case is that the GFC
23 goes beyond a demand effect because, even though it was
24 the fall in demand that triggered things because demand
25 had fallen, it led to such a change to the way DAF

1 looked at its business that it changed the way it
2 conducted its pricing. It went into panic mode as
3 opposed to normal commercial mode or something in
4 that -- so therefore it changed the way in which it
5 looked at the whole question of pricing?

6 MR WARD: If you do not mind, I will put it slightly more
7 bluntly than that.

8 MR RIDYARD: Please do.

9 MR WARD: Simply that there is the evidence that there were
10 changes in the way pricing was approached. They do not
11 prove the existence of any effect that would not be
12 picked up by demand. I am not saying they do. What
13 I am saying is they justified Mr Harvey in testing for
14 it. When he put in the GFC dummies, he got highly
15 statistically significant results. Neither of these
16 things proves anything on its own. It is highly
17 statistically significant on its own, it does not prove
18 anything unless it has a rationale and this evidence
19 that shows there were reasons to think there was
20 a rationale also serves to justify testing for it.

21 Professor Neven has accepted, if there is something
22 going on there, that the demand control would not pick
23 up. He has not tested for it or identified it. Of
24 course what we are talking about here is a collapse in
25 pricing, so if he has failed to test for it, the problem

1 is that his infringement coefficient is bias
2 downwards -- if there is such an effect, I mean, just
3 putting it in the hypothetical.

4 THE CHAIRMAN: I think I am right in saying that Mr Harvey's
5 explanation as to how he first approached this only
6 emerged in his oral evidence, did it not?

7 MR WARD: Yes, it did. But what I said earlier -- and we
8 have dealt with this in more detail in the statement --
9 is there is nothing remotely sinister about that. An
10 awful lot of time and energy was spent on it and it just
11 does not show anything.

12 THE CHAIRMAN: The other thing I wanted to ask is that you
13 say there was a change in the approach by switching from
14 IKP to MLO but was not MLO always the primary metric via
15 which DAF NV and PACCAR presumably assessed approvals
16 and deals?

17 MR WARD: Well, it was used to a different extent in
18 different levels at different times. That is really the
19 point.

20 THE CHAIRMAN: Well, it was not disclosed to the sales unit,
21 was it?

22 MR WARD: That is right. But even within DAF NV it became
23 much more widely used in the GFC period. That is the
24 point and that is what is explaining --

25 THE CHAIRMAN: More widely used to what effect? In terms of

1 approving?

2 MR WARD: Well, in other words, assessing -- because what
3 happens is transactions which are outside the margin
4 approval thresholds get referred upwards towards DAF NV.
5 What happens at this point is that DAF NV is using MLO
6 much more widely in preference to IKP, so there is
7 a change that instead of using this IKP measure, which
8 is essentially artificial, suddenly people -- many more
9 people are looking at real MLO. But this is only one
10 factor.

11 THE CHAIRMAN: They would always be looking at MLO, would
12 they not, because those are the real costs and IKP is
13 a sort of fictional figure?

14 MR WARD: Well, this is what is traced through 562. Yes,
15 but more so. That is it, if I can put it in one
16 sentence. It is traced through in 562 in a little bit
17 more detail. But there is just one element. What we
18 are saying is there is enough here cumulatively to
19 provide a rationale for these dummies and what we end up
20 with is highly statistically significant effects coupled
21 with a rationale that justifies their use. They are not
22 arbitrary.

23 Professor Neven has some footnotes which say, "Well,
24 you can always come up with dummies that will be
25 statistically significant". Well, of course you can but

1 these are actually compellingly -- there is a compelling
2 logic to them based on the evidence itself. It is
3 grounded in the evidence. That is the argument.

4 Now, Professor Neven has a different approach. It
5 is 2.45. I do not know whether Mr Beard --

6 THE CHAIRMAN: Do you want to finish off this point?

7 MR WARD: I think if I could finish this point. It will not
8 take very long.

9 I am just reminded from behind that part of the
10 answer to your point, sir, is an awful lot more
11 transactions are going on during the GFC. I think from
12 recollection the evidence is saying -- sorry, not --
13 yes, GFC -- all the transactions had to be approved at
14 the DAF NV level. Mr Ashworth had no authority during
15 this period.

16 I was going to move on to Professor Neven's
17 alternative approach because, of course, in his main
18 model he does not test at all for this, but he has
19 a different approach. Again, it is useful just to
20 remind ourselves what it looks like. This is just an
21 alternative he offers and it is {E/35/29}, where, if we
22 look at paragraph 2.50 -- just scroll down a little
23 more -- he says what he is going to do is "compute two
24 dummy variables indicating respectively the highest and
25 lowest quartile of their respective distribution, up

1 until but not inclusive of that moment. The dummy are
2 defined on a monthly basis. The dummy variable
3 indicating the highest quartile ... would control for
4 extreme hikes in demand. The dummy variable indicating
5 the lowest quartile ... would control for extreme drops
6 in demand". So, in effect, he characterises half of the
7 time as either extremely high or extremely low in his
8 approach.

9 We can see it in action on page 30, {E/35/30}. This
10 is by reference to one of his different demand controls,
11 order board. The blue dots are what he calls "extremely
12 high" and the red dots are what he calls "extremely
13 low". We can see the GFC in there down at 2008, 2010,
14 a cluster of red dots. The effect of what he has done
15 here is to treat all of those red periods as equivalent
16 to GFC and then we have got lots of blue dots also, in
17 fact including some in 2008 when, because of the GFC,
18 demand is actually falling off a cliff.

19 Now, the effect of this, as we understand it or at
20 least I understand it, is you end up with a sort of
21 averaging out of all of these red dots on the one hand
22 and all of these blue dots on the other, so it does not
23 isolate the GFC. In fact it is bundled in with other
24 periods which are also, because of Professor Neven's
25 definition of "extreme", in fact well outside the

1 period, so it does not control in a focused way for the
2 GFC itself.

3 THE CHAIRMAN: Sorry, he is taking out of account the red
4 dot; is that right?

5 MR WARD: Yes, and all the blue dots. Then he says that it
6 leads to peculiar results. We are not really surprised
7 by that. But this is another area where Professor Neven
8 produced a surprise for us. In his cross-examination he
9 explained he had done some -- I think maybe it was in
10 the hot tub -- he refers to some additional
11 sensitivities in connection with this, but they have
12 never been provided to us and it was really a surprise
13 to see them referred to in paragraph 94 of DAF's reply.
14 Obviously they cannot be relied on.

15 But our principal objection to this is it just does
16 not bear any logic in the sense that it does not have
17 a rationale in the way that the GFC control of Mr Harvey
18 does. Demand is controlled for in both models. What we
19 have here is a GFC period where, paradoxically, part of
20 it is blue and part of it is red. If we are right and
21 there is something distinctive about the GFC over and
22 above demand, this model or this sensitivity is not
23 going to pick it up.

24 MR RIDYARD: But Professor Neven's rationale is that you
25 should look at it in terms of unusual demand, whether it

1 is positive or negative, and he defines a decision rule
2 that justifies whether these things are blue and red and
3 then he follows it through, so in that sense it is
4 principled, is it not?

5 MR WARD: That is the rationale. The point I am making is
6 that begs the question about whether there is something
7 distinctive about this period. If he is really right
8 and it has no -- there is nothing more unusual in the
9 GFC than an order board which is low in 2006 or an order
10 board which is low at the end of 2014, then it is fine,
11 he has tested for it. But he has accepted that, if we
12 are right and there is more to the GFC than that, he
13 just has not captured it. What we end up with in effect
14 is downward bias, zero-rated or even negative
15 overcharges. That is really the issue.

16 Sir, that is a convenient moment for me.

17 THE CHAIRMAN: Yes, all right. Ten-minute break.

18 (2.51 pm)

19 (A short break)

20 (3.03 pm)

21 MR WARD: Well, having said I had finished that topic, with
22 the formidable assistance from behind I want to make one
23 extra point, if I may. It is still on the screen. Even
24 better. This is the chart of Professor Neven's model --
25 sorry, alternative approach, I should say, {E/35/30}.

1 I made the point before the break that, if you look in
2 2008/2009, there is a vertiginous collapse in demand,
3 but actually Professor Neven has marked that with blue
4 dots because it still rates in his top quartile. Of
5 course Mr Harvey's point is that there is an extreme
6 fall here in the GFC period which is actually pushing
7 prices down and what Professor Neven has done, in
8 effect, is split the GFC into two periods and the first
9 chunk -- I am not sure it is exactly half, but the first
10 part that is marked blue is effectively treating it as
11 a period of high demand. So the effect of that is in
12 fact to imply that in that period prices are actually
13 falling [sic] and then I think there is a gap of
14 a month, I am told, between the blue and the red dots
15 which is then treated as normal demand.

16 So the effect of that is to skew the coefficients
17 that he gets in the end and to treat effectively GFC
18 period as in fact a period of high demand, so it is not
19 surprising therefore that he comes up with results that
20 are rather different to Mr Harvey.

21 THE CHAIRMAN: The period of high demand would imply that
22 prices were rising.

23 MR WARD: Yes, exactly.

24 THE CHAIRMAN: You said the opposite.

25 MR WARD: Did I? That is just --

1 MR RIDYARD: I suppose he is focusing on the level of demand
2 and you are suggesting you should be looking at the rate
3 of change in demand.

4 MR WARD: Well, it is at least important here. If what is
5 really happening here is a sort of collapse in demand,
6 the idea that that is pushing prices up is, we would
7 say, just obviously wrong. That is the point.

8 THE CHAIRMAN: One way or another, throughout the period,
9 whether it is because of high demand or low demand, it
10 is taking it out of account for the GFC period, it looks
11 like.

12 MR WARD: Yes, but it matters which because he has got
13 a high demand -- he is treating it as high demand which
14 will effectively assume a period of increased prices,
15 whereas in fact what we know is, in the GFC, the prices
16 were collapsing.

17 I am now going to go on to emission standards, our
18 last substantive topic on overcharge. The closing
19 starts at 230, {S/9/230}. Now, it does need a little
20 bit of untangling to make sure we are clear what the
21 case is on this. We have been consistent but I want to
22 be clear.

23 The first thing is to keep in mind we are only
24 talking about the during/after period. That is because
25 of the lack of truck-level cost data in the

1 before/during period. Both experts identify what we are
2 calling "emissions standard premia", ES premia, in our
3 closing and they are measured against the margin made on
4 Euro 3 trucks because Euro 3 trucks were sold in the
5 before/during period and in the during/after period but
6 we cannot disentangle the costs on a trucks-specific
7 basis.

8 This is all common ground, what I am saying so far.

9 Now, the high-level issue is essentially that
10 Mr Harvey attributes these premia to the infringement
11 and Professor Neven considers the cartel to be
12 irrelevant. He says in effect -- he does not say this
13 explicitly, but that the same margin gains would have
14 been made in the counterfactual. I want to make two
15 starting points just to frame this discussion. The
16 first is at 569, {S/9/232}, which is why we say
17 Mr Harvey's approach is conservative in two important
18 reports.

19 Firstly, it assumes that DAF would have been able to
20 recover its full costs of complying with each emission
21 standard even without the cartel. We are not making any
22 claim in respect of the money that was paid, which
23 covered the costs, and that is conservative because
24 a key part of the cartel, the admitted part of the
25 cartel, concerned collusion on the passing-on of those

1 costs. So we are giving with one hand before we are
2 going to try to take away with the other. We know that
3 those costs were very significant, for example, for
4 Euro 4, where we heard a lot about how they were
5 developing this SCR technology.

6 The second reason that it is conservative is that
7 the baseline for this is Euro 3 trucks, 569.2. It
8 assumes the amount of margin over and above costs that
9 DAF was able to make on Euro 3 trucks would have been
10 made on Euro 3, 4, 5 and EEV, absent the cartel. That
11 is conservative because the Euro 3 trucks were
12 cartelised. When we look at the decision, the collusion
13 involved Euro 3, 4, 5 and 6. It is done this way
14 because Mr Harvey has only attributed the increase in
15 margin over and above Euro 3 trucks that DAF achieved on
16 the sale of 4, 5 and EEV. So we are giving with our
17 hand as well there. We are saying, "Okay, even though
18 Euro 3 trucks were cartelised, we are not making a claim
19 there".

20 MR RIDYARD: Just on the first of those conservative
21 concessions or whatever you want to call them, is that
22 very conservative because, in general, there is a very
23 high correlation between costs and prices. I mean, is
24 this almost a one-on-one pass-through between costs and
25 prices?

1 MR WARD: Well, it is conservative in the sense that we are
2 accepting without challenge that they are entitled to
3 the full recovery of those costs.

4 MR RIDYARD: Sure. Is not that what the data is generally
5 showing, that --

6 MR WARD: It is, but the data is from the cartel.

7 MR RIDYARD: Well, the data is across the whole period, is
8 it not?

9 MR WARD: Yes, so not just the cartel. Okay. The answer is
10 "Yes".

11 THE CHAIRMAN: What was the question?

12 MR WARD: Well, like any good advocate, I am sure the answer
13 is "Yes" no matter what the question!

14 Shall we go to page 244, please, {S/9/244}, where we
15 have a paragraph where we try to set out what the issue
16 is here. In shorthand it is willingness to pay. Is it
17 all just down to willingness to pay, as Professor Neven
18 says. I am going to try to read this out because it is
19 quite important to get this right.

20 The first thing is that there is no doubt that
21 customers actually did pay more for these trucks with
22 new emission standards. Of course. That is what the
23 premium is actually showing. The costs of those
24 features would be accounted for in the truck-level MLO
25 costs that formed part of the MI database. We know that

1 those costs could be high and we have given you
2 a reference to Mr Borsboom's evidence, but we saw
3 various documents that gave numbers to this. The logic
4 of Professor Neven's position is that in a competitive
5 market, in the counterfactual, customers would have been
6 willing to pay for all of the costs of the new features,
7 the Euro 4 technology, and the costs -- sorry, I am
8 garbling this. I said I was going to read it out.

9 "... willing to pay for all of the costs of the new
10 features that were added to the Trucks [that go along
11 with the] emission standards, and the costs of the
12 (unwelcome) emissions standards [which we are going to
13 come to], and then pay [overall] an increased margin ...
14 having swallowed all of those costs [as compared to the
15 margins on Euro 3s]."

16 So you get some new features but you also get
17 a nasty euro emissions thing that you do not want
18 because I am afraid they are not very green and you pay
19 all of those costs, and even then you come up with not
20 just a margin but a better margin. That is DAF's case,
21 that that was all that would have happened in the
22 counterfactual.

23 We make the point that there is not actually
24 evidence to support that, whether it is quantitative or
25 qualitative, but, instead, it assumes away the cartel.

1 But I want to back up now and take that in more stages.
2 I leapt ahead because I thought, reading this yesterday,
3 this was a useful formulation to frame the discussion.

4 So let us go, please, back to 235, {S/9/235},
5 where -- actually 234, {S/9/234}. 574, this is
6 a memorable phrase from Mr Borsboom's evidence:

7 "DAF's evidence was clear that Trucks customers do
8 not have emotional reasons to buy Trucks."

9 The evidence was that customers were not very
10 environmentally conscious and, as Mr Borsboom put it:

11 "Society has changed in recent years, however as of
12 twenty years ago, there was less pressure on businesses
13 to promote an environmentally friendly image, and even
14 those businesses at the forefront of environmental
15 awareness were generally unwilling to sacrifice
16 reliability at the expense of ethics or image ... we
17 also wrap up the legal requirements as part of the
18 vehicle update including [other] enhancements ..."

19 Professor Neven put this well, and we quote this
20 over the page, {S/9/234}:

21 "[UK] customers were not interested in ... paying
22 more for the new emission standards by itself because
23 they did not attach a value to being green."

24 Then:

25 "DAF customers did not place a value on mere

1 compliance with an emission standard."

2 That is of a keeping with Mr Ashworth's evidence.

3 So the problem, though, that they faced was that
4 this is all expensive and it is an industry-wide problem
5 as well. But, even so -- then the question was: where
6 did that leave them in terms of pricing because they had
7 this pretty nasty thing that people did not want, from
8 their customers' point of view, and they needed to try
9 and continue to make a profit. Let us look at what
10 Mr Ashworth said about this, which is set out at 577,
11 {S/9/235}. He says:

12 "The new Emissions standards impacted price
13 aspirations, as developing trucks compliant with the new
14 emission standards led to substantial cost increases.
15 The more difficult [it] was to achieve, the greater the
16 cost of implementation, which led to DAF UK seeking
17 increased prices."

18 Then he says, just like Mr Borsboom:

19 "At the same time ... DAF introduced other
20 improvements. [They] could ... be unrelated to
21 compliance with the Emissions standard (eg ABS)."

22 They had the effect -- there were also improvements
23 that had the effect of improving fuel efficiency, which
24 I will come to in a minute separately, and mitigating
25 the impact of the emissions reductions technology, which

1 made the vehicles less efficient.

2 Then {S/9/236}:

3 "However, as a result of the introduction of these
4 various new developments, trucks that were compliant
5 with the new emissions standards were in some cases more
6 expensive to produce ... All things being equal, DAF of
7 course wanted to achieve a higher sales price for
8 a truck with a higher cost base in order to ensure that
9 it could maintain its margin."

10 So this was obviously a problem and, as we say at
11 579:

12 "DAF (like its competitors) therefore faced
13 a considerable challenge. It was required by
14 legislation to introduce large and expensive changes to
15 its Trucks every few years ... to make them compliant
16 with the latest Emission [Standards]. It knew that
17 customers were generally unwilling to swallow these
18 large cost increases and that there would ... be
19 a material risk of margin deterioration for DAF each
20 time a new emission standard compliant Truck was
21 introduced. The margins that DAF obtained would fall if
22 DAF was unable to pass on fully the costs associated
23 with meeting the new legislative requirements to its
24 customers."

25 But there was a solution and the solution was

1 collusion. We just remind you at page 237 and onwards,
2 {S/9/237}, what that collusion looked like. At 583 we
3 start with the again inescapable fact that the decision
4 says that:

5 "... DAF and the other manufacturers colluded ...
6 'on pricing and gross price increases in the EEA for
7 medium and heavy Trucks; and the timing and the passing
8 on of costs for the introduction of emission
9 technologies ..."

10 But it is also true that we have seen -- we have
11 pleaded and indeed in the decision in one case there is
12 reference to collusion on prices, not just costs.

13 THE CHAIRMAN: When it says there "on pricing", that means
14 transaction prices?

15 MR WARD: Well, it is characteristically non-specific, I am
16 afraid.

17 THE CHAIRMAN: It is something different to gross pricing --

18 MR WARD: Well, pricing and gross price increases. You have
19 actually, sir, if I may say, picked up on something
20 which is important which possibly has not featured as
21 large in our argument as it should have. It does make
22 clear that it is pricing as well as gross price
23 increases. We have focused an awful lot on gross price
24 increases. There is no question that they are core to
25 the cartel but it is not the only thing. This is not

1 just talking about emission standards. This is from
2 Article 1 of the settlement decision. This is the
3 maximally high-level description. So it is important to
4 focus on gross list prices, not the whole cartel.

5 THE CHAIRMAN: Sorry, what do you say Article 1 means when
6 it refers to pricing?

7 MR WARD: Well, there are various things in the decision.
8 So, firstly, there are parts of the decision which talk
9 about net prices, that there is collusion over net
10 prices, and we have pleaded a lot of examples of that
11 from the file. But it also talks about price strategy
12 and it also talks about the use of confidential
13 information to help execute the -- sorry, I am going to
14 look -- take you to the decision rather than
15 extemporise. Please, sir, even at this stage of the
16 litigation I have not got it completely at my
17 fingertips.

18 THE CHAIRMAN: I do not want to take you out of --

19 MR WARD: No, sir, it is an important question. It is
20 authorities 3.9, {AU/3.9}, and let me find the part
21 I had in mind. I will just show you a few parts of the
22 decision we have seen a few times before. I am afraid
23 this is not paginated. Page 17, please, {AU/3.9/17}.
24 That is it.

25 This is talking about single and continuous

1 infringement. It says, picking up the bottom half of
2 this paragraph:

3 "The single anti-competitive economic aim of the
4 collusion ... was to coordinate each other's gross
5 pricing behaviour and the introduction of certain
6 emission standards in order to remove uncertainty
7 regarding the behaviour of the ... Addressees and
8 ultimately the reaction of [consumers] on the market.
9 [They] followed a single economic aim, ... the
10 distortion of independent price setting and the normal
11 movement of prices ..."

12 So there is, we would say, there a link to the
13 transaction prices. Gross prices are not of interest in
14 themselves for the reasons that DAF give, but we are
15 trying to influence the reaction of consumers on the
16 market, remove uncertainty regarding the reaction of
17 customers on the market, so distorting price setting and
18 the normal movement of prices of trucks in the EEA.

19 Then more of a clue, sir, to what we are concerned
20 with here is at 75 on the next page, {AU/3.9/18}. This
21 is saying:

22 "By exchanging ... applicable gross price lists, the
23 Addressees were in a better position to understand from
24 the price increase information exchanged ... each
25 other's European price strategy, than they would have

1 been solely on the basis of the market intelligence ..."

2 So it is European price strategy.

3 Then on the next page, Recital 81, {AU/3.9/19}:

4 "The conduct is characterised by the coordination
5 between Addressees, which were competitors, of gross
6 prices, directly and through the exchange of planned
7 gross price increases, the limitation and the timing of
8 the introduction of technology complying with new
9 emission standards and sharing other commercially
10 sensitive information such as their order intake and
11 delivery times. Price being one of the main instruments
12 of competition, the various arrangements and mechanisms
13 adopted by the Addressees were ultimately aimed at
14 restricting price competition ..."

15 Then in fact, in Recital 51, which we do not need to
16 go to, there is reference to actual discussion of net
17 prices. So that is what it is about. It is not gross
18 list prices in a vacuum, which is something you might be
19 forgiven for thinking DAF is trying to persuade you of.
20 It is about actual customer prices, distorting actual
21 price competition.

22 Did that help, sir?

23 THE CHAIRMAN: Yes, thank you.

24 MR WARD: What I was about to talk about indeed comes from
25 the decision and probably you could see from the

1 passages I was just referring to. At 584 we make the
2 point, from the decision itself, {S/9/238}:

3 "The collusion on the timing and passing on of costs
4 ..."

5 So sorry. We are back in {S/9/238}:

6 "The collusion on the timing and passing on of costs
7 for emission standard was linked and complementary to
8 the collusion on pricing and gross price increases, and
9 was undertaken pursuant to the ... common purpose of
10 eliminating competition. The single anti-competitive
11 economic aim ... was to coordinate each other's gross
12 pricing [information] ... 'in order to remove
13 uncertainty regarding the behaviour of the ...
14 Addressees and ultimately the reaction of [consumers] on
15 the market'. The collusive practices followed a single
16 economic aim, ... 'the distortion of independent
17 price setting and the normal movement of prices for
18 Trucks ...'"

19 In the *Scania* decision, the general court said that
20 discussions on the timing for the new emission standards
21 were "complementary to collusion on prices ... since
22 they equipped the cartelists with knowledge of, not only
23 the intended level of price increases for Trucks
24 containing the new technology, but also the timing ...".

25 We make the point that I foreshadowed a moment ago,

1 that the collusion actually extended to additional
2 charges. We looked at some examples in opening and more
3 are pleaded and we have set some of them out there.

4 So that is the collusion. Professor Neven says that
5 is just irrelevant, it did not make any difference to
6 anything, everything is exactly the same in the
7 counterfactual. I seem to remember putting to
8 Professor Neven that this rather reflected -- rather
9 failed to reflect the elephant in the room, which was
10 the cartel itself. But we also see, I want to remind
11 you, that we got a little bit more detail about this out
12 of Mr van Veen.

13 If we turn to page 252, please, {S/9/252}, 617,
14 Mr van Veen told us that DAF's pricing for emission
15 standard trucks was based not only on cost "but how much
16 we thought we could get out of the market". We make the
17 obvious point over the page, {S/9/253}, that how much
18 you could get out of the market was obviously going to
19 depend on what your competitors were charging, as he
20 accepted, and of course, alas, the competitors were all
21 in the cartel.

22 Then we showed Mr van Veen a number of documents
23 that seemed to show the influence of competitor pricing
24 on emission standards and, if I may, I will just briefly
25 remind you of one in particular that we spent some time

1 on. It is {I1/417T}. That is the cover email which
2 was:

3 "Please find attached the memo concerning the
4 make-up of the list prices for the Euro 4 and 5 ..."

5 Then if we go to {I1/417}, we can see the underlying
6 document. Go, please, to the second page, {I1/417/2}.
7 You will recall, I think -- there is material here about
8 the pricing of these euro updates. Then on the third
9 page, {I1/417/3} -- this is all stuff we covered in
10 cross-examination: Under the "... Euro 5":

11 "Euro 5 nearly equals the costs of Euro 4. We
12 advice to raise the IKP to an artificial higher level.
13 This will support the nett price and margin target."

14 Then over the page, {I1/417/34}, there is a helpful
15 table of competitor pricing, and we do not know who, but
16 somebody wrote "List" as "Competitor List Pricing". We
17 explored this with Mr van Veen and we have given the
18 transcript references, but this is just one example of
19 a number we looked at where competitor pricing is being
20 used here in formulating DAF's own net and indeed list
21 prices.

22 What we see generally therefore, we say, is,
23 unsurprisingly given the admissions, plenty of evidence
24 of collusion here over price setting. Then we do get
25 back to our good friend, the M&S director, if we look at

1 623 on page 254, if you go back to {S/9/254}. This is
2 Mr van Veen, but we can then turn to the next page,
3 {S/9/255}, where he talks about how prices were set.

4 The last four lines of this quoted paragraph:

5 "Following these discussions, proposals were made to
6 DAF NV's M&S Director, who would be responsible for
7 signing off the proposals before announcements were made
8 to the sales units and DAF's dealers about the new truck
9 models."

10 So what we say is there is systemic collusion here
11 and indeed evidence linking DAF's prices to competitor
12 information and our familiar friend the M&S director is
13 particularly implicated in this.

14 Now, Professor Neven's approach is essentially to
15 just disregard all of this cartel activity. He says,
16 "Well, all that cartel activity was for nothing". Even
17 though, of course, I am afraid to say it one more time,
18 we have no explanation at all as to why DAF did it and,
19 although they do not generally explain how they used the
20 information, there is a very clear example among
21 a number of others we looked at of competitor
22 information in respect of Euro emission standards.

23 So, to summarise, we have this situation: truck
24 buyers have to buy trucks with new emission standards;
25 they do not want to; new emission standards are

1 expensive; DAF colludes over the prices and the costs
2 and the timing of these emission standards; the customer
3 ends up paying higher margins as compared to Euro 3 even
4 after swallowing all of the cost of these new emission
5 standards; and the argument for DAF is the cartel has
6 nothing at all to do with that result. It all would
7 have happened the same in the counterfactual because
8 there are also new features. Our submission is that
9 that just simply ignores the elephant in the room, the
10 cartel. It does not explain it; it just ignores it.

11 I want to focus for a minute on fuel efficiency
12 gains because this was the subject of some
13 cross-examination as well and for this, I am afraid,
14 with apologies, I have to go back to -- slightly further
15 back in the document. We set out on page 249,
16 {S/9/249} -- there was some cross-examination that was
17 essentially aimed at getting the witnesses to accept
18 that Royal Mail might be willing to pay more for more
19 fuel-efficient vehicles, subject to evaluation of its
20 benefits. But what matters here, though, is
21 Mr Borsboom's evidence, which we have set out at page
22 {S/9/251}, because actually fuel efficiency makes the
23 problem worse, not better. What Mr Borsboom said -- if
24 we look at 614.1:

25 "It is worth noting that without other drastic

1 technology changes to the vehicle, meeting the relevant
2 Emissions [Standards] ... would generally have led to an
3 increase in weight, a deterioration (not an improvement)
4 in fuel efficiency and therefore an increase in total
5 costs of ownership"

6 So the emission standards actually is making this
7 problem worse.

8 "That meant that DAF's vehicle development projects
9 were complicated by the need to wrap up new legally
10 compliant technology with customer enhancements to the
11 truck as a whole (including fuel efficiency ...)."

12 Then Mr Ashworth said something quite similar:

13 "At the same time as it introduced these emission
14 [reductions] ... DAF introduced other improvements.
15 [They] could ... be unrelated to compliance ...
16 Generally, there were ... improvements that had the
17 effect of improving fuel efficiency, mitigating
18 the impact of the emissions [fuel] reduction
19 technologies ..."

20 So what we say at 615 is that what this evidence is
21 saying is that emission standards increased the weight
22 of the truck; led to deterioration; fuel efficiency
23 enhancements were added to mitigate this; DAF's aim was
24 to maintain the margin. But, of course, the fuel
25 efficiency increase comes at a cost too, so once again

1 the cost has gone up. You have got the euro standards,
2 you have got whatever is being done to improve the fuel
3 efficiency, then you have got the cost of the other
4 enhancements, like enhanced steering wheels or cabs or
5 whatever it is, and you have still got the magical
6 effect that you have nevertheless got a bigger margin as
7 compared to the Euro 3 margins; a truck emission
8 standard that was already cartelised.

9 So none of that could possibly help DAF in our
10 submission.

11 MR RIDYARD: Do you accept the idea, just abstracting away
12 from this point about emission standards, that as trucks
13 become more highly specified, they tend to earn higher
14 margins, so the benefit and price exceeds the increase
15 in cost as you spec the truck up?

16 MR WARD: Well, I am not going to, as it were, dispute that
17 because it is an empirical question whether that is the
18 case and I cannot say with confidence --

19 MR RIDYARD: I thought Mr Harvey accepted that as
20 a proposition, but I may be wrong.

21 MR WARD: He probably did. I am not about to trespass into
22 arguing about high-level propositions of economics of
23 that kind. But what I do want to do is talk about the
24 two sensitivities that were done. There was
25 a sensitivity by Mr Harvey and a sensitivity by

1 Professor Neven in rather different directions.

2 We can see Mr Harvey's at page 245, {S/9/245}. I am
3 sorry we are going back and forth. It is just the way
4 I organised it. This is paragraph 603 where he says --
5 we say, sorry. Not "he says":

6 "Mr Harvey carried out a sensitivity that controlled
7 for Truck series and also examined the sensitivity of
8 his model to the inclusion of additional
9 characteristics, namely adding weight, horsepower, cabin
10 type, gearbox type, number of axles, and configuration
11 ... He found that the sensitivity slightly increased his
12 Overcharge finding."

13 He did not adopt that. But he also says, {S/9/246}:

14 "The Overcharge and emission standard premia were
15 not materially sensitive to their inclusion, which
16 suggests that these features did not drive higher or
17 lower margins. Therefore [he says] I would not expect
18 other features such as 'a new steering wheel design' or
19 'improved ergonomic storage' to do so either."

20 It is worth just pausing there. On horsepower --
21 a lot is made of this in DAF's reply -- professor Neven
22 specifically controlled for that in his model and so
23 that obviously cannot be part of his premia so we can
24 forget about horsepower.

25 The point we make here -- as you say, sir, there is

1 obviously a question about what the impact of these
2 quality improvements would be. What we are seeing from
3 Mr Harvey's sensitivity is that the choice between
4 a manual or an automatic gearbox or an ordinary cab
5 versus a sleeper cab -- because that is the difference
6 between these kind of cabs -- does not actually make
7 a difference to margins. So if that is true, it raises
8 at least a question whether a better sleeper cab, say,
9 or an enhanced automatic gearbox actually would.

10 Again, I want to pull back for a moment and remind
11 ourselves what DAF's argument amounts to. It is just
12 not enough for DAF to say it improved the margin. It
13 has got to be a big enough improvement in the margin
14 that it covers all these unwelcome costs of emission
15 standards, fuel efficiency we now know, and still give
16 rise to a bigger margin overall because that is what the
17 emission standard is capturing. In our respectful
18 submission, the better view and indeed the obvious
19 inference is that this sustained cartel activity
20 actually had the effect here.

21 Now, with that, I will turn to Professor Neven's
22 sensitivity, which we refer to at 261, {S/9/261}, of the
23 closing. Essentially what happened is Professor Neven
24 did various sensitivities which omitted the emissions
25 premia and he made the point that, doing that, the

1 infringement coefficient did not rise essentially. He
2 says, "Well, there you are then. The emissions premia
3 cannot be capturing any infringement effect because,
4 otherwise, that coefficient would rise".

5 Now, in the joint expert statement at {E/78/64},
6 which we will not go to, paragraph 17, there is a very
7 lengthy debate between the experts on omitted variable
8 bias and indeed it was still playing out in the joint
9 expert statement. Mr Harvey maintained his view that
10 Professor Neven's sensitivities suffered from omitted
11 variable bias once you took these infringement
12 coefficients out.

13 Now, this is, I suspect -- if anyone is going to get
14 enjoyment out of this issue, it is probably Mr Ridyard.
15 You are shaking your head, sir!

16 I do want to make a point, though, in passing here
17 that we were criticised in DAF's closing for not
18 cross-examining on this point. But there are, in my
19 submission, some double standards operating here because
20 we did use our limited time for residual
21 cross-examination as far as we were able but DAF
22 cross-examined Mr Harvey on almost nothing in the
23 residual cross-examination. So I want to put that
24 aside, though, and just focus on what Mr Harvey did say.

25 This is at 644, {S/9/263}, where he makes the point

1 that the sensitivities fail to account for the fact
2 there were other variables in Professor Neven's model,
3 such as the series fixed effects that could pick up the
4 ES premia once the control was removed. The idea was
5 that they would be more likely to pick them up because
6 they were not blanket dummies across the whole period of
7 the infringement. Indeed it is an oddity about
8 Professor Neven's sensitivity.

9 If we turn it up at {E/35/46} -- sorry, that is not
10 right. {E/35/45}. If we look towards the bottom of the
11 table, we can see towards the bottom, underneath the
12 line for "Euro 6", it says, "Series [fixed effect] Yes".
13 So we know it is in there, but we cannot actually tell
14 how it might be changing to pick this up. But we do
15 submit, as you said, going back -- if we can go back to
16 the closing, Mr Ridyard made the point, summarising
17 Mr Harvey's position -- so it is {S/9/262}:

18 "The infringement would not be the closest
19 substitute because it is a blanket dummy across the
20 whole period, whereas some of these other things are
21 more granular and therefore maybe that is why they are
22 appearing to be the closest substitute ..."

23 We respectfully agree.

24 Then there was one further point on
25 Professor Neven's sensitivity that we most certainly did

1 explore in cross-examination, which was about the lack
2 of a clean period. It is a little bit involved and it
3 is explained in our closing at pages 263 and 264 and
4 I will take it quite shortly, {S/9/263}. It relates to
5 what Professor Neven said he was doing with this
6 sensitivity, and we quoted him at paragraph 646, where
7 he says:

8 "To conduct this test in a rigorous way I need two
9 conditions to be verified: (i) first, I need to control
10 for changes in production costs and technical
11 characteristics of the trucks; (ii) secondly, I need to
12 ensure that the reference category over which the
13 emission premia are calculated is unaffected by the
14 infringement."

15 It is this "secondly" which is the issue.

16 "The second requirement stems from the need to have
17 a clean counterfactual for the emission premia, ie, to
18 estimate the emission premia in relation to trucks that
19 are not tainted by the infringement. This will ensure
20 that the hypothesis that I intend to test ... whether
21 the emission premia are associated with the effect of
22 the infringement, is correctly specified."

23 What we did was we went through this sensitivity
24 with Professor Neven and explored with him whether he
25 did indeed have a clean period. I will not take up time

1 reliving this exciting issue now, but we have given the
2 transcript references and we have explained it. But
3 where we get to is in our closing at 649, where he says,
4 at 649, {S/9/265}:

5 "Technically it is impossible to estimate this model
6 without assuming that some trucks are untainted."

7 Because you either have Euro 5 or Euro 6 in the
8 so-called clean period and our short point is then that
9 this sensitivity failed the test that Professor Neven
10 set for himself.

11 MR RIDYARD: Is that your position in relation to EEV trucks
12 as well?

13 MR WARD: Well, either way there are going to be either
14 potentially tainted Euro 5 or potentially tainted Euro 6
15 trucks in the so-called clean period. That is the logic
16 of how this works. So, yes, because either way you have
17 not got a clean period.

18 So that is what we wanted to say. I am just
19 reminded that we do have examples of the EEV collusion
20 pleaded in our particulars of claim, just so you know.

21 That is, if you just give me a moment, I think all
22 we are going to say on overcharge before I move on.

23 Yes, that is it on overcharge.

24 THE CHAIRMAN: An impressive canter through the issues then.

25 MR WARD: I am on page 268, sir. That is good going!

1 Are you about to suggest that might be enough for the
2 day? I cannot imagine why.

3 THE CHAIRMAN: It probably would be but I just want to ask
4 a general point about overcharge. What happens if we
5 agree with you on some of the points and we agree with
6 DAF on some of the others, so we go with you on
7 currency, the other on GFC, et cetera? How do we deal
8 with that?

9 MR WARD: I think probably the short answer is that it would
10 be in a disposal hearing, but there are numbers as to
11 exactly what these are worth; in other words, how
12 many -- if you stylise the overcharge figure to 10%,
13 what percentage of that is represented by the currency
14 and what is represented by the GFC and so forth. Those
15 numbers do exist, although someone has just said to me
16 it gets very complicated.

17 THE CHAIRMAN: I am sure it does and --

18 MR WARD: There are numbers and of course we also accept
19 there are ways to, as it were, come down the middle on
20 some of these points; in other words, you might reach
21 a judgment which is -- certainly once we are into broad
22 axe territory, which in our respectful submission at
23 some point we are going to reach -- whether or not you
24 agree with what I said about *BritNed*, there is no
25 question that once we have established -- once we have

1 perfected the tort, then there is going to be a good
2 deal of broad axe. So, for example, we might perfect
3 the tort with one head but not others, say, so at that
4 point there is obviously going to be a degree of broad
5 axe being applied by the tribunal.

6 THE CHAIRMAN: Yes.

7 MR WARD: Also there is no getting away from the fact that
8 there are issues at a particular level of granularity in
9 this case that just have not really been ventilated in
10 front of the court because we have only had nine weeks
11 for this case as opposed to nine months.

12 THE CHAIRMAN: We obviously cannot be expected to run our
13 own model depending on what we find on all the
14 particular issues.

15 MR WARD: Well, of course.

16 THE CHAIRMAN: You are claiming 10% now. Is that what
17 you --

18 MR WARD: No, no, that is -- I am using that as just broad
19 indication. It varies. So I think from recollection,
20 it is 11.6 in the before/during period and then in the
21 during/after period it depends on which emissions premia
22 that you applied. I said 10%. It is just indicative,
23 that is not arithmetic. So we can provide whatever
24 would help most.

25 There are some tables, as you asked, at the back of

1 our closing. I confess they are probably more complex
2 than you would hope. What they do not actually do,
3 I think, is break down the overcharge by reference to
4 the different elements in it, but they do go through
5 a lot of the complications which lie just below the
6 surface.

7 THE CHAIRMAN: I think, from memory, that was dealing with
8 the other issues, complements, pass-on and whatever.
9 But I am talking about within the overcharge and even
10 within exchange rate because we could agree with one on
11 exchange -- on euros to pounds or pounds to euros but
12 agree with the other on whether it is market rate or ...

13 MR WARD: Well, that is why I suspect that, if you find in
14 our favour, unless we get a clean sweep, there may need
15 to be a disposal hearing.

16 THE CHAIRMAN: That is what I was going to ask. So you
17 mentioned a disposal hearing. How does that work?

18 MR WARD: I confess, sir, I am really speaking from the top
19 of my head. So you would give a judgment saying, for
20 example, "We find in your favour on GFC but not emission
21 standards", or vice versa. That might be
22 straightforward or it might not be; or on currency you
23 say, "We think you are right about euros but the pass-on
24 rate that you have assumed is too far", say, and you
25 have seen Mr Harvey's sensitivity and you say, "Well,

1 that is still not what we want".

2 Now, it may be that you feel that the broad axe can
3 be applied and that one says, "Look, doing the best we
4 can, we are going to come here", or you may say, "Well,
5 at this point, having reached these rulings, exactly
6 what this means in money terms, we would like to have
7 some more assistance".

8 Now, I do not think anyone in this room is going to
9 welcome the suggestion being made from the front bench,
10 "Oh, lovely, let us have some more hearings in the
11 autumn". I am not advocating that in any positive
12 sense, but I accept that is a possibility just because
13 this case is fiendishly complicated and there are some
14 fiendishly complicated issues about how the various
15 defences of DAF, of complements, supply pass-on, retail
16 pass-on -- how they all interact.

17 THE CHAIRMAN: Yes, so basically it is up to us. We decide
18 whether we want to just apply the broad axe and go for
19 some sort of percentage that feels right by reference to
20 the points of principle that we have decided or we come
21 back and say, "This is what we have decided and you tell
22 us what -- how that affects the figures"?

23 MR WARD: Yes, and I think I can say with confidence and
24 without instructions that nobody will have much appetite
25 for more of these hearings, however delightful they have

1 been for everyone. They attract a big crowd so they are
2 obviously considered to be enjoyable. But joking aside,
3 if it has to be done, of course it has to be done and
4 I can see that, for example, in the finance claim it
5 might have to be done, but obviously nobody is going to
6 want that, sadly.

7 THE CHAIRMAN: Yes. Well, we are certainly not going to do
8 our own financing calculations.

9 MR WARD: No, of course. Of course.

10 MR RIDYARD: Just on the overcharge, though, let us suppose
11 the three topics -- the three big topics are worth three
12 percentage points each, are they separable? So if we
13 decide to score them, each one of them, as a win or lose
14 for one side or the other, is it appropriate then to
15 say, "Well, you have won two of the three but you have
16 lost the other one, therefore the answer is six", or the
17 other way round or do they sort of interact in a complex
18 way with one another?

19 MR WARD: I think there is a table in Mr Harvey's second
20 report that in fact I referred him to in re-examination
21 where he actually does provide percentage figures for
22 each part of the overcharge. Somebody behind me might
23 just give me the reference for it while I am speaking
24 potentially. So it is possible, again, taking a broad
25 axe view.

1 You may be right that there are some interactions
2 that, if we wanted to spend another couple of months
3 litigating this case and get another few hundred pages
4 of expert reports, we could get to the bottom of, but
5 I am quite confident no one on this side of the room
6 wants that to happen.

7 We will find the reference that I have in mind, even
8 though no one has popped up with it yet. They are just
9 looking for it. If we can just pause a moment, then
10 that will help.

11 Another thing just for the note is that in
12 Mr Harvey's first report, {E/1/9}, he sets out the
13 percentages. There is a table there. The table I had
14 in mind was something slightly different.

15 I hear {E/28/50} from behind me. Yes, that is what
16 I had in mind. Thank you. There we are. You can see
17 a sort of bar chart here of different effects. This is
18 prior to the euro emissions premia and then, on the next
19 page, there are charts including euro emissions premia.
20 So it is not a completely tidy way, perhaps you might
21 think, of presenting it, but it gives you some idea. If
22 there is anything else in this kind of category we can
23 provide that would be helpful, of course we would be
24 delighted to do it.

25 THE CHAIRMAN: Thank you.

1 MR WARD: Right, 10 to 4.

2 THE CHAIRMAN: Yes, what are you going to? Complements?

3 MR WARD: Complements.

4 THE CHAIRMAN: Yes.

5 MR WARD: Shall we?

6 THE CHAIRMAN: Yes, absolutely. Let us do it.

7 MR WARD: I am delighted to. We want to use our time to the
8 best of our ability but not to the extent of making
9 everyone lose the will to live.

10 THE CHAIRMAN: Well, we are off tomorrow so --

11 MR WARD: You have got time to recover!

12 THE CHAIRMAN: And read the rest of your submissions.

13 MR WARD: Right, let us talk about complements. We pick
14 this up at 269 in our -- we are going to go to 269 in
15 a minute, {S/9/269}.

16 The argument is that Royal Mail and BT will have
17 made a saving on the price of trailers and bodies
18 because they are strict complements to trucks. The
19 essential problem, we can see in paragraph 664, is that
20 the foundation of this argument is indeed economic
21 theory that they are perfect complements. But
22 Professor Neven accepted, when I put to him, the
23 existence of this effect is an empirical matter. In
24 fairness, in his reports he says the extent of it is an
25 empirical matter, but he nevertheless expressly accepts

1 that he lacks the data to test it empirically because,
2 of course, we just do not know about the rest of the
3 market and we do not know much at all about complement
4 manufacturers.

5 So what we have instead is the simulation analysis.
6 A simulation analysis is a form of prediction about what
7 would be expected to occur based on a limited set of
8 assumptions and a very limited set of empirical
9 information, and what it does is it uses an algorithm to
10 produce what is called a "constellation of parameters".
11 The crucial point here is, as Mr Harvey has explained at
12 667, it is not actually a test of whether body and
13 trailer prices in fact decreased as a result of
14 increases in the price of trucks. It is a test of what
15 could be expected to occur on the basis of the limited
16 information and assumptions that Professor Neven has
17 adopted. We quote here from how Mr Harvey puts it in
18 the cross-examination, {S/9/270}:

19 "Simulation models in general are intended to almost
20 provide a refined hypothesis based on economic theory
21 and models of competition, so I see this more as ... if
22 everyone plays by the rules that are within the
23 simulation modelling process, then we would expect to
24 see these types of figures, assuming all of the inputs
25 and so forth are correct ..."

1 But, as he says, that is very different from the
2 overcharge analysis.

3 THE CHAIRMAN: So it is normally looking forward rather than
4 back?

5 MR WARD: Yes. It is used typically in merger situations
6 where you are trying to work out what the effect of
7 competition would be in the market if you go from four
8 to three, say. Of course merger authorities are quite
9 avaricious collectors of data from the merging parties
10 and they do simulations.

11 But the oddity here, as I put to Professor Neven, is
12 that we are using a simulation to make predictions about
13 the past because all this either did happen or it did
14 not happen or it is getting on for 25 years, but it is
15 the past, and we are not looking at what actually
16 happened. We are saying, "Let us produce this very
17 stylised model and see what it tells us".

18 THE CHAIRMAN: Can you have a prediction about the past?

19 MR WARD: I would say no, but that is why I say this is all
20 a waste of time frankly. I did put that to
21 Professor Neven and he did actually agree, albeit
22 laughingly. Here, what we have, in fact, is a test
23 performed on data from 2013 to 2015 where of course
24 there was no cartel. As we explain in the closing and
25 as I put to Professor Neven, actually the data was very,

1 very different in the post-cartel period in various
2 senses. What he did was simulate a 1% price increase
3 across the board, already a major assumption because we
4 do not actually know anything about what the other
5 cartelists did, which is a point Mr Beard prays in aid.
6 So you have a stylisation of a narrow kind of
7 infringement in a totally different period, 2013 to
8 2015.

9 But the problem for DAF is it has to prove causation
10 on this issue. Now, whether or not you characterise
11 this as a species of mitigation, which I confess I was
12 thinking about yesterday -- I thought it was quite
13 a difficult argument -- but at the very least it has to
14 prove causation in fact. Our short point here is that
15 this model does not and cannot do that.

16 Now, underneath that are three sets of problems. If
17 we are going to entertain this model, there are three
18 sets of problems: the stylisation of it, the lack of
19 data and the fact it is underdetermined, and I am going
20 to deal with each of them. I am going to get this done
21 by 4.20, I am confident. I am just going to say
22 a little bit more about each of them.

23 We start, though, with the fact that the model is
24 highly stylised and we see, nicely put, if I may, say by
25 Professor Neven, on page 272, paragraph 676,

1 {S/9/272} -- he says at the bottom of the page:

2 "There was a lot of structure in these models ...
3 I am not denying that this methodology here is
4 a methodology that imposes a lot of structure."

5 Which it does, and it does it through a whole series
6 of assumptions which are an obvious departure from
7 reality. So the first thing he does at 679 is at least
8 assume a particular model of competition, price
9 competition, with differentiated products, even though
10 he says that trailers and bodies have limited product
11 differentiation; all right? Then he divides the market
12 into 15 segments, depending on types of truck or body
13 and trailer, and it is quite important that the results
14 he gets differ dramatically between these segments, as
15 we will see in a minute, and BT and Royal Mail did not
16 buy trucks in all segments at all, so this division is
17 actually very important to his results.

18 Then we have a dramatic simplifying assumption,
19 where he says, "Well, I am assuming there are two
20 symmetrical suppliers of bodies and trailers". Well,
21 actually there are about 25 and they vary a great deal
22 in terms of strength and size. I showed Professor Neven
23 a table from Mr Harvey of size and he justified his
24 approach largely by reference to a market research
25 report called Absolute that he referred to. But this is

1 something he accepted in cross-examination.

2 If the market for complements is highly competitive,
3 then it is unlikely you would have a complement effect.
4 The problem is he knows almost nothing about that
5 market, as we are going to see in a minute.

6 It is interesting, at 683, {S/9/274}, we quote this,
7 but so too do DAF, so they obviously think this is
8 a helpful observation he made, where he said it is an
9 "oversimplification of reality" but "the question is to
10 design a model in ... a way that is still reliable".
11 Well, we agree and that is the problem.

12 Then we get to truck manufacturers at 684,
13 {S/9/275}, and for some reason that is a little hard to
14 fathom he says, "Well, we will proceed on the basis
15 there are five", even though there are actually six. He
16 rolled I think it was MAN and Iveco into one on the
17 basis that market share data from 2013/2015 showed that
18 they were roughly half the size of the others. But as
19 I put to him, market share data in the cartel period
20 that we are actually interested in did not show that at
21 all. So then what he does is he stylises it so he has
22 specific parameters for DAF, so they are special, and
23 then all the other manufacturers, including the combined
24 merged MAN/Iveco, are treated as equivalent.

25 So what we end up with, as we say at 686, {S/9/275},

1 we end up with a trailer/body market with fewer
2 competitors and more symmetric than the truck market,
3 whereas the evidence shows the opposite.

4 Then we have the question of what is the data that
5 goes into this model. You discussed this in the hot tub
6 and I also asked him about it in cross-examination. We
7 gathered together at 689 a bit of what he said in the
8 cross-examination about the lack of data because each
9 time -- not each time, but when I asked him about this
10 he said at various points, {S/9/276}:

11 "I wish I could do something better than that, but
12 I cannot because I would need to have, you know, prices
13 and sales of each of the competitors."

14 This was about the assumption that all truck
15 suppliers other than DAF are symmetric.

16 "... it is a response to ... the fact we have no
17 data."

18 Then in relation to using a simulation model in
19 general:

20 "If I had sort of better information, in particular,
21 if I had information on the prices of competitors,
22 I mean, the range of parameters for which I could get
23 the calibration would be drastically cut, but I ... do
24 not have it".

25 Then:

1 "I wish I had better data (in relation to the lack
2 of data on body/trailer prices) I tried to look for
3 reliable data on trailers ..."

4 Which is why he used Royal Mail data.

5 As we say, with respect, at paragraph 690,
6 {S/9/277}, the issue here is not whether this is the
7 best that Professor Neven could do in the circumstances;
8 the question is whether this model is potentially robust
9 enough to make good the complements effect, and we say
10 it just plainly is not.

11 There is a lot of detail in this in annex B to his
12 first report. I went through some of this with him and
13 I just, if I may, point to some highlights now.

14 So on the trucks side -- on the trucks said, he
15 says, "Look, I have got DAF costs and prices
16 information, which is excellent". But what he then does
17 is assume that those costs of other manufacturers are
18 the same, which is of course a massive assumption here.

19 Then he says, "Well, it is not restrictive because
20 I allow the prices to be calibrated" so, of course, he
21 does not have the prices either. We do make, in our
22 submission, I think an important point here at 694. The
23 relative margins of the truck and the trailer/body
24 manufacturers are a key determinant of the complements
25 effect, so it really, really matters. If the truck

1 manufacturers put the prices up, the responsiveness of
2 the complements manufacturers is influenced by the
3 extent of their margins. I do not go further than that
4 because it is in the maths and I hesitate to try to
5 explain exactly why, but that is how this works.

6 So it really matters to have costs and prices on
7 both sides, but then the problem he has got on the
8 complements side is he has got no direct data from any
9 manufacturer at all. He stylised them into two but he
10 has not got any data. If we look at paragraph 698,
11 {S/9/278} -- I will not really encourage you to read
12 this now, but there was a really complicated piece of
13 engineering through market share data, publicly
14 available data and then an ingenious adjustment he came
15 up with where he used one Royal Mail box body as a kind
16 of index and rigged the others by reference to it.

17 As I said at 699, there is a whole series of
18 assumptions here used, including the assumption that
19 DAF-manufactured bodies are sufficient to be used as
20 a kind of tariff. This is very, very far from being
21 robust data that this kind of model really requires. No
22 wonder he said, "I wish I had better data".

23 Then it gets worse because on trailer prices he has
24 data about the two types of trailer that Royal Mail buys
25 and he treats those as representative both as to type

1 and price. But then we get to the critical theme which,
2 as I have said, is margins, 701, {S/9/279}. He says --
3 well, look, as to costs of bodies and trailers,
4 Professor Neven only had average gross margin data from
5 the manufacturers as a whole, so he acknowledged that
6 this comes with, as he called it, limitations. But
7 Mr Ridyard will recall asking him about this and you
8 made the point to him:

9 "I can understand why the smaller trucks have lower
10 margins than the big trucks but I do not necessarily
11 understand why that range of margins straddles the
12 margins for trailers."

13 In other words, some trailers had higher margins
14 than trucks even though they are obviously much simpler
15 products.

16 Professor Neven said, "I have no direct answer to
17 that". Then you probed it further, sir:

18 "We cannot observe a lot of these numbers, can we,
19 because we are just using imperfect data?"

20 Professor Neven accepted:

21 "It could be that the margins are lower -- it could
22 be that the margin for bodies and trailers is lower than
23 11% [that he had used] ..."

24 Then a critical concession, unavoidable:

25 "Of course, if the actual margins were lower, the

1 complement effect would ... be lower. That is also
2 true."

3 It is lower because there is less place for the
4 manufacturers to go when they are notionally being
5 squeezed by the truck manufacturers busy overcharging us
6 on trucks.

7 So these are really very difficult problems for
8 Professor Neven. In our respectful submission, what
9 this shows is that he just does not have anything like
10 the data he would need to produce a model of this kind
11 that could be convincing, even if you were willing to
12 accept that it actually is sufficient to prove
13 causation.

14 But then we get to the third problem which I call
15 "under-determination", and there is more detail in here
16 but I will not take you to it now. This is itself
17 a function of his lack of data, as he has accepted and
18 you have seen already. Because we do not have much
19 data, there are an awful lot of so-called constellations
20 of parameters where the algorithm produces a possible
21 result.

22 Now, if you are feeling so inclined, you can read
23 back into this issue and you will find that Mr Harvey
24 challenged Professor Neven's first report on the basis
25 he had restricted the range of parameters in a way that

1 actually served to increase the complements effect. The
2 reference to that is -- I will not go to it, but it is
3 {E/28/119}, paragraph 4.53. When he relaxed them, as
4 Mr Harvey did, the problem actually got worse. The
5 breadth of these outputs grew worse. Professor Neven,
6 in fairness -- this was possibly the only occasion where
7 he accepted Mr Harvey had a point -- did relax the
8 parameters and what we end up with is the table which we
9 have reproduced at 714, {S/9/283}, which was in
10 correspondence and which was put to Professor Neven.

11 What you have here is the minimum -- if we look at
12 it -- we have got the segments by number, then we have
13 got the previous minimum, which was Professor Neven's
14 opening bid, then we have got the revised minimum, which
15 you can see even on the top line is dramatically lower,
16 and then the maximum. Then we have got the previous
17 ratio of maximum to minimum which, in Professor Neven's
18 first go, was up to 3.9 and then the revised ratio of
19 maximum to minimum, which ranged from 1.6 to 13.6, so
20 13.6 times greater the maximum was than the minimum.

21 Well, as I said -- and we remind you at 715,
22 {S/9/284} -- Professor Neven accepted a wide range of
23 parameters was a consequence of the absence of data, in
24 particular on the prices of competitors. What Mr Harvey
25 says is, "Well, this wide range itself calls

1 Professor Neven's model into question. We just do not
2 have enough data to try and answer this question by this
3 means".

4 What Professor Neven said orally was, "Well,
5 actually there is some economic sense to this because
6 certain segments give similar results". But here we
7 respectfully endorse what Mr Ridyard put to
8 Professor Neven at 718, {S/9/285}:

9 "I do not know that the fact that it is the right
10 pattern gives us any assurance that it is the right
11 level, that the numbers are right."

12 In our submission, to suggest that it does give such
13 assurance is entirely question-begging. This is why we
14 say that the complements defence simply fails.

15 Sir, that is all I was going to say on complements.
16 It is 4.10.

17 THE CHAIRMAN: Do you say we do not need to really consider
18 Mr Harvey's approach?

19 MR WARD: We have put some points here about it and there is
20 a lot of criticism of it. It is a trends analysis. It
21 is a trends analysis. Mr Harvey said, "Well, look, I am
22 at least looking at something empirical here. I am
23 doing this comparison of margins". Unlike
24 Professor Neven, it is at least based on actual data
25 about the actual period. But of course Mr Harvey

1 accepts that it is not the most refined form of
2 modelling. It is not a regression. What he did, we can
3 see at 720, {S/9/285}, he used publicly available
4 information to conduct two trends analyses to actually
5 examine real world market outcomes, whether body/trailer
6 manufacturers earned lower margins during the
7 infringement, which would be a sign of a complements
8 effect, and whether there was a negative correlation
9 between average truck prices and percentage margins
10 earned by body and trailer manufacturers. He explored
11 this and he found that there was no evidence under any
12 of these, either head, for a complements effect.

13 Professor Neven criticised this, saying, "Look, this
14 data is very noisy. It does not control for all sorts
15 of factors". Mr Harvey said, "Well, look, doing the
16 best I can, I have controlled in various ways for this.
17 They are not perfect. These are not regressions". But
18 neither Mr Harvey nor Professor Neven had the data to do
19 a regression. It would have required a huge exercise in
20 modelling on all of these complements manufacturers and
21 indeed potentially other truck manufacturers. So this
22 was an attempt to be pragmatic and to see if there was
23 any evidence.

24 One of the points I explored with Professor Neven,
25 of course, was, "Had you actually asked your clients

1 whether they had any commercial experience of this?",
2 you will recall, and the answer was, "Actually I did ask
3 them but it is the first you have heard of it". There
4 are a couple of crumbs he was able to point to in
5 Mr Ashworth and in the pricing statement, but we have
6 addressed those in the closing. I was not going to go
7 through it. But they are not showing that DAF has
8 general commercial experience of the kind that would
9 establish this complements effect.

10 THE CHAIRMAN: But you accept as a matter of pure economic
11 theory that there could be a complements effect because
12 the bodies have to be sold together with -- or the
13 bodies and trailers have to be sold together with the
14 truck?

15 MR WARD: If you have a rigid truck, you need a body. If
16 you have a tractor, you are going to need at least one
17 trailer -- maybe more, but one. Mr Harvey accepted that
18 that meant that there was in theory a complements
19 effect. But the point I opened with is the question of
20 whether there is, according to Mr Harvey -- or at least
21 the extent of such an effect according to
22 Professor Neven is empirical. They both agree it is
23 empirical because there is a very broad economic theory
24 there, but how it actually played out is a different
25 question.

1 THE CHAIRMAN: You say they cannot show it --

2 MR WARD: They cannot show it. Certainly not with this

3 simulation model. It is possible, if you did some giant

4 regression analysis, you would be able to isolate

5 a complements effect. Mr Harvey's approach was

6 obviously much less sophisticated than the complex

7 mathematical modelling of Professor Neven, but at least

8 it was an attempt to say, "Well, what data is there out

9 there that reasonably and proportionately we could

10 actually get hold of? Does it provide any support?";

11 Answer: "Not at all".

12 MR RIDYARD: Your position is you do not need to do anything

13 constructive on this topic because it is down to DAF to

14 do the running?

15 MR WARD: Completely.

16 THE CHAIRMAN: It affects maximum, what, 10%(?) of the

17 overcharge?

18 MR WARD: Let me see if that figure is in here. Sorry, I am

19 hearing some whispering. 6% Royal Mail.

20 MR RIDYARD: It is a lot more for BT.

21 MR WARD: It is more for BT because they had more expensive

22 bodies because they were highly specialised.

23 THE CHAIRMAN: That is assuming that we are also against you

24 on the value of commerce; no?

25 MR WARD: So it interacts in quite a complicated way because

1 it is a claim in respect of Royal Mail bodies and
2 trailers, so if you find that the bodies are cartelised
3 in the way that we contend, there is still potentially
4 a complements effect in respect of trailers.

5 THE CHAIRMAN: Yes.

6 MR WARD: So that is another area where, alas, you might
7 need some -- we might need some arithmetic to say, well,
8 if that combination is where you ended up, exactly where
9 it leads us -- that probably is arithmetical. Someone
10 is bound to say immediately, "No, it is more complicated
11 than that", but there is a question there about how they
12 interrelate.

13 MR BEARD: I am sure Mr Ward meant to say BT. It is that
14 simple(?).

15 MR WARD: I am sorry? I beg your pardon?

16 MR BEARD: BT -- that nothing in relation to value of
17 commerce, of course, is relevant to BT because they do
18 not make any claim and therefore complements does apply
19 in relation, but I am sure that was implicit.

20 MR WARD: Absolutely. Indeed it was.

21 Sir, it is 4.15.

22 THE CHAIRMAN: Excellent. So that is it for complements and
23 then we are going on to pass-on in various forms.

24 MR WARD: Pass-on in its various forms, loss of volume and
25 then finance, tax and timelines.

1 THE CHAIRMAN: Excellent. So we are on time?

2 MR WARD: We are.

3 THE CHAIRMAN: We are not sitting tomorrow so 10.30 on

4 Monday.

5 (4.14 pm)

6 (The hearing adjourned until

7 Monday, 27 June 2022 at 10.30 am)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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

INDEX

Closing submissions by MR WARD2